

Explanatory notes on the Revised draft text of the convention

Status: 24 January 2024

In order to further facilitate the consideration of the Revised draft text of the convention (RDTC, contained in [A/AC.291/22/Rev.1](#)) at the concluding session of the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes, the Committee Chair, with the assistance of the secretariat, prepared the present document, which contains explanations of the amendments made to the Draft text of the convention (DTC, contained in [A/AC.291/22](#)) on the basis of the discussions in the sixth session of the Ad Hoc Committee¹ as well as in the various informal meetings.² With regard to the sources of the provisions that remain the same as in the DTC, reference is made to the Explanatory notes on the Draft text of the convention.³

Article 1. Statement of purpose

In paragraph (c), a reference to “capacity-building” has been included, based on a proposal that was supported by a large number of Member States. As several Member States expressed their preference for the wording “capacity-building and technical assistance”, while others called for “technical assistance, including capacity-building”, the wording of this paragraph has been aligned with the terms used in article 54, paragraph 1, and article 57, paragraph 5, subparagraph (h), namely “technical assistance and capacity-building”.

Moreover, in order to allow for a more general approach to technical assistance and capacity-building, the last half-sentence of paragraph (c) has been deleted.

Article 2. Use of terms

This article is subject to co-facilitated informal negotiations and has therefore not been amended. Only paragraph (o) has been included, which contains a definition of the term “relevant stakeholders”, following the terminology used in General Assembly resolution 75/282. This inclusion aims to ensure a coherent approach to the involvement of stakeholders in the various activities related to the international efforts against the use of information and communications technologies (ICTs) for criminal purposes, and to streamline the text, avoiding repetition each time when the term is mentioned. Consequently, all enumerations of stakeholders throughout the revised draft text have been replaced with the term “relevant stakeholders”, as defined in article 2. This concerns preambular paragraph 9; article 34, paragraph 4; article 53, paragraph 2; article 54, paragraph 4; article 55, paragraph 1; article 56, paragraph 2, subparagraph (d) as well as article 57, paragraph 5, subparagraph (c) and paragraph 6.

¹ A/AC.291/22, containing the proposals made by representatives at the sixth session of the Ad Hoc Committee (version as of 2 September 2023), available on the web pages of the sixth session: www.unodc.org/unodc/en/cybercrime/ad_hoc_committee/ahc_sixth_session/main.

² The reports and working documents of the coordinators of the informal meetings held during the sixth session have been made available on the [web pages of the sixth session](#).

³ *Explanatory notes on the Draft text of the convention* (26 July 2023), available on the [web pages of the sixth session](#).

Articles 6 to 10. Offences against the confidentiality, integrity and availability of data and systems

Apart from one minor editorial change, articles 6 to 10 remain as in the DTC.

In view of the discussions surrounding the work of ethical hackers and security researchers who provide authorised penetration testing and vulnerability reporting, several points should be considered.

First, several provisions enable Member States to limit criminal liability to acts committed with the intent to obtain [computer data] [digital information],⁴ to cause serious harm,⁵ or with dishonest intent.⁶ Additionally, article 9 requires the “serious hindering of [a computer system] [an ICT device]” and article 10 explicitly exempts those tools created for authorised testing or the protection of [a computer system] [an ICT device].

Second, the term “without right” in articles 6 to 10 is a context-specific requirement for criminal liability, which encompasses both written and unwritten exemptions, including legal defences, excuses, justifications as well as other principles of domestic criminal law which, in specific circumstances, exonerate individuals from criminal responsibility.⁷ These include traditional legal justifications, such as consent, necessity or self-defence, as well as other principles or interests that require the exclusion of criminal liability, for instance in cases where the overriding interest in protecting the security of [a computer system] [an ICT device] outweighs the affected interest in preserving the confidentiality, integrity or availability of [computer data] [digital information], or in cases where individuals seek to prevent harm in the public interest or harm that is likely to be caused by a third party. Activities that are authorised by the owner or other rights holders of [a computer system] [an ICT device] or part thereof are not conducted “without right” and are therefore always legitimate, such as authorised testing or protection of [computer systems] [ICT devices].⁸

Third, any domestic measure implementing the future convention must be consistent with States Parties’ obligations under human rights law, as stipulated in article 5. Therefore, any measures aimed at regulating the activities of penetration testing or vulnerability reporting must be provided for by law, pursue a legitimate aim, be necessary to achieve that aim, and be proportionate.

