



**GLACY+**

Global Action on Cybercrime Extended  
Action Globale sur la Cybercriminalité Élargie

Funded  
by the European Union  
and the Council of Europe



Implemented  
by the Council of Europe

**2016 Octopus Conference**

**Workshop 5**

**Legislation on Cybercrime and Electronic Evidence in Africa**

**Comparative analysis:  
Malabo Convention of African Union  
and  
Budapest Convention on Cybercrime**

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**Strasbourg 17 November 2016**



# Fundamentals of a Cybercrime Treaty

- **Global** instrument  
(**Operational, Functional framework**)
- Members:
  - should include **Infrastructure Countries**
- Definitions
- Offences
- Comprehensive procedural powers
- Comprehensive **Legally binding** International cooperation mechanism



# BC

# AUC

- **Global** instrument
- **Infrastructure Countries**
- **Cybercrime** and **electronic evidence** convention
- **Comprehensive procedural powers**
- **Functional international cooperation mechanism**

- **Regional** instrument
- **No Infrastructure Countries**
- **Cybercrime**, cyber security, electronic transactions & data protection
- **Missing key procedural powers**
- **No international cooperation mechanism**

# Scope of Budapest Convention

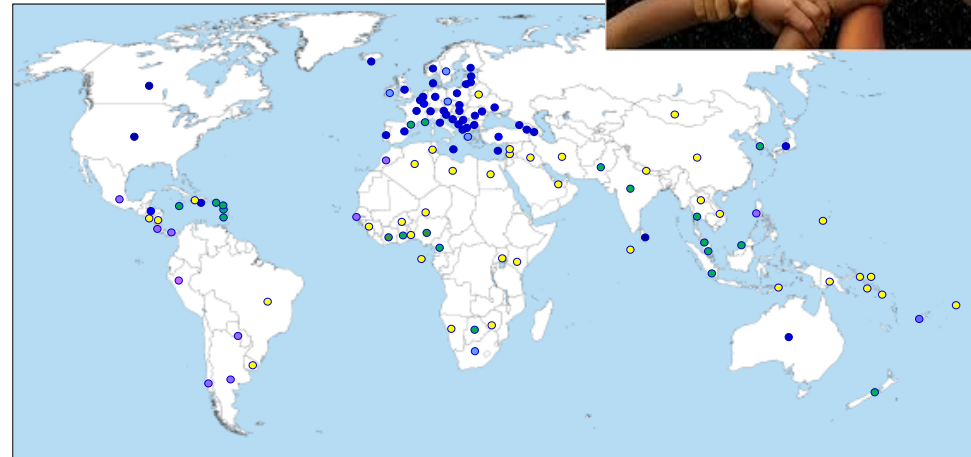
## Comprehensive

- Operational, Functional framework targeting:
  - **cybercrime** and
  - **other criminal offences involving electronic evidence**
- Provides for:
  - offences,
  - procedural powers and
  - international cooperation **legally binding framework**



# Budapest Convention

- **Global** instrument
- Members – **Infrastructure Countries**
- Definitions
- Offences
- Comprehensive procedural powers
- Comprehensive **Legally binding** International cooperation mechanism





# Scope of AU Convention

- **Deals with:**
  1. Electronic transactions,
  2. Personal Data Protection,
  3. Cyber security and
  4. Cybercrime
- AU Convention **political commitment on a range of issues** including cybercrime
- Attempt to **unite different IT Law aspects** and certain non-digital and non-criminal justice issues

- **Regional Instrument (No Infrastructure countries)**
- **Restricted to Cybercrime –not other offences**
- Definitions **missing** (e.g. procedural powers)  
foundational definitions are **vague** (e.g. computer system)
- Offences **not comprehensive** and are largely **missing mens rea elements**
- Many procedural powers are **missing**, rest are **vaguely** defined and **not** subject to **safeguards**
- **No international cooperation mechanism**  
(aspirational statements)

