

Explanatory notes on the Draft text of the convention

Status: 26 July 2023

In addition to the annex to the draft methodology for conducting the work of the Ad Hoc Committee at its sixth session containing the discussion order of the articles of the draft text of the convention at the plenary meetings of the sixth session of the Ad Hoc Committee, the Committee Chair prepared, with the assistance of the secretariat, the present document, which contains the sources of the provisions of the draft of the convention, to further facilitate the consideration of the draft text of the convention at the sixth session of the Ad Hoc Committee.

Group 1

Article 1. Statement of purpose

Article 1 of the draft text of the convention is based on a proposal made by the Chair, which followed the structure of article 1 of the United Nations Convention against Corruption¹ (UNCAC) and was discussed at the first session.² Paragraphs (a) and (b) are almost identical to those in UNCAC.³

The wording “promote, facilitate and support” in paragraph (c) was proposed by a Member State during the fourth formal session,⁴ which was chosen due to its similarity to article 1 paragraph (b) UNCAC.

The second half of paragraph (c) is based on the above-mentioned Chair’s proposal,⁵ which was included unamended from the Consolidated negotiating document (CND) discussed at the fourth session.

Group 2

Article 2. Use of terms

(a) “[Computer system] [Information and communications technology device]” and (b) “[Computer data] [Digital information]”

Finding a term and its definition among the proposed terms under article 2 paragraphs (a) and (b) is still subject to the co-facilitated informal negotiations of group C.

(c) “Traffic data” and (d) “Content data” follow the proposals of the co-facilitators of informal negotiating group C.

(e) “Service provider” follows the definition in article 1 paragraph (c) of the Council of Europe Convention on Cybercrime (Budapest Convention).⁶

(f) “Subscriber information” follows the definition in article 18 paragraph 3 Budapest Convention.

¹ United Nations, *Treaty Series*, vol. 2349, p. 41

² A/AC.291/CRP.8/Rev.1.

³ Art 1(b) of the draft text of the convention reads “strengthen international cooperation”, while Art 1(b) UNCAC reads: “support international cooperation”.

⁴ A/AC.291/16, as updated during the fourth session of the Ad Hoc Committee (status as of 21 January 2023), available at www.unodc.org/unodc/en/cybercrime/ad_hoc_committee/ahc_fourth_session/main.html (CND fourth session).

⁵ A/AC.291/CRP.8/Rev.1.

⁶ Council of Europe, ETS No. 185.

(g) “**Personal data**” follows the proposals of the co-facilitators of informal negotiating group C.

(h) “**Serious crime**” follows the definition in article 2 paragraph (b) of the United Nations Convention against Transnational Organized Crime⁷ (UNTOC).

(i) “**Child**”

The definition of the term “child” is based on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing UNTOC.⁸

This definition is also found in regional instruments that *inter alia* deal with the protection of children against abuse and exploitation, such as the African Charter on the Rights and Welfare of the Child,⁹ the Inter-American Convention on International Traffic in Minors,¹⁰ the Council of Europe Convention on Action against Trafficking in Human Beings,¹¹ and the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.¹²

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography¹³ equally prohibits any form of production, possession or distribution of child sexual abuse or exploitation material.¹⁴ In its guidelines regarding the implementation of the Protocol, the Committee on the Rights of the Child has itself stated that – until the age of 18 years – children “can never consent to any form of their own sale, sexual exploitation or sexual abuse, and that States parties must criminalize all the offences covered by the Optional Protocol, committed against any child up to the age of 18.”¹⁵

Given that articles 13 and 14 of the draft text of the convention equally aim to protect children against sexual abuse and exploitation, and not to establish the age of criminal liability of the child, the draft text of the convention contains the age limit of 18 years.

Finally, different age limits would lead to fragmentation at the international level and – in light of dual criminality – possibly pose obstacles to international cooperation in the prevention, investigation and prosecution of child sexual abuse or exploitation material.

⁷ United Nations, *Treaty Series*, vol. 2225, p. 209.

⁸ United Nations, *Treaty Series*, vol. 2237, p. 319. Article 3(d) “‘Child’ shall mean any person under eighteen years of age.”

⁹ African Union, document CAB/LEG/24.9/49 (1990). Article 2 “For the purposes of this Charter, a child means every human being below the age of 18 years.”

¹⁰ Organization of American States, *Treaty Series* No. 79. Article 2(a) “‘Minor’ means any human being below the age of eighteen.”

¹¹ Council of Europe, CETS No. 197. Article 4(d) “‘Child’ shall mean any person under the age of 18 years.”

¹² Council of Europe, CETS No. 201. Article 3(a) “‘Child’ shall mean any person under the age of 18 years.”

¹³ United Nations, *Treaty Series*, vol. 2171, p. 227.

