

## Proposal for a compromise

Status: ~~21~~ February 2024, ~~10 A.M.~~ 10 A.M.

### 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, [and serious crimes including terrorism, prohibition of incitement to violence, trafficking in persons, smuggling of migrants, illicit manufacturing and trafficking in firearms, [acts threatening public safety (China, Eritrea)], drug trafficking and trafficking in cultural property (Egypt, Iran, Russian Fed., China, Nicaragua, Sudan, Eritrea, Venezuela, Belarus)] [involvement of minors in the commission of illegal acts, encouragement of or coercion to suicide and denial, approval, justification or rehabilitation of Nazism, racism, genocide or crimes against peace and humanity (Russian Fed., Nicaragua, Eritrea, Belarus)] [the recruitment of children in armed conflicts (Sudan)] [when committed by means of ICTs/computer system (China, Nicaragua, Sudan, Eritrea)] [including alt: as well as (China, Eritrea)] the freezing, seizure, confiscation and return of the proceeds from such offences. Retain original: Norway, Peru, Caricom, Cabo Verde
- b- The collecting, obtaining, preserving and sharing of evidence in electronic form for the purpose of [specific (delete: Brazil, Argentina, Caricom, Iran, Russian Fed., Nicaragua, Sudan, India, Paraguay, Tanzania, Namibia, South Africa, Peru, Uruguay, Eritrea, Belarus, Angola, Venezuela) (retain: Norway, Cabo Verde)] criminal investigations or proceedings [related to serious crimes as provided for in the relevant articles of this Convention. (Brazil, Argentina, Russian Fed., China, Nicaragua, India, Paraguay, Tanzania, South Africa, Peru, Uruguay, Indonesia)], as provided for in articles 23 and 35 of this Convention. Retain original: Norway, Angola

[c – Nothing in this Convention shall be interpreted as permitting or facilitating repression of expression, conscience, opinion, belief, peaceful assembly or association [in a manner inconsistent with respective obligations under international human rights law and national legislation (Cuba, China, Nicaragua, Belarus)]; or permitting or facilitating discrimination or persecution based on individual characteristic. (Canada, New Zealand, EU and mS, Liechtenstein, UK, Costa Rica, Georgia, Chile, Norway, Peru, Israel, Mexico, Angola, Albania, Cabo Verde) (Delete: Singapore, Iran, Russian Fed., Nicaragua, Malaysia, Sudan, India, Nigeria, Tanzania, Namibia, South Africa, Indonesia, Eritrea, Belarus, Saudi Arabia, Venezuela)]

[C.bis. Nothing in this Convention should be interpreted as fundamental freedoms and rights that shall not be subjected to reasonable restrictions fully considering the principle of harm and are necessary to protect national security, public order, public health or morals or the right and freedoms of

others (Pakistan, Iran, Russian Fed., Nicaragua, Sudan, Eritrea, Belarus, Venezuela) (Delete: Tanzania, Saudi Arabia)]

*Article 3 bis (former article 17)*

1. States Parties shall ensure that criminal offences established in accordance with the United Nations conventions and protocols [existing at the time of adoption of the text of this Convention (Australia, New Zealand, EU and mS, UK, Singapore, Argentina, Georgia, Malaysia, Chile, Angola, Albania, Cabo Verde) (delete: Iran, Russian Fed., Sudan, India, Namibia, Belarus, Thailand, Egypt, Pakistan, Venezuela)] to which they are parties[, including those adopted subsequent to the adoption of the text of this Convention to which they become parties (Namibia, South Africa)] 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 alt.: set out in (Australia, New Zealand, EU and mS, Georgia, Malaysia, Albania) (retain: Sudan, India)] paragraph 1 of this article are not considered as offences established in accordance with this Convention. Delete: Egypt, Iran, Russian Fed., Nicaragua, Belarus, Angola, Pakistan, Venezuela. Retain: Norway

[Alt.1: States Parties shall ensure that criminal offences established in accordance with applicable United Nations Conventions and protocols to which they are parties are also considered as criminal offences under domestic law when committed with the use of ICTs/computer system.] (Tanzania, Norway, South Africa) (Delete: Pakistan)

[Alt.2: Nothing in this article shall be interpreted as establishing offences under this Convention. (Caricom, Pakistan, Iran, Tanzania, South Africa, Belarus, Venezuela)]

~~2~~ Retain original 3bis: Peru

*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 (delete: Egypt, Pakistan, Iran, Russian Fed., Nicaragua, Sudan, Namibia, Eritrea, Belarus, Saudi Arabia, Angola, Venezuela) (retain: Malaysia, India, Chile, Norway, Albania, Cabo Verde)] 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. [(Liechtenstein) (retain: Russian Fed., South Africa, Cabo Verde, Venezuela)]
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.