# **SUMMARY of FINDINGS**



# Summary of Findings

Budapest Convention on Cybercrime ("BC")	African Union Convention on Cyber Security and Personal Data Protection ("AUC")	Comments
<b>Definitions</b>		
Article 1.a "computer system"	Article 1. "computer system"	AUC different from BC
Article 1.b "computer data"	Article 1. "computerized data"	AUC incomplete but compatible with BC
Article 1.c "service provider"		Missing in AUC
Article 1.d "traffic data"		Missing in AUC
Protocol 189 Article 2 "racist and xenophobic material"	Article 1. "racist and xenophobic material"	AUC largely compatible with Protocol to BC
Article 18.3 "subscriber information"		Missing in AUC

# Summary of Findings

Substantive criminal law		
Article 2. Illegal access	Article 29.1.a-c. Attacks on computer systems	AUC largely compatible with BC
Article 3. Illegal interception	Article 29.2.a. Computerized data breaches	AUC largely compatible with BC
Article 4. Data interference	Article 29.1. e-f. Attacks on computer systems	AUC largely compatible with BC
Article 5. System interference	Article 29.1.d. Attacks on computer systems	AUC largely compatible with BC
Article 6. Misuse of devices	Article 29.1.h. Attacks on computer systems	AUC largely compatible with BC
Article 7. Computer-related forgery	Article 29.2.b. Computerized data breaches	AUC largely compatible with BC
Article 8. Computer-related fraud	Article 29.2.d. Computerized data breaches	AUC largely compatible with BC
Article 9. Offences related to child pornography	Article 29.3. Content related offences	AUC largely compatible with BC
Article 10. Offences related to infringement of copyright and related rights		Missing in AUC
Article 11. Attempt and aiding or abetting	Article 29.2.f. Computerized data breaches	AUC largely compatible with BC
Article 12. Corporate liability	Article 30.2. Criminal liability for legal persons	AUC largely compatible with BC
Article 13. Sanctions and measures	Criminal sanctions	

# Summary of Findings

Article 13. Sanctions and measures	Criminal sanctions	
Article 3 Protocol. Dissemination of racist and xenophobic material through computer systems	Article 29.2.e. Content related offences	AUC largely compatible with Protocol to BC
Article 4 Protocol. Racist and xenophobic motivated threat	Article 29.2.f. Content related offences	AUC largely compatible with Protocol to BC
Article 5 Protocol. Racist and xenophobic motivated insult	Article 29.2.g. Content related offences	AUC largely compatible with Protocol to BC
Article 6 Protocol. Denial, gross minimisation, approval or justification of genocide or crimes against humanity	Article 29.2.h. Content related offences	AUC largely compatible with Protocol to BC
<b>Procedural law</b>		
Article 14. Scope of procedural provisions		Missing in AUC
Article 15. Conditions and safeguards		Missing in AUC
Article 16. Expedited preservation of stored computer data	3.d. Procedural law	AUC largely compatible with BC
Article 17. Expedited preservation and partial disclosure of traffic data		Missing in AUC
Article 18. Production order		Missing in AUC
Article 19. Search and seizure of stored computer data	3.a and b. Procedural law	AUC incomplete but compatible with BC
Article 20. Real-time collection of traffic data		Missing in AUC
Article 21. Interception of content data	3.e. Procedural law	AUC compatible with BC but safeguards missing
<b>Jurisdiction</b>		
Article 22. Jurisdiction		Missing in AUC

# Summary of Findings

International co-operation		
Article 23. General principles relating to international co-operation		Missing in AUC
Article 24. Extradition		Missing in AUC
Article 25. General principles relating to mutual assistance		Missing in AUC
Article 26. Spontaneous information		Missing in AUC
Article 27. Procedures pertaining to mutual assistance requests in the absence of applicable international agreements		Missing in AUC
Article 28. Confidentiality and limitation on use		Missing in AUC
Article 29. Expedited preservation of stored computer data		Missing in AUC
Article 30. Expedited disclosure of preserved traffic data		Missing in AUC
Article 31. Mutual assistance regarding accessing of stored computer data		Missing in AUC
Article 32. Trans-border access to stored computer data with consent or where publicly available	3.a Procedural law	Implicit and broader in AUC
Article 33. Mutual assistance regarding the real-time collection of traffic data		Missing in AUC
Article 34. Mutual assistance regarding the interception of content data		Missing in AUC
Article 35. 24/7 Network		Missing in AUC