¹⁴ Article 3(1)(c) “Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.” Article 2(c) provides: “Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”

¹⁵ Committee on the Rights of the Child, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (2019) CRC/C/156, para. 72.

(j) “Property”, (k) “Proceeds of crime”, (l) “Freezing” or “seizure”, (m) “Confiscation” and (n) “Predicate offense”

The definitions of these terms are taken verbatim from article 2 subparagraphs (d) to (h) of both UNTOC and UNCAC.

Group 3

Article 4. Protection of sovereignty

This article is taken verbatim from article 4 of both UNCAC and UNTOC.

Article 22. Jurisdiction

This article is based on the proposal of the co-facilitators of informal negotiating group D and article 42 UNCAC.

Paragraph 2 (d), which is the main difference between article 42 UNCAC and article 15 UNTOC, was included for further discussion, given that some Member States’ domestic laws as well as the Arab Convention on Combating Information Technology Offences and the Model Arab Law on Combating Offences related to Information Technology Systems provide for this basis of jurisdiction. This provision is not included in UNTOC, but is included in UNCAC, and there could be offences covered by the draft convention carrying some similarity with the UNCAC language, for instance, where there is manipulation or interception of government data from one State that is stored on servers located in another State or in the cloud, blurring the “effect” and nexus to the affected State’s territory or nationals.

Group 4

This thematic cluster concerns the scope of application of the draft convention as a whole as well as the different scopes of its chapters.

The general scope of the draft text of the convention, as set out in article 3 paragraph 1, extends to the prevention, investigation and prosecution of the offences established in accordance with articles 6 to 16. In respect of these offences, States Parties shall also cooperate with each other, through various forms of international cooperation, as set forth in article 35 paragraph 1.

The scope on the collection, obtaining, preservation and sharing of evidence in electronic form covers the same range of offences, both at the national and international level. The scope of international cooperation on evidence also extends to serious offences, including those covered by article 17 when the concerned offences are serious.

The focus on this category of crimes is intended to dedicate the available resources and efforts to counter crimes that present an important threat. It also aims to prevent situations where the 24/7 networks or the channels for mutual legal assistance are overwhelmed by requests pertaining to less serious crimes.

Such prioritization of certain categories of serious offences is also in conformity with the approach of the international community so far, including in elaborating UNTOC.

In contrast and at the domestic level, article 23, on the scope of procedural measures, seeks to ensure that States Parties enable their law enforcement authorities for the purpose of criminal investigations and proceedings to obtain or collect evidence in electronic form of *any criminal offence* through the powers and procedures set out in that chapter. It is important to enable Member States to establish sufficient powers to investigate any kind of crime, at their national level, and not restrict these powers

to a specific category of crime. However, this article provides some flexibility to limit the application of certain intrusive powers to a limited range of crimes.

Article 3. Scope of application

This article is based on article 3 UNCAC.

Paragraph 1 is adapted from article 3 paragraph 1 UNCAC and provides for a broad scope on the prevention, investigation and prosecution of the offences established in accordance with articles 6 to 16 of the draft convention.

Extending the scope to “the freezing, seizure, confiscation and return of the proceeds of such offences”, as established in UNCAC, is a response to the high amount of cybercrime that is motivated by financial gain. Its inclusion in the scope of application would, thus, allow for a holistic legal framework for international cooperation in the pursuit of proceeds of crime from the misuse of information and communications technologies. Otherwise, States Parties would possibly have to invoke different international treaties as legal bases for individual cases.

Paragraph 2 is based on the Chair’s proposal,¹⁶ which was discussed during the second and fourth sessions. It has been incorporated in the draft text of the convention in a slightly modified form by inserting the wording “as provided for in the relevant articles of this Convention”, to allow for some flexibility regarding the scope of the chapters on procedural measures and law enforcement and international cooperation.

Article 23. Scope of procedural measures

This article is mainly taken from article 14 Budapest Convention.

Although the scope of these measures to be implemented at the national level is broad, this article, in recognition of privacy concerns, provides that States Parties are only required to implement the measure on the interception of content data in relation to a range of serious offences to be determined by domestic law. The concept of serious offences is different from the term “serious crime” defined in article 2, as the determination of serious offences for which the interception of content data is permitted is left to the domestic law of each State Party.

This article also provides for the possibility to reserve the application of the real-time collection of traffic data only to specific offences, provided that the range of these offences is not more restrictive than the range of offences to which the measure of interception of content data applies.

Article 35. General principles of international cooperation

This article is based on article 23 Budapest Convention and article 43 UNCAC as well as proposals by Member States.

Paragraph 1 derives from article 23 Budapest Convention and was amended in accordance with some proposals made by Member States during the fifth session,¹⁷ and to take into consideration the inclusion of article 17.

Paragraph 2 is taken verbatim from article 43 paragraph 2 UNCAC.