Retain original: South Africa, Peru

#### *Article 35. General principles of international cooperation*

1. ~~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 [this Convention as well as [serious] crimes established in accordance with applicable (Australia, New Zealand, UK, Singapore, Georgia, Caricom, Malaysia) (delete: Iran, Russian Fed., Nicaragua, Sudan, Venezuela)] United Nations conventions and protocols [existing at the time of adoption of the text of this Convention (Australia, New Zealand, UK, Singapore, Georgia) (delete: Iran, Russian Fed., Nicaragua, Sudan, Venezuela)] to which they are Parties[, committed by means of [a computer system] [an information and communications technology device]. (delete: Brazil, Argentina, Paraguay, Tanzania, Chile, Peru, Uruguay)] Retain original: India, Pakistan~~
- 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]. (delete: Brazil, Argentina, Egypt, Caricom, Pakistan, Iran, Russian Fed., China, Nicaragua, Malaysia, Sudan, India, Paraguay, Tanzania, Namibia, South Africa, Peru, Uruguay, Indonesia, Eritrea, Belarus, Angola, Thailand, Venezuela)]

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 [41 (Argentina, China, India, Paraguay, Peru, Caricom, Pakistan)], 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 alt: the relevant articles of this Convention (Brazil, Paraguay)]. Delete: Egypt, Iran, Russian Fed., Nicaragua, Sudan, Nigeria, Tanzania, Belarus, Saudi Arabia, Venezuela]. Retain original: Caricom. Delete: Pakistan

[3.alt. Except as provided otherwise in this chapter, States Parties shall cooperate in accordance with the conditions and safeguards in article 24 as provided for under domestic laws. (UK, Georgia, India, Chile, Norway, Peru) (Delete: Russian Fed., Nigeria, Tanzania, Belarus, Pakistan, Venezuela)]

45. 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. Delete: Pakistan

## **Element 2: Human rights safeguards and grounds for refusal**

### *Article 5. Respect for human rights*

States Parties shall ensure that the implementation of their [respective (Pakistan, Namibia, Indonesia, Saudi Arabia, Venezuela)] obligations under this Convention is consistent with their [respective (Pakistan, Namibia, Indonesia, Saudi Arabia, Venezuela)] obligations under international human rights [conventions to which they are a party (Pakistan, Namibia, Indonesia, Saudi Arabia, Venezuela)] law [including the right of States to access the international ICT services (Saudi Arabia, Egypt)]. Delete: Russian Fed., Belarus. Retain original: Tanzania, Norway, South Africa, Peru, Uruguay, Mexico, Angola, Albania, Cabo Verde

### *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 (delete: Sudan, Namibia, Egypt, Pakistan)] protection of human rights, (delete: Russian Fed., Nicaragua)] in accordance with its [respective (Namibia)] obligations under international human rights law [conventions to which they are parties (Namibia)], and which shall incorporate the principles of proportionality [and legality (delete: Caricom, Russian Fed.,

Sudan, India, Tanzania, Venezuela, Belarus)]. (delete: Pakistan)] Delete: Iran, Nicaragua, Sudan

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, (delete: Pakistan, Iran, Sudan, Egypt)] and limitation of the scope and the duration of such power or procedure.<sup>1</sup>

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.

Retain original: Norway, South Africa, Peru, Netherlands, Cabo Verde

40. bis – explanatory note (Iran, Russian Fed., Sudan, Belarus).

20- +—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 (delete: Norway)]. 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 (delete: EU and mS, Liechtenstein, Norway)]”. Retain: Tanzania, Pakistan. Delete: Norway*

#### 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. (Delete: Egypt, Pakistan, Iran, Russian Fed., China, Nicaragua, Sudan, Tanzania, Eritrea, Belarus, Saudi Arabia, Nigeria, Venezuela) – (Retain: Caricom, Norway, Peru, Uruguay, Albania, Cabo Verde)]

[Article 40.20.e

As determined by the State Party, the offence by which the person is sought is a political offence or an offence related thereto (EU and mS, Georgia, Norway, Albania, Cabo Verde) (delete: Pakistan, Russian Fed., Nicaragua, Sudan, Belarus, Egypt)]

[Alt. Article 40.20.e

Determined by the requesting State, the offence for which the person is sought is a political offence, an offence related thereto, or an ordinary criminal offence persecuted for political reasons (Costa Rica) (delete: Pakistan, Russian Fed., Nicaragua, Sudan, Tanzania, Belarus, Venezuela)]

[Article 42.5

A request for preservation may only be refused for the reasons outlined in articles 40.20.b or 40.20.bis (Brazil, Argentina, India, Paraguay) (delete: Norway, Pakistan)]

**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.”

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