# Summary of Findings

<b>Electronic Transactions</b>		Not specifically related to BC
	Electronic Commerce	
	Contractual Obligations in Electronic Form	
	Security of Electronic Transactions	
<b>Personal Data Protection</b>		Not specifically related to BC
	Personal data protection	
	Institutional framework for the protection of personal data	
	Obligations relating to conditions governing personal data processing	
	The Data Subjects' Rights	
	Obligations of the Personal Data Controller	
<b>Promoting Cyber Security and Combatting Cybercrime</b>		Not specifically related to BC
	Cyber Security Measures to be taken at National Level	



# Comparative analysis: Malabo Convention of African Union and Budapest Convention on Cybercrime

## SNAPSHOT

# Budapest Convention

Xenophobic material
Subscriber information
Unauthorised Access
Traffic Data
Service Provider
Computer Data
Computer System

Definitions

Sanctions and Measures
Corporate Liability
Aiding/Abetting
Copyright
Child Pornography
e-Fraud
e-Forgery
Misuse of Devices
System Interference
Data Interference
Illegal Interception
Illegal Access

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Exp. Pres. of Traffic Data
Exp. Preservation of Data
Safeguards

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24/7 Network
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Ex. Disc. of Traffic Data
Trans-border Access
Ex. Pres. of Stored Data
Confidentiality
Absence of agreements
Spontaneous Information
Mutual Assistance
Extradition
General Principles

International Cooperation



Consistent with international standard



Not consistent but not conflicting



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## **Imperative**

**Enabling Environment** to combat Cybercrime

Sovereign's/State's **positive** obligation to **protect citizens** from (cyber)crime

## **Impact**

**Missing** or **Inadequate** Legal Provisions **Prejudice**  
this **Objective**

Could **undermine existing** Best Practice **Legislation**  
and Processes in AU member states

# **Salient Examples of Issues**

# AUC: Unauthorised Access

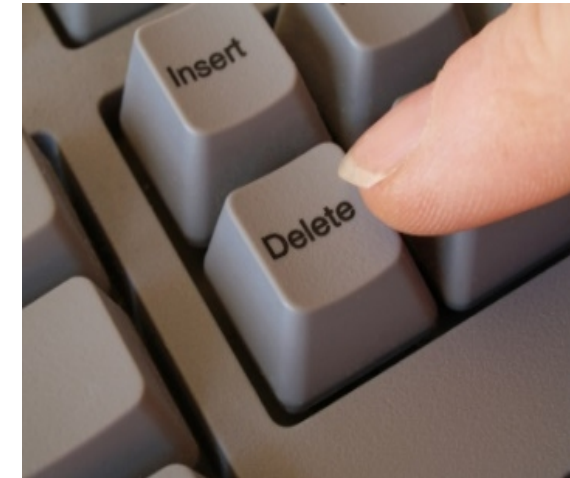
- AUC Offence: "Gain or attempt to gain **unauthorized access** to part or all of a computer system or **exceed authorized access**"
- No definition of "unauthorized access"





# AUC: Data Interference & System Interference

## Data Interference



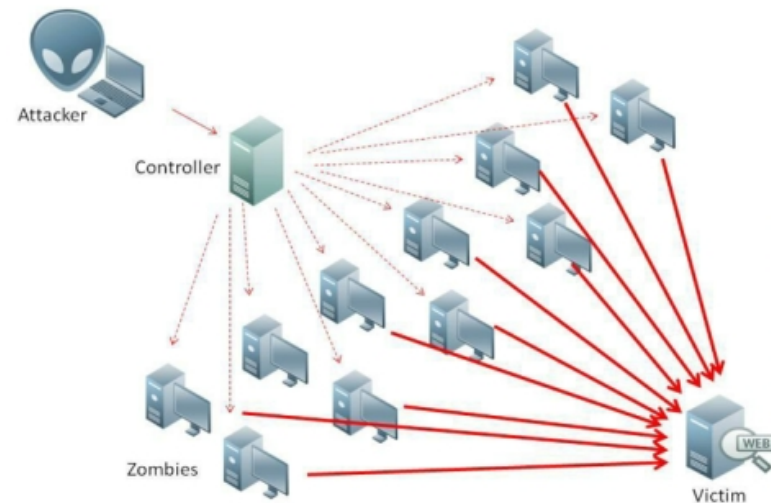
- Missing “without right”  
(i.e. missing unauthorised)
- Requirement of “**fraudulently**”  
(for data interference and illegal interception)
  - **means offences legal if no element of fraud**
- computer data