Article 11. [Computer] [Information and communications technologies]-related forgery

The title of article 11 has been amended in order to reflect the ongoing discussions under article 2 on the use of terms.

Article 12. [Computer] [Information and communications technologies]-related theft or fraud

The title of article 12 has been amended in order to reflect the ongoing discussions under article 2 on the use of terms. The term “theft” has been retained, as some Member States’ domestic laws consider that causing a loss of property by manipulating [computer data] [digital information] would constitute theft rather than fraud. The reference to both theft and fraud should therefore simply reflect the diversity of legal concepts found in different legal traditions.

⁴ Article 6(2) RDTC.

⁵ Article 8(2) RDTC.

⁶ Articles 6(2) and 7(2) RDTC.

⁷ See also Council of Europe, *Explanatory Report to the Convention on Cybercrime* (2001), available at <https://rm.coe.int/16800ccea5b>, paras. 38, 103.

⁸ *Ibid.*, para. 47.

In addition, paragraph (c) has been included, following the work of the informal consultations on group 8 (arts. 11 and 12) as well as the broad support expressed by Member States in plenary at the sixth session. Article 12 now covers not only fraud by inputting or altering [computer data] [digital information], or by interfering with the functioning of [a computer system] [an ICT device], but also the use thereof to deceive a natural person as to factual circumstances with a view to causing a loss of money or other property.

The bottom of article 12 equally incorporates the work of the informals on group 8 and the discussion in plenary during the sixth session by replacing the last part with “a gain in money or other property”.

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

In article 13, a number of changes have been made to reflect the work of the informal consultations on group 7 (arts. 13-15) and in plenary during the sixth session.

The title has not been changed, as the majority of Member States requested the retention of the term “child sexual abuse or child sexual exploitation material”.

In subparagraph (b), the act of “otherwise engaging with” has been deleted, in accordance with the working document of the informals on group 7 and in view of the number of Member States calling for its deletion in plenary.

Original subparagraph (d) has been deleted, as Member States expressed both in informals and in plenary that these actions would already be covered by article 16 on laundering proceeds of crime and article 19 on participation and attempt.

Paragraph 2 contains the definition of child sexual abuse or child sexual exploitation material elaborated in the informals on group 7. It defines “visual material” in mandatory and “written or audio content” in optional terms, while deleting the terms “or a person appearing to be a child” from paragraph (a) as well as original paragraph (b).

In subparagraph (a) of paragraph 2, the words “or pose” have been deleted, due to concerns of several Member States.

Regarding subparagraph (d) of paragraph 2, the revised draft text follows the wording contained in the working document of the informals on group 7.

Paragraph 4, on the exclusion of criminalisation of children for self-generated material, largely retains the original text of the DTC, with the exception of changing “shall” to “may”.

Paragraph 5 reflects a proposal made in the informals on group 7, which received the support of a large number of Member States. This provision allows States Parties to not apply this offence to material that has been consensually produced in relationships between persons who have reached the legal age of sexual consent for their private use only. In addition to the exclusion of self-generated material from criminalization in paragraph 4, paragraph 5 would thus be an important exception to recognize adolescents’ progressively developing right to self-determination.

Former paragraph 5 has been moved and inserted in article 21 as paragraph 7. It has been adjusted to reflect a more general approach to the protection of children accused of the offences under this Convention, which has been requested by several Member States.

Article 14. Solicitation or grooming for the purpose of committing a sexual offence against a child

The title has been amended in accordance with the proposal of the informals on group 7. The title has been agreed on in informals.

In paragraph 1, the prohibited conduct now focuses on the purpose of “committing a sexual offence against a child”, instead of the broader notion of “sexual purposes”. This change follows the working document of the informals on group 7.

In paragraph 2, which was agreed on in informals, the option of requiring an act “in furtherance of the communication described in paragraph 1” has been extended to encompass every conduct described in paragraph 1.

Paragraphs 3 and 4 have been included to allow States Parties more flexibility in determining the specificities of this offence. The two paragraphs have been agreed upon in informals.