¹⁶ A/AC.291/CRP.8/Rev.1, para. i.

¹⁷ A/AC.291/19, as updated during the fifth session of the Ad Hoc Committee (status as of 21 April 2023), available at www.unodc.org/unodc/en/cybercrime/ad_hoc_committee/ahc_fifth_session/main.

Article 17. Offences relating to other international treaties

This article is a proposal by the Chair, based on the outcome of the co-facilitated informal negotiation process of group B.

Some might be of the view that offences established in accordance with international conventions and protocols, including UNTOC and its three protocols, UNCAC, the international drug control conventions, the WHO FCTC Protocol on the smuggling of tobacco products, etc., would already cover the same offences when committed by means of information and communications technologies.

For others, this article would make clear that all States Parties to the draft convention would need to ensure the above to be the case. There are caveats that give flexibility to States Parties, especially those whose domestic law already covers the cases in which cyber elements or information and communications technologies are involved. Cases that do not involve cyber elements or information and communications technologies are outside the scope of this article.

These offences are generally considered to be serious, and therefore some of the provisions of the draft convention would apply to cooperation in relation to these offences, especially when it comes to the collection and sharing of evidence in electronic form.

From this perspective, the inclusion of article 17 aims to pave the way for the use of adequate tools and rapid communication channels set forth in the draft convention for the preservation, collection, and sharing of electronic evidence related to the cyber element of the offences established by other international instruments. States Parties would remain free to apply the provisions on cooperation foreseen in those treaties with regard to the remaining aspects of these crimes (that is, other than the aspect of evidence in electronic form), as there is no contradiction with those treaties. Accordingly, the future convention would operate as a complement to these international instruments.

Article 61. Relation with protocols

This article is taken verbatim from article 37 UNTOC. It would ensure that in the future, States Parties to the Convention could discuss the possibility of supplementing it.

Group 5

This thematic cluster relates to the conformity of the draft text of the convention with human rights law, which is guaranteed by article 5 on respect for human rights. This article applies to the draft convention in its entirety, that is, to all provisions. Article 24 on conditions and safeguards reaffirms and specifies this obligation.

It is important to emphasize that the assessment of the level of human rights safeguards included in the draft text of the convention should take into account all forms of safeguards and not only the express references to human rights instruments. In addition to the references in articles 5, 21 paragraph 4, 24 and 36 of the draft text of the convention, the narrow and well-defined scope of the convention, the dual criminality principle, the non-discrimination clause, the references to domestic law and the grounds for refusal all form part of the package on safeguards.

Article 5. Respect for human rights

This article is based on Member States' proposals¹⁸ and on the discussion held during the second to fifth sessions.

¹⁸ A/AC.291/CRP.11.

Article 24. Conditions and safeguards

This article is based on article 15 Budapest Convention and was only slightly altered in paragraph 1 to refer to international human rights law in more general terms.

Paragraph 2 requires judicial or other independent supervision, grounds justifying the application of the power or procedure and the limitation on the scope of the duration of the measure. This paragraph does not imply any international supervision. Supervision is exercised as provided for by domestic law and any other binding international instrument to which a Member State is a Party. This paragraph also allows each Member State to determine, at its national level, which of the powers and procedures require supervision, justification or specific limitation.

Paragraph 3 requires Member States to take into consideration the rights, responsibilities and legitimate interests of third parties, including service providers, that could be affected by the enforcement of procedural measures. It is worth noting that this paragraph gives priority to the “public interest”, in particular the interests of “the sound administration of justice”.

Group 6

Article 25. Expedited preservation of stored [computer data] [digital information]

This article reflects article 16 Budapest Convention.

Paragraph 4 of article 16 Budapest Convention, which states that the powers and procedures established under this provision are subject to article 23 on the scope of procedural provisions and article 24 on conditions and safeguards, was not included. Given that article 5 applies to the draft text of the convention in its entirety and article 23 on the scope of procedural provisions and article 24 on conditions and safeguards to the entire chapter on Procedural measures and law enforcement, the reference to the preceding articles could be considered redundant or lead to confusion, rather than strengthen the text. The same has been done in articles 26, 27, 28, 29 and 30.

Article 26. Expedited preservation and partial disclosure of traffic data; Article 27. Production order; Article 28. Search and seizure of stored [computer data] [digital information]; Article 29. Real-time collection of traffic data; Article 30. Interception of content data

The procedural measures enshrined in articles 26 to 30 are all taken from the Budapest Convention, namely articles 17 to 21.

The *Explanatory Report to the Convention on Cybercrime* of the Council of Europe¹⁹ gives exhaustive and detailed explanation of these measures. Considering the opposition of some Member States to the inclusion of article 29 on real-time collection of traffic data and article 30 on interception of content data, invoking the intrusive nature of the measures or the insufficient technical capacity of many Member States to carry out these procedures, it is useful to explain the rationale behind the inclusion of these articles.

