

Proposal for a compromise

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Element 1: Scope of the Convention

Article 3. Scope of application

This Convention shall apply, except as otherwise stated herein, to:

- a- The prevention, investigation and prosecution of the criminal offences established in accordance with this Convention, including the freezing, seizure, confiscation and return of the proceeds from such offences.
- b- The collecting, obtaining, preserving and sharing of evidence in electronic form **for the purpose of specific criminal investigations or proceedings, as provided for in articles 23 and 35 of this Convention.**

Article 3 bis (former article 17)

- 1. **States Parties shall ensure that criminal offences established in accordance with the United Nations conventions and protocols to which they are parties are punishable also under their domestic law when committed by means of [a computer system] [an information and communications technology device].**
- 2. **The offences covered by paragraph 1 of this article are not considered as offences established in accordance with this Convention.**

Article 23. Scope of procedural measures

- 1. Each State Party shall adopt such legislation and other measures as may be necessary to establish its powers and procedures provided for in this Chapter for the purpose of **specific** criminal investigations or proceedings.
- 2. Except as provided otherwise in this Convention, each State Party shall apply the powers and procedures referred to in paragraph 1 of this article to:
 - (a) The criminal offences established in accordance with this Convention;
 - (b) Other criminal offences committed by means of [a computer system] [an information and communications technology device]; and
 - (c) The collection of evidence in electronic form of any criminal offence.
- 3. (a) Each State Party may reserve the right to apply the measures referred to in article 29 only to offences or categories of offences specified in the reservation, provided that the range of such offences or categories of offences is not more restricted than the range of offences to which it applies the measures referred to in article 30. Each State Party shall consider restricting such a reservation to enable the broadest application of the measure referred to in article 29;

(b) Where a State Party, owing to limitations in its legislation in force at the time of the adoption of the present Convention, is not able to apply the measures referred to in articles 29 and 30 to communications being transmitted within a [computer system] [information and communications technology device] of a service provider, which:

- (i) Is being operated for the benefit of a closed group of users; and
- (ii) Does not employ public communications networks and is not connected with another [computer system] [information and communications technology device], whether public or private;

that State Party may reserve the right not to apply these measures to such communications. Each State Party shall consider restricting such a reservation to enable the broadest application of the measures referred to in articles 29 and 30.

Article 35. General principles of international cooperation

1. States Parties shall cooperate with each other in accordance with the provisions of this Convention, as well as other applicable international instruments on international cooperation in criminal matters, and domestic laws, for the purpose of:

- a- The investigation, prosecution and judicial proceedings of the criminal offences established in accordance with this Convention, including the freezing, seizure, confiscation and return of the proceeds from such offences.
- b- The collecting, obtaining, preserving and sharing of evidence in electronic form of criminal offences established in accordance with United Nations conventions and protocols to which they are Parties, committed by means of [a computer system] [an information and communications technology device].
- c- The collecting, obtaining, preserving and sharing of evidence in electronic form of serious crime, when committed by an organized criminal group [as defined in UNTOC].

2. For the purpose of the collecting, obtaining, preserving, and sharing of evidence in electronic form of offences provided for in paragraph 1 subparagraphs b and c of this article, the relevant paragraphs of article 40, and articles 42 to 46 of this convention shall apply.

3. Except as provided otherwise in this chapter, a request for international cooperation shall be executed in accordance with the domestic law of the requested State Party, which provide for the conditions and safeguards as specified in article 24 of this Convention.

5. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

Element 2: Human rights safeguards and grounds for refusal

Article 5. *Respect for human rights*

States Parties shall ensure that the implementation of their obligations under this Convention is consistent with their obligations under international human rights law.

Article 24. *Conditions and safeguards*

1. Each State Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Chapter are subject to conditions and safeguards provided for under its domestic law, **which shall provide for the adequate protection of human rights**, in accordance with its obligations under international human rights law, and which shall incorporate the principles of proportionality **and legality**.
2. **In accordance with the domestic law of each State Party**, such conditions and safeguards shall, as appropriate in view of the nature of the procedure or powers concerned, inter alia, include judicial or other independent review, **the right to an effective remedy**, grounds justifying application, and limitation of the scope and the duration of such power or procedure.¹
3. To the extent that it is consistent with the public interest, in particular the proper administration of justice, each State Party shall consider the impact of the powers and procedures in this Chapter upon the rights, responsibilities and legitimate interests of third parties.

1- An explanatory note could be included to the report of the concluding session that the Ad Hoc Committee will submit to the UN General Assembly together with the future convention. Such explanatory notes could be read as follow:

“Paragraph 2 of article 24 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”.

Article 40 (20 bis)

20 bis. **Nothing in this Convention shall be interpreted as imposing an obligation to render mutual legal assistance if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, language, religion, nationality, ethnic origin or political opinions, or that compliance with the request would cause prejudice to that person’s position for any one of these reasons.**

Element 3: Scope of Criminalization: extension of the mandate of the ad hoc Committee to negotiate an additional protocol

Extension of the mandate of the Ad Hoc Committee for the purpose of elaborating a protocol to the new convention, aimed at broadening the scope of the criminalization chapter to include additional forms of offence. For this end, the following paragraphs will be added to the draft resolution:

“4 bis. *Decides* that the Ad Hoc Committee shall continue its work, *mutatis mutandis*, in accordance with resolution 74/247 of 27 December 2019 and resolution 75/282 of 26 May 2021, to elaborate a draft protocol addressing [criminalization of additional criminal acts] [additional forms of offences to be established], including, if needed, relevant human rights safeguards relating to those offences, and, for that purpose, to convene [three] negotiating sessions, of [10] days each, in New York and Vienna, to commence in [xxxx], and to conduct a concluding session in New York for the purposes of adopting the draft protocol for submission to the General Assembly at its [eightieth] session;

5 bis. Also decides that the Ad Hoc Committee shall hold the first and third negotiating sessions in Vienna and the second session in New York.”