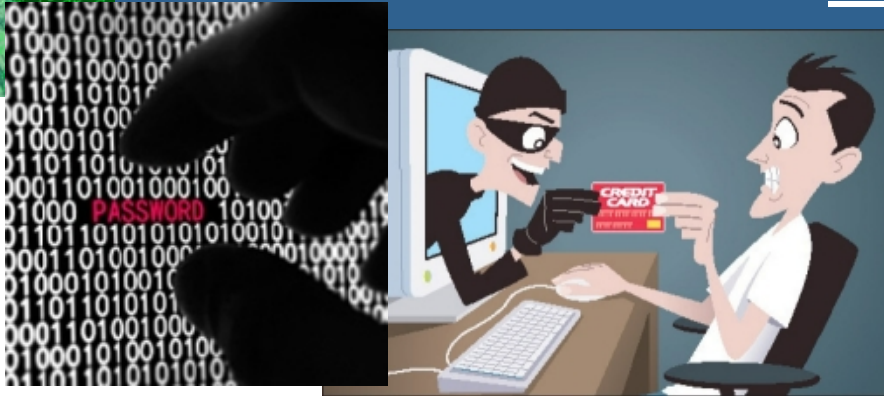
© Can Stock Photo - csp16131109

## System interference

- NO **“without right”**  
(i.e. missing **unauthorised**)
- **No mens rea** (no without right or fraudulent – strict liability
  - Means that **authorised system interference** an offence
- **Missing**: damaging, deleting, or suppressing computer data



# AUC: Misuse of Devices



- Does **not cover** production, sale, procurement for use, import, distribution of **access codes** and other computerized data
- Does **not cover** dual-use technologies (requires that device be “specially adapted” rather than “adapted primarily”)
- does **not provide** protection/carve out for **authorized testing** or cybersecurity operations

# AUC: e-Forgery, e-Fraud and racism/xenophobia-related offences

- Consistent with the Budapest Convention and the Additional Protocol
- One of the good examples of realization of Budapest Convention





# AUC: Aiding, Abetting and Corporate Liability

- Largely consistent to the Budapest Convention
- Consistent in principle but lacks the **necessary tests to determine authorized person acting on behalf of a legal person**

# AUC: Child Pornography

- Largely consistent with the Budapest Convention
- **Missing mens rea** element (intentionally/without right)
- Restricted definition of child pornography, **missing** the elements of:
  - **persons appearing to be minors** engaged in sexually explicit conduct;
  - **realistic images** representing minors engaged in sexually explicit conduct

*UN Protocol Rights of the Child on the sale of children, child prostitution and child pornography*





# AUC: Procedural Provisions

- Unclear scope of procedural provisions
- Missing **safeguards** against abuse of powers (especially in interception of content data)
- Missing the following procedural powers:
  - **Expedited** preservation and **partial disclosure** of traffic data (Article 17)
  - **Production** order (Article 18)
  - No provision for **seizure** of **electronic evidence** (A.19)
  - **Real-time** collection of **traffic data** (Article 20)



# AUC: Procedural Provisions

- Provision corresponding to expedited preservation of data in AU is **not an “expedited power”** – **requires warrant** for judge and therefore may not be effective
- Provision corresponding to **interception** of content data is **missing judicial safeguards** and is open to abuse



## • **NO Binding/Suggested Legal Framework:**

### **Article 28: International cooperation**

#### **1. Harmonization**

State Parties shall ensure that the legislative measures and/or regulations adopted to fight against cyber-crime will strengthen the possibility of regional harmonization of these measures and respect the principle of double criminal liability.