First, the draft text of the convention, in its article 23 paragraph 3, recognizes the intrusive nature of these measures by allowing States Parties to limit the scope of offences in relation to which they can be applied. In addition, article 24 paragraph 2 allows States Parties to impose additional safeguards on the application of certain procedural measures. This paragraph concerns mainly the real-time collection of traffic data and interception of content data.

¹⁹ Council of Europe, *Explanatory Report to the Convention on Cybercrime* (2001), available at <https://rm.coe.int/16800cce5b>.

Second, the argument that some Member States are not in possession of technical means to collect or intercept data is not sufficient to justify not including these two important measures for at least two considerations. Firstly, articles 29 and 30 provide some flexibility, so that if law enforcement authorities of a State Party are unable to intercept data, they may instead adopt a different approach, such as compelling service providers in their jurisdiction to provide the necessary technical tools to ensure the real-time collection or interception of data. One of the main objectives of the future convention is to provide technical assistance and help building the capacities of States Parties in preventing and countering the crimes covered by the convention. Technical tools and facilities for carrying out the real-time collection of traffic data and the interception of content data could be one of the areas of capacity-building. Secondly, the inclusion of these two powers in the draft text of the convention is mainly justified by their decisive role in the investigation of many offences. In fact, the real-time collection of traffic data is crucial as it allows for the route of the communications to be traced back from the victims to the perpetrator. For example, the source of an intrusion in the case of illegal access, or distribution in the case of child sexual abuse and exploitation material, could not be determined without real-time collection of traffic data. The interception of content data is also crucial for law enforcement authorities. It is impossible to determine in real-time the harmful and illegal nature of a communication without intercepting the content of the message. Without the ability to determine and prevent the occurrence of ongoing criminality, law enforcement would merely be left with investigating past and completed crimes, where all the damage has already occurred.

Group 7

Article 13. Offences related to online child sexual abuse or child sexual exploitation material

This article is based on article 9 Budapest Convention and proposals made by Member States.

Paragraph 1 aims to cover the entire cycle of online child sexual abuse or child sexual exploitation material in a logical manner:

Subparagraph (a) covers the production as well as all forms of dissemination of online child sexual abuse or child sexual exploitation material.

Subparagraph (b) covers all forms of procurement, including the solicitation of and access to such material. To make this provision future proof, the term “engaging with” was added to cover acts in virtual spaces, such as the metaverse.

Subparagraph (c) covers the possession or control of child sexual abuse or child sexual exploitation material through any storage medium.

Subparagraph (d) criminalizes the financing, facilitating and profiting from all offences established in the preceding subparagraphs.

Paragraph 2 on the definition of “Child sexual abuse or child sexual exploitation material” as well as paragraphs 3 to 5 are based on proposals made by Member States.²⁰

Paragraphs 3 to 5 are also based on proposals made by Member States.²¹

²⁰ A/AC.291/CRP.11.

²¹ Ibid.; CND (fourth session).

Article 14. Solicitation of a child for sexual purposes through [a computer system] [an information and communications technologies device]

This article is based on proposals by Member States, taking into account article 23 of the Lanzarote Convention as well as the relevant *Opinion on Article 23 of the Lanzarote Convention and its explanatory note* of the Lanzarote Committee.²²

The opinion of the Lanzarote Committee on article 23 of the Lanzarote Convention, which deals with the solicitation of children, and its explanatory note state that, if the offence is committed through the use of information and communications technologies, provisions on the solicitation of children should not require “material acts” following the solicitation. Rather, child sexual abuse and exploitation can by itself be carried out online. Mere communication may, therefore, already give rise to criminal liability.

Paragraph 2 allows for States Parties to require an act beyond the “communication with a child for sexual purposes”.

Article 15. Non-consensual dissemination of intimate images

This article is based on proposals made by several Member States.

Paragraphs 1 and 2 are based on proposals made by Member States.²³

Paragraph 3 affords States Parties some room for limiting this offence to so-called “revenge porn” only, namely by establishing the intent to cause harm as a constitutive element before criminal liability attaches.

Group 8

Article 11. Computer-related forgery

Article 11 is based on article 7 Budapest Convention and on proposals made by Member States.²⁴

Article 12. Computer-related theft or fraud

This article is based on article 8 Budapest Convention and amended in accordance with the proposal of the co-facilitators of informal negotiating group A to have elements of articles 15 and 16 of the CND on the violation of personal information and on identity-related offences be merged with this article.

This addition is reflected in paragraph (b) through the insertion of the following wording: “...or [computer data] [digital information] containing personal data, including information related to a person’s bank account, without the consent of the person concerned, and that would not otherwise be made available to the perpetrator”.

