

**KEYNOTE ADDRESS OF HON. ATTORNEY GENERAL OF THE
REPUBLIC OF MAURITIUS**

**Cybercrime and the rule of law, including
benefits of the Budapest Convention for Mauritius**

Mr. Chairperson,
Member of delegations,
Ladies and gentlemen,
All protocols observed,

Good morning. On behalf of the Mauritian delegation, I wish to express my profound appreciation for the opportunity given to us by the Council of Europe and European Union to participate in both The Cybercrime Convention Committee (The T-CY) and the Octopus Conference.

I am also very grateful for having been invited to address this august assembly today. It gives me the opportunity to share with you the benefits of the Budapest Convention for Mauritius as an essential tool to strengthening the rule of law against cybercrime.

When the Universal Declaration on Human Rights was adopted in 1948, the European Convention on Human Rights came into force in 1953, and the International Covenant on Civil and Political Right was adopted in 1966, no one could have foreseen that it would affect the so called 'Cyberspace'.

Today, a large proportion of the world populations are Internet users and the Internet has become a common and regular platform for individuals to exercise the right to freedom of expression and information. We must however accept that large-scale mass surveillance has also curtailed this freedom of expression, right to privacy and the rule of law.

Owing to its basic characteristics and vulnerabilities, Cyberspace is facing a wide variety of complicated and dangerous threats. Some threats come from abroad, some from homeland, some from national governments, some from non-state actors and some from vulnerabilities

of computer systems. There is the recent incident whereby some of the customers of Tesco bank had lost money when some 40,000 cards have been hacked and money stolen from 20,000 accounts. This clearly illustrates the existing threats in the Cyberspace. Threats to the cyberspace include cybercrime, cyber invasion, cyber-attack, malware, and cyber vulnerabilities.

However, there are sufficient safeguards both legal and institutional to meet the threats and challenges such as international human rights law, the Budapest Convention on Cybercrime, Cyber security strategies of our respective countries, strong network technology and innovation, effective cyber security response system to detect and prevent cyber-attack timely, efficient cyberspace laws and regulation and above all international cooperation akin to the Budapest Convention on Cybercrime which provides the mechanism for international cooperation.

In order to deal with the threats associated with cybercrime, it is very important to have appropriate laws in place. Indeed, one of the fundamental tenets of the principle of the rule of law is that people and institutions ought to be subject to and accountable to law that is fairly applied and enforced. Laws are important because they regulate conduct and set standards for everyone and provide for penalties to ensure compliance. And, for laws to be properly applied and enforced, it is also crucial to have robust institutions in place.

The Budapest Convention on Cybercrime is undoubtedly one of the most important international treaties of the modern era. Its main objective, as set out in its Preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international cooperation.

The UN General Assembly and UN Human Rights Council have both regularly asserted that individuals enjoy the same rights online that they enjoy offline. For instance, *The Human Rights Council Thirty-second session, June 2016, Agenda item 3*, on the promotion, protection and enjoyment of human rights on the Internet,

'Affirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in

accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights’.

It is also to be noted that as far back as in 2003 during the World Summit on the Information Society (WSIS), more than 180 governments have reaffirmed the full applicability of the Universal Declaration of Human Rights online.

States are required to respect human rights on the internet and for this matter, states are required to take ‘judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations under Article 2 of the International Covenant on Economic, Social and cultural Rights (ESECSR).

What would be the relevance of the **Budapest Convention on Cybercrime (BCC)** to human rights and the rule of law in the cyberspace ?

While the BCC on one hand requires governments to take measures against offences against and by means of computer data and systems, to provide law enforcement with procedural powers for effective investigations and to engage in efficient international cooperation,

Article 15 of the BCC, provides conditions and safeguards in order to protect individuals against arbitrary intrusion:

Article 15 provides:

Article 15- Conditions and safeguards

Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are “subject to conditions and safeguards provided for under its domestic law which shall provide for the adequate protection of human rights and liberties”, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality.

Article 15, therefore requires for adequate protection of human rights and liberties in the domestic laws.