#### **2. Mutual legal assistance**

State Parties that do not have agreements on mutual assistance in cyber-crime shall undertake to encourage the signing of agreements on mutual legal assistance in conformity with the principle of double criminal liability, while promoting the exchange of information as well as the efficient sharing of data between the organizations of State Parties on a bilateral and multilateral basis.

#### **3. Exchange of information**

State Parties shall encourage the establishment of institutions that exchange information on cyber threats and vulnerability assessment such as the Computer Emergency Response Team (CERT) or the Computer Security Incident Response Teams (CSIRTs).

#### **4. Means of cooperation**

State Parties shall make use of existing means for international cooperation with a view to responding to cyber threats, improving cyber security and stimulating dialogue between stakeholders. These means may be international, intergovernmental or regional, or based on private and public partnerships.

# AUC: International Cooperation

- **Double criminality (dual criminality)** means a crime punished in both the country **where a suspect is being held** and the country asking for the suspect to be handed over or transferred to;
- Limited **only** to:
  - **Extradition** cases
- **BC**: Mutual Assistance: applies to **all** cases (***except Art 2-11 and Expedited Preservation***)



[BC Article 25 – General principles relating to mutual assistance]

- Most **important** aspect of international or regional cybercrime instrument is:  
**functional legally binding framework** for criminal justice cooperation – Missing in AU Convention
- AU Convention provides **aspirational principles - no specific powers** that are necessary for effective international cooperation and combatting of cybercrimes
- **Infrastructure/Data Repository countries - not AU Convention members** – but are members of Budapest Convention

- Missing a functional international cooperation mechanism including the following provisions:
  - Article 23. General principles relating to international co-operation
  - Article 24. Extradition
  - Article 25. General principles relating to mutual assistance
  - Article 26. Spontaneous information
  - Article 27. Procedures pertaining to mutual assistance requests in the absence of applicable international agreements
  - Article 28. Confidentiality and limitation on use
  - Article 29. Expedited preservation of stored computer data

- Missing a functional international cooperation mechanism including the following provisions:
  - Article 30. Expedited disclosure of preserved traffic data
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  - Article 32. Trans-border access to stored computer data with consent or where publicly available
  - Article 33. Mutual assistance regarding the real-time collection of traffic data
  - Article 34. Mutual assistance regarding the interception of content data
  - Article 35. 24/7 Network



# Are BC and AUC complementary?

- AU Convention may offer limited value to AU member states due to:
  - no comprehensive procedural powers in relation to electronic evidence, and
  - no functional international cooperation mechanism
- **However, AU Convention and Budapest Convention are not in conflict with each other**



# Are BC and AUC complementary?

- AU Convention may be interpreted as a set of **aspirational principles** that still requires a **functional framework such as Budapest Convention to realize them.**
- Draft language for Article 3 of the AU Convention mandated the use of the language provided for in the Budapest Convention:

*"Member States shall take into account the approved language choice in international cybercrime legislation models such as the language choice adopted by the **Council of Europe** and the Commonwealth of Nations where necessary."*



# Are BC and AUC complementary?

- Certain language in the AU Convention appears to mandate Member States to leverage the Budapest Convention
  - *"Considering that the goal of this Convention is to **take on board internationally recognized best practices**"*
  - *"State Parties shall **make use of existing means for international cooperation**"*





# Are BC and AUC complementary?

- Even though many provisions in the AU Convention are **missing** and others **inconsistent** with the Budapest Convention, the AU Convention is **not in conflict** with the Budapest Convention
- **Problems** would arise if a state implemented vague provisions of the **AU Convention without support of the Budapest Convention**

# Comparative analysis: Malabo Convention of African Union and Budapest Convention on Cybercrime

## Towards a Collaborative Approach



- AU states could **build upon political commitment** of AU leaders in adopting the AU Convention **through use of Budapest Convention** to:
  - improve their **domestic cybercrime legislation** and
  - **engage in international cooperation**

# AU Convention & Budapest Convention

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# Comparative analysis: Malabo Convention of African Union and Budapest Convention on Cybercrime



## Questions

**Thank you!**

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