Current article 12, thus, covers any form of theft or fraud caused by manipulating data or interfering with data processing, resulting in the acquisition by the perpetrator of an economic benefit or personal data without right.

²² Council of Europe, *Solicitation of children for sexual purposes through information and communication technologies (Grooming): Opinion on Article 23 of the Lanzarote Convention and its explanatory note* (2015).

²³ A/AC.291/CRP.11.

²⁴ *Ibid.*

Group 9

Article 6. Illegal access

This article is based on article 2 Budapest Convention.

The terms “without right”²⁵ and “dishonest intent”²⁶ were chosen as the majority of Member States favoured them. They are also used in the Budapest Convention.

For consistency, these two terms were used throughout the draft text of the convention.

Article 7. Illegal interception

This article is taken almost verbatim from article 3 Budapest Convention.

Article 8. Interference with [computer data] [digital information]

This article is taken from article 4 Budapest Convention. Some actions proposed by Member States were not included, as they seem comprised in the acts foreseen in this draft provision.

Article 9. Interference with [a computer system] [an information and communications technology device]

This article is taken from article 5 Budapest Convention.

Article 10. Misuse of devices

This article is taken from article 6 Budapest Convention and amended in accordance with the proposal of the co-facilitators of informal negotiating group A to have some elements of articles 15 and 16 of the CND on the violation of personal information and on identity-related offences be merged with this article. These amendments are:

The insertion of “obtaining”, in paragraphs 1(a) and 2.

The insertion of “electronic signature” in the paragraph 1(a)(ii).

Group 10

Article 36. Protection of personal data

This article is based on a proposal made by several Member States.

Paragraph 1 provides that a State Party shall not require transferring personal data if it cannot be provided in compliance with its applicable laws concerning the protection of personal data.

Paragraph 2 requires States Parties to subject the received personal data to appropriate safeguards.

Paragraph 3 requires a prior authorization for sharing personal data with a third party.

²⁵ 49 Member States in favour, 2 against. Other proposals were “unlawfully / the unlawful access” (18 in favour), “unauthorized access” (supported by 12), “beyond permitted right” (supported by 2) and “in excess of such authorization or right” (supported by 1).

²⁶ 37 Member States supported the term “dishonest”, while only 2 Member States called for retaining “criminal intent”. 1 Member State supported the term “malicious”.

Group 11

Article 40. General principles and procedures relating to mutual legal assistance

This article is based on article 46 UNCAC and article 18 UNTOC and has been amended to reflect the scope of the draft text of the convention.

Most paragraphs, namely paragraphs 1 to 13 and 15 to 31, were taken verbatim from article 46 UNCAC and article 18 UNTOC with the exception of some minor amendments made in accordance with the proposals made by Member States during the fifth formal session.²⁷ Substantial amendments were made as follows:

Paragraph 1 is based on article 46 paragraph 1 UNCAC and article 18 paragraph 1 UNTOC, which have been amended in accordance with the scope of the draft text of the convention.

Paragraph 3 has been amended to include the specific forms of mutual legal assistance relating to searching or similarly accessing, seizing or similarly securing, and disclosing data stored by means of [a computer system] [an information and communications technology device]; the real-time collection of traffic data and the interception of content data in subparagraphs (d) to (f).

Paragraph 14 is based on a proposal made by a Member State²⁸ and has been amended in accordance with the proposals made by Member States during the fifth session.²⁹

Paragraph 18 is based on article 46 paragraph 18 UNCAC. The last sentence of this paragraph is based on a proposal made by Member States.³⁰

Article 42. Expedited preservation of stored [computer data] [digital information]

This article is based on article 29 Budapest Convention.

Paragraphs 1 to 4, 6 and 7 of article 42 are identical to paragraphs 1 to 4, 6 and 7 of article 29 Budapest Convention. Subparagraph 2(g) of article 42 of the draft text of the convention was added based on a proposal by a Member State during the fifth session.³¹

Paragraph 5 was adjusted to provide for a scope of refusal that is clearly based on grounds present in the provision on general principles and procedures relating to mutual legal assistance. Accordingly, the paragraph is broader than the similar paragraph in the Budapest Convention. The concern for consistency in adopting the same ground for refusal as those included in UNTOC, in order to facilitate consensus, is the main justification for this approach.

Article 43. Expedited disclosure of preserved traffic data

This article is taken from article 30 Budapest Convention, with the exception of paragraph 2 on the grounds for refusal for providing mutual legal assistance, as explained in article 42.

Article 44. Mutual legal assistance in accessing stored [computer data] [digital information]

This article is taken verbatim from article 31 Budapest Convention.

Article 45. Mutual legal assistance in the real-time collection of traffic data

This article is based on article 33 Budapest Convention.

²⁷ CND (fifth session).

²⁸ A/AC.291/CRP.13.

²⁹ CND (fifth session).

³⁰ A/AC.291/CRP.13.