Article 15. Non-consensual dissemination of intimate images

Article 15 follows the work of the informals on group 7.

In paragraph 1, the only change that has been made is the deletion of the act of “offering”. The informals on group 7 considered this act to constitute an attempt of “selling”, which would already be covered in article 19 on participation and attempt.

Paragraph 2, on the definition of “intimate image”, follows the proposal of the informals on group 7 and the discussion in plenary. Member States may wish to discuss whether this offence would apply to intimate images that were generated through the use of artificial intelligence.

Paragraphs 3 and 4 have been included, as these have been agreed on in informals. Paragraph 3 appears to cover material that is produced in the period during which adolescents wish to exercise their gradually developing sexual self-determination as they approach adulthood, in accordance with domestic legal systems. Thus, paragraph 3 allows States Parties to categorize images of persons, whose age lies between 18 years and a possibly earlier age of sexual consent, as “intimate image” instead of “child sexual abuse material”, as long as it does not depict child abuse or exploitation. This provision follows the request of several Member States to treat such conduct in accordance with article 15, rather than under the usually more severely punished offences established in accordance with article 13.

Paragraph 4 clarifies that any depiction of child sexual abuse or exploitation cannot be consented to, thereby limiting the optional application of article 15 to appropriate cases.

Paragraph 5 gives States Parties the option to require intent to cause harm and thereby limit this article to the criminalization of so-called “revenge porn”.

Article 16. Laundering of proceeds of crime

In paragraph 2, subparagraph (a) has been deleted as requested by a large number of Member States. In turn, subparagraph (b) has been divided into two subparagraphs. With this change, predicate offences under this provision are limited to the offences established in accordance with this Convention.

In subparagraph (d) of paragraph 2, an editorial revision has been made by deleting the reference to “the Conference of States Parties to this Convention” in order to align the wording of this provision with that of UNCAC and UNTOC.

Paragraph 2 now also includes subparagraph (f), which reflects subparagraph (f) of article 6, paragraph 2, of UNTOC. Originally, article 37 of the consolidated negotiating document discussed at the fourth session of the Ad Hoc Committee⁹ contained a stand-alone provision on this matter, which ultimately was not included in the DTC as a large majority of Member States called for its deletion. As it could be a useful addition under article 16, it has been included for further discussion.

Article 19. Participation and attempt

In paragraph 1, the terms “aider or abettor” have been deleted at the request of several Member States and in order to maintain consistency with the language of article 27 UNCAC.

Article 21. Prosecution, adjudication and sanctions

Article 21 has been largely retained in its original form, with the addition in paragraph 7 of a general provision on the protection of children accused of offences established under this Convention, which was originally contained in paragraph 5 of article 13.

Article 22. Jurisdiction

Two editorial changes were made to this article. In paragraph 3, the reference to “the article on extradition” contained in the DTC now specifies “article 37, paragraph 11”. In paragraph 4, the word “take” has been replaced with “adopt”.

Article 23. Scope of procedural measures

In article 23, the term “specific” has been inserted before “criminal investigations or proceedings”, as a considerable number of Member States has requested this addition, both in plenary and in informals.

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

In article 25, paragraph 1, the terms “content data, and subscriber information” have been included after the term “traffic data” in order to provide a non-exhaustive enumeration of those types of data that may be subject to a preservation order. This inclusion was proposed by the informals on group 6 (arts. 25 to 30), as well as a number of Member States in plenary.

Article 28. Search and seizure of stored [computer data] [digital information]

In article 28, one minor editorial change has been made to paragraph 1 by moving part of the sentence from the chapeau to the bottom of that paragraph, as proposed by the informals on group 6 and as requested by several Member States.

⁹ 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.

Article 33. Protection of witnesses

In article 33, paragraph 1, the wording “in accordance with its domestic law” has been added to align this provision with article 32 UNCAC, as requested by several Member States.

Article 34. Assistance to and protection of victims

In article 34, paragraph 4, a proposal which received considerable support has been included, for a more general approach to the assistance to and protection of victims.

Article 36. Protection of personal data

This article has been retained as in the original text due to ongoing informal discussions. Reference is made to the report and working document of the coordinator of the informal consultations on group 10 (art. 36), whose proposal is, in its version of 12 October 2023, available on the website of the sixth session of the Ad Hoc Committee.