However, Human rights need to be balanced with State's duty to protect other rights and to maintain national security and public order, including the cyberspace.

While the scope and applicability of any right may be limited by the manner in which it is interpreted, Human Rights and Rule of law are also subject to certain limitations. For instance, most of the rights enshrined in the *European Convention on Human Rights* are also subject to more explicit restrictions, which could be said to fall into 4 main categories namely:

1. "express definitional exclusions" attached to specific articles attempt to set out in relatively precise terms what a given right means. For example, Article 4, paragraph 3, lists various kinds of obligatory work, such as compulsory military service, which are excluded from the definition of "forced or compulsory labour".
2. Some provisions include statements of the 'relatively limited circumstances' in which a given right does not apply. For example, the right to liberty under Article 5 is not infringed by, amongst other things, "the lawful detention of a person after conviction by a competent court".
3. Certain classes of person with "special legal status" may be expressly denied full entitlement to certain rights. For example, Article 11, paragraph 2, permits the imposition of lawful restrictions upon freedom of association and freedom of peaceful assembly in the armed forces, the police and the civil service.
4. Various kinds of public and private interest provide states with defences against interferences with certain rights. For instance, Article 15 enables the suspension of some rights in "time of war or other public emergency threatening the life of the nation" provided this is "strictly required by the exigencies of the situation".

Public authorities may only interfere with the human rights and rule of law upon the successful invocation of any of the legitimate purposes attaching to the second paragraphs of Articles 8 to 11 of the ECHR which in effect is contingent upon compliance with two vital conditions:

- (i) that the interference, or limitation, is prescribed by, or is in accordance with, law (the "rule of law test"); and
- (ii) that it is necessary in a democratic society in pursuit of one or more of the second paragraph objectives (the "democratic necessity test")

The purpose of the “prescribed by” or “in accordance with the law” clauses in the second paragraph of Articles 8 to 11 is to ensure that domestic legislative or judicial authority limits the scope for arbitrary tampering with rights by the executive. The concept of “law” in this context is not, however, confined to domestic legal processes and includes more abstract or general assumptions about the requirements of the “rule of law”, a basic Council of Europe ideal. The purpose of the “democratic necessity test” is to ensure that any specific interference with rights is judged against the “true”, rather than the alleged, needs of a democratic society.

We are all familiar with the basic ‘rule of law’ tests developed by the European Court

In **HUVIG v. FRANCE (Application no. 11105/84) and KRUSLIN v. FRANCE** (Application no. 11801/85), both cases involving phone tapping, the Court identified four questions from earlier cases which provide the test for deciding if any given interference with a specific right, or rights, has been “legal”:

- (1) Does the domestic legal system sanction the infraction?
- (2) Is the relevant legal provision accessible to the citizen?
- (3) Is the legal provision sufficiently precise to enable the citizen reasonably to foresee the consequences, which a given action may entail?
- (4) Does the law provide adequate safeguards against arbitrary interference with the respective substantive rights?

In a gist, to pass these tests, all restrictions on human rights must be based on clear, precise, accessible and foreseeable legal rules, and must serve clear legitimate aims, which must be ‘necessary’ and ‘proportionate’.

Mauritius is very proud to have been the first African country to have ratified the Budapest Convention on 15 November 2013. Following ratification of the Convention, Mauritius was selected by the Council of Europe and the European Union as one of the 7 priority countries to participate in the Global Action on Cybercrime (GLACY) project aimed at supporting countries worldwide in the implementation of the Budapest Convention. Mauritius has benefited from assistance in terms of harmonization of legislation, judicial training, law enforcement training

and capacity building. Another project, the GLACY+ project, which intends to extend the experience of the GLACY project, will soon be under way. Mauritius is privileged and honoured to be part of both the GLACY and GLACY + projects. As a result of the assistance provided, Mauritius is dedicated to sharing the knowledge acquired and enhancing capacity-building in cybercrime on the African continent by becoming a regional training hub.

Last and not least, as a member state of the Budapest Convention, Mauritius shall contribute and continue to uphold and promote the rule of law in the cyberspace whilst at the same time ensuring that human rights are protected.

Thank you very much for your kind attention.