³¹ CND (fifth session).

Paragraph 1 was taken verbatim from the Budapest Convention, while paragraph 2 is based on proposals made by Member States.³²

Article 46. Mutual legal assistance in the interception of content data

This article is taken from article 34 Budapest Convention.

Group 12

Article 37. Extradition

This article is based on article 24 Budapest Convention and article 44 UNCAC, with slight amendments regarding the scope of the draft convention.

Paragraph 1 aligns article 24 paragraph 1 Budapest Convention to the draft text of the convention. This paragraph includes a threshold penalty because States Parties may punish some of the offences established in the draft text of the convention with a relatively short maximum term of imprisonment (e.g., article 6 on illegal access and article 8 on interference with [computer data] [digital information]). Such a threshold is not needed in other international conventions, such as UNTOC, since its scope covers serious crimes.

Paragraphs 2 and 3 are taken from article 44 paragraphs 2 and 3 UNCAC.

Paragraph 4 is equally taken from article 44 paragraph 4 UNCAC, of which the last sentence has been deleted in accordance with the views of Member States expressed during the fifth session.³³

The remaining paragraphs 5 to 17 and 20 of this provision are based on article 44, paragraphs 5 to 18 UNCAC.

Paragraph 18 is based on a proposal made by Member States³⁴ and amended in accordance with another proposal made during the fifth session.³⁵

Paragraph 19 is based on article 24 paragraph 7 Budapest Convention.

Article 38. Transfer of sentenced persons

This article is based on article 45 UNCAC and article 17 UNTOC.

Article 39. Transfer of criminal proceedings

This article is based on article 21 UNTOC and article 47 UNCAC.

Group 13

Article 18. Liability of legal persons

This article is based on article 26 UNCAC and article 10 UNTOC, with minor amendments to reflect the scope of the draft convention.

³² A/AC.291/CRP.13.

³³ CND (fifth session).

³⁴ Ibid.; A/AC.291/CRP.13.

³⁵ A/AC.291/CRP.13; CND (fifth session).

Article 19. Participation and attempt

This article is based on article 27 UNCAC.

Article 20. Statute of limitations

This article is based on article 29 UNCAC and has been amended based on the proposal made by a Member State.³⁶

Article 21. Prosecution, adjudication and sanctions

This article is based on article 11 UNTOC and article 30 UNCAC and has been amended based on the outcome of the discussions during the fourth session.³⁷

Paragraph 1 has been amended by “effective, proportionate and dissuasive” following the views expressed by several Member States.³⁸

Paragraph 2 has been inserted to provide for the possibility of establishing aggravating circumstances in one general provision, with reference to only one possible example of aggravating circumstance that seemed to be relevant to several delegations. The wording structure originates from article 6 paragraph 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing UNTOC.³⁹

Paragraph 3 is based on article 11 paragraph 2 UNTOC and article 30 paragraph 3 UNCAC.

Paragraph 4 is based on proposals made by a Member State.⁴⁰

Paragraph 5 is based on article 11 paragraph 3 UNTOC and 30 paragraph 4 UNCAC.

Paragraph 6 is based on article 30 paragraph 5 UNCAC.

Paragraph 7 is based on article 11 paragraph 6 UNTOC and article 30 paragraph 9 UNCAC.

Article 32. Establishment of criminal record

Article 31 on the Establishment of criminal record is taken from article 22 UNTOC and article 41 UNCAC.

Group 14

Article 33. Protection of witnesses

This article is based on articles 32 UNCAC and on proposals made by Member States.⁴¹

Article 34. Assistance to and protection of victims

Article 34 on the assistance to and protection of victims draws from article 25 UNTOC.

Paragraphs 1 to 3 are identical to article 25 paragraphs 1 to 3 UNTOC.

³⁶ CND (fourth session).

³⁷ Ibid.

³⁸ Ibid.

³⁹ United Nations, *Treaty Series*, vol. 2241, p. 480.

⁴⁰ A/AC.291/CRP.11.

⁴¹ Ibid.

Paragraphs 4 and 5 have been added in accordance with proposals made by Member States, using language from article 6 paragraphs 3 and 4 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing UNTOC.

Paragraph 6 is based on the proposal made by a Member State.⁴²

Group 15

Article 41. 24/7 network.

This article is based on article 35 Budapest Convention and proposals made by Member States.

Paragraph 1 is based on article 35 Budapest Convention and was amended to reflect the scope of international cooperation, extending not only to articles 6 to 16, but also to serious crime, including those offences covered by article 17.

Paragraph 2 is based on proposals made by Member States.⁴³

Paragraph 3 to 5 are based on article 35 paragraphs 1 to 3 Budapest Convention.