Article 37. Extradition

In article 37, paragraph 10, a reference to “existing channels of the International Criminal Police Organization” has been added at the request of several Member States.

Article 38. Transfer of sentenced persons

In article 38, wording concerning the rights of sentenced persons and issues relating to consent, rehabilitation, and reintegration has been added, at the request of a number of Member States.

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

Paragraph 1 of article 40 of the original draft text of the convention, addressing the general scope of mutual legal assistance, has been deleted and its content moved to article 35, on general principles of international cooperation, which would now govern all relevant articles on mutual legal assistance of this chapter. This change should simplify the text and provide for a clearer and more coherent approach to the scope of the chapter on international cooperation. Articles that define their own scope, such as article 37 on extradition, remain unaffected by that change. Member States may wish to consider whether the current paragraph 1 of article 40 is well placed, or whether it should be moved to another place, such as article 35, as it is equally specifies the scope of international cooperation.

Second, in paragraph 20 of article 40, on the refusal of mutual legal assistance, a footnote makes reference to the additional grounds for refusal that were proposed during the sixth session, and which might be subject to further discussion.

Article 41. 24/7 network

Article 41 has been adjusted, as article 35, paragraph 1, now determines the scope of the 24/7 network. Member States may wish to consider amending paragraph 1 of this article to more clearly reflect the network’s specific tasks, once the text of article 35 has been finalized.

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

In article 42, paragraph 1, an addition proposed by a Member State has been inserted, which would allow Member States to discuss the technicalities and practices of the procedure to request the expeditious preservation of computer data.

The reason for the addition is that, in practice, the requesting authority often does not know the exact location where the sought data is stored, particularly in consideration of the geographically distributed ICT infrastructure of service providers and the increasing use of cloud computing. A narrow reading of the original provision could, thus, imply that it only covers such data that is stored in a computer system located in the territory of the requested State Party, while such data that is stored by the same service provider in a server cluster in a third State would not be covered. The current wording would have the effect that the nexus to the requested State Party is not only established when the data is stored in the requested State Party, but also when the service provider controlling the data is located or established in the territory of the requested State Party. Also, the Second Additional Protocol to the Council of Europe Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence¹⁰ introduces the notion of [data] [information] in “possession or control” by a service provider.¹¹

For the same reason, the same addition has been made in article 44, paragraph 1 on mutual legal assistance in accessing stored [computer data] [digital information] and in article 45, paragraph 1, on mutual legal assistance in the real-time collection of traffic-data.

In article 42, paragraph 7, the period of preservation of stored [computer data] [digital information] effected in response to a preservation request has been amended at the request of a large number of Member States. The period now is a minimum of sixty days, instead of a maximum of ninety days.

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

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

In articles 45 and 46, the words “shall” have been retained in italics. This approach follows the work of the informal consultations on group 11 (arts. 40, 42 to 46), which advised to continue the discussion on the question as to whether these provisions are to be mandatory or optional.

Article 53. Preventive measures

In paragraph 3, subparagraph (b), the words “and contribute to its non-tolerance” have been deleted as the minimum common denominator of Member States’ positions.

In paragraph 3, subparagraph (d), a provision that was proposed during the sixth session has been included, which encourages service providers to take effective preventive measures, with the caveats “where feasible in light of national circumstances and to the extent permitted by domestic law” to facilitate consensus.

Article 54. Technical assistance and capacity-building

In paragraph 1, the wording “taking into particular consideration the interests and needs of developing States Parties” has been inserted at the request of a large number of Member States.

¹⁰ Council of Europe, CETS No. 224.

¹¹ Preambular paragraph 9 and articles 6(1), 7(1), 8(1), 9(1) and 9(3).

In paragraph 3, subparagraph (g), the word “confiscation” has been inserted to align with article 3, paragraph 1, of the RDTC as well as in the relevant articles of UNCAC and UNTOC.

In paragraph 4, a reference to domestic law has been included at the request of a number of Member States.

In paragraph 8, the wording “operational and training activities” has been replaced with “technical assistance and capacity-building” to implement a proposal that received significant support and to align its wording with article 1, paragraph (c), article 54, paragraphs 1 and 10 and article 57, paragraph 5, subparagraph (h).