Paragraph 6 is based on a proposal made by Member States⁴⁴ and amended in accordance with the views of Member States expressed during the fifth session.⁴⁵

Article 47. Law enforcement cooperation

This article is taken almost unchanged from article 48 UNCAC.

Paragraph 1 (e) was amended in accordance with the proposals made by Member States⁴⁶ to better reflect their positions.

Article 48. Joint investigations

This article is based almost verbatim on article 49 UNCAC and article 19 UNTOC.

Group 16

Article 16. Laundering of proceeds of crime

This article is based on article 23 UNCAC and article 6 UNTOC. It has been amended to reflect the scope of the draft text of the convention.

Article 31. Freezing, seizure and confiscation of the proceeds of crime

This article is based on article 31 UNCAC.

Article 49. Mechanisms for the recovery of property through international cooperation in confiscation

This article is based almost verbatim on article 54 UNCAC.

⁴² CND (fourth session).

⁴³ A/AC.291/CRP.13; CND (fifth session).

⁴⁴ A/AC.291/CRP.13.

⁴⁵ CND (fifth session).

⁴⁶ Ibid.; CND (fifth session).

Article 50. International cooperation for the purposes of confiscation

This article is almost identical to article 55 UNCAC.

Article 51. Special cooperation

This article is based on article 56 UNCAC, with some amendments made in accordance with views expressed by Member States during the fifth session.⁴⁷

Article 52. Return and disposal of confiscated proceeds of crime or property

This article is based on article 14 UNTOC, as the majority of Member States favoured the second option of those proposed in the CND discussed during the fifth session.⁴⁸

Group 17

Article 53. Preventive measures

This article consolidates the proposals made by Member States and is based on article 31 UNTOC, articles 5, 12 and 13 UNCAC and proposals made by Member States during the fifth session. It includes all provisions that enjoyed support by Member States in a streamlined manner, as called for by Member States.

Paragraph 1 is based on article 5 UNCAC, 31 UNTOC and proposals made by Member States.⁴⁹

Paragraph 2 is based on article 13 UNCAC.

Paragraph 3 subparagraph (a) is based on article 31 paragraph 2(a) UNTOC, article 12 paragraph 2(a) UNCAC and proposals made by Member States.

Paragraph 3 subparagraph (b) is based on article 31 paragraph 5 UNTOC, article 13 paragraph 1 UNCAC and the proposals of Member States.⁵⁰

Paragraph 3 subparagraph (c) is based on a proposal made by a Member State.⁵¹

Paragraph 3 subparagraph (d) is based on a proposal made by a Member State.⁵²

Paragraph 3 subparagraph (e) is taken from article 31 paragraph 3 UNTOC, article 30 paragraph 10 UNCAC and proposals made by Member States.⁵³

Paragraph 3 subparagraph (f) combines several proposals made by Member States.⁵⁴

Paragraph 3 subparagraph (g) is based on several proposals made by Member States.⁵⁵

Paragraph 3 subparagraph (h) merges article 13 paragraph 1(a) and (b) UNCAC.

⁴⁷ CND (fifth session).

⁴⁸ Ibid. 50 Member States expressed their support for that option, while 16 supported option 1.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ A/AC.291/CRP.13; CND (fifth session).

⁵⁵ A/AC.291/CRP.13; CND (fifth session).

Paragraph 3 subparagraph (i) is based on article 13 paragraph 1(d) UNCAC and in line with the proposal of several Member States.⁵⁶

Paragraph 3 subparagraph (j) is based on a proposal made by a Member State.⁵⁷

Paragraph 3 subparagraph (k) is based on a proposal made by a Member State.⁵⁸

Paragraph 4 is based on article 13 paragraph 2 UNCAC and amended in accordance with Member States proposals.⁵⁹

Paragraph 5 is taken from article 5 paragraph 3 UNCAC and amended in accordance with a proposal made by a Member State.⁶⁰

Paragraph 6 is based on article 31 paragraph 7 UNTOC and article 5 paragraph 4 UNCAC.

Paragraph 7 is taken from article 31 paragraph 6 UNTOC and article 6 paragraph 3 UNCAC.

Group 18

Article 54. Technical assistance and capacity-building

This article is based on article 60 UNCAC and article 29 UNTOC, as well as proposals of Member States submitted prior to the third session and during the fifth session.

Paragraph 1 is based on article 60 paragraph 2 UNCAC and proposals by Member States.⁶¹

Paragraph 2 is based on article 60 paragraph 3 UNCAC, article 29 paragraph 1 UNTOC and proposals by Member States.⁶²

Paragraph 3 subparagraph (a) is based on proposals made by Member States.⁶³

Paragraph 3 subparagraph (b) is based on article 60 paragraph 1(b) UNCAC.

Paragraph 3 subparagraphs (c) and (d) are based on proposals made by Member States.⁶⁴

Paragraph 3 subparagraph (e) is based on a proposal made by Member States.⁶⁵

Paragraph 3 subparagraph (f) is based on article 29 paragraph 1(d) UNTOC.

Paragraph 3 subparagraph (g) is based on article 60 paragraph 1(h) UNCAC.

Paragraph 3 subparagraph (h) is based on article 29 paragraph 1(i) UNTOC.

Paragraph 3 subparagraph (i) merges several proposals by Member States.⁶⁶

Paragraph 4 is based on a proposal made by Member States.⁶⁷

⁵⁶ A/AC.291/CRP.13; CND (fifth session).

⁵⁷ CND (fifth session).

⁵⁸ Ibid.

⁵⁹ A/AC.291/CRP.13.

⁶⁰ CND (fifth session).

⁶¹ A/AC.291/CRP.13; CND (fifth session).

⁶² A/AC.291/CRP.13; CND (fifth session).

⁶³ A/AC.291/CRP.13; CND (fifth session).

⁶⁴ A/AC.291/CRP.13.

⁶⁵ Ibid.; CND (fifth session).

⁶⁶ A/AC.291/CRP.13.

⁶⁷ Ibid.

Paragraph 5 is based on article 29 paragraph 2 UNTOC.

Paragraph 6 is based on article 60 paragraph 4 UNCAC.

Paragraph 7 is based on article 29 paragraph 3 UNTOC.

Paragraph 8 is based on a proposal by Member States.⁶⁸

Paragraphs 9 and 10 are based on article 60 paragraphs 7 and 8 UNCAC.

Article 55. Exchange of information

Article 55 is based on article 61 UNCAC, adapted to the subject matter of the draft convention.

Paragraphs 1 to 3 are taken almost verbatim from article 61 paragraphs 1 to 3 UNCAC.

Paragraph 4 is based on a proposal by a Member State.⁶⁹

Article 56. Implementation of the Convention through economic development and technical assistance

This article is based on article 62 UNCAC and article 30 UNCTOC.

Paragraph 1 is based on article 30 paragraph 1 UNTOC and article 62 paragraph 1 UNCAC.

Paragraph 2 subparagraphs (a) to (d) are based on article 30 paragraph 2 subparagraphs (a) to (d) UNTOC and article 62 paragraph 2 subparagraphs (a) to (d) UNCAC. Subparagraph (e) is based on proposals by Member States.⁷⁰

Paragraphs 4, 5 and 6 are based on proposals by Member States.⁷¹

Group 19

The chapter on the mechanism of implementation is based on the proposal of the co-facilitators of informal negotiating group E, the consideration of such proposal by the Ad Hoc Committee during the fifth session, and the respective provisions in UNCAC and UNTOC. In accordance with the proposals by Member States, the United Nations Office on Drugs and Crime (UNODC) would be designated as the secretariat of the Convention. That could also be done in a paragraph of the General Assembly resolution adopting the Convention. As clarified by the Office of Legal Affairs, this designation is sound, as long as approved by the General Assembly.

Article 57. Conference of the States Parties to the Convention

This article is based on the proposal of the co-facilitators of informal negotiating group E, the discussions of Member States during the fifth session,⁷² and articles 63 UNCAC and 32 UNTOC.

Article 58. Secretariat.

This article is based on article 64 UNCAC and article 33 UNTOC, with the direct designation of UNODC as the secretariat of the future Conference of the States Parties.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² CND (fifth session).

Group 20

The chapter on final provisions of the draft text of the convention is generally based on the final provisions of UNCAC and UNTOC.

Article 59. Implementation of the Convention

This article is based on article 65 UNCAC and article 34 UNTOC.

Article 60. Effects of the Convention

This article is based on article 39 paragraphs 2 and 3 Budapest Convention and slightly adapted to fit the purpose of the future convention.

Article 62. Settlement of disputes

This article is based on article 66 UNCAC and article 35 UNTOC, with a slight amendment proposed by Member States.⁷³

Article 63. Signature, ratification, acceptance, approval and accession

This article is based on article 36 UNTOC and article 67 UNCAC.

Article 64. Entry into force

This article is based on article 68 UNCAC and article 38 UNTOC.

Article 65. Amendment

This article is based on article 69 UNCAC and article 39 UNTOC.

Article 66. Denunciation

This article is based on article 70 UNCAC and article 40 UNTOC.

Article 67. Depositary and languages

This article is based on article 71 UNCAC and article 41 UNTOC.

Group 21

The preambular paragraphs aim to cover proposals by Member States that appeared to be close to consensus. In some cases, proposed preambular paragraphs were merged in order to avoid overlapping ideas.

It is worth mentioning that references to the relevant General Assembly mandates were omitted, as such references would be better placed in the preamble of the General Assembly resolution to be negotiated during the concluding session, through which this convention, annexed to the resolution, shall be adopted.

⁷³ CND (fifth session).