

Guiding questions

I. Criminalization – Groups 4 and 5

Group 4

On Question 1 (*Offences related to discrimination, racism or xenophobia and Offences related to the distribution of narcotic drugs and psychotropic substances, arms trafficking, illegal distribution of counterfeit medicines and medical products; arms manufacturing, trafficking in persons, criminal association*)

- The EU and its Member States are strong defenders of striking the right balance between the fight against discrimination, racism and xenophobia and the exercise of freedom of expression. The EU and its MS are also committed to fight trafficking of narcotic drugs and psychotropic substances, arms trafficking, illegal distribution of counterfeit medicines and medical products; arms manufacturing and trafficking in persons.
- However, several international conventions and protocols already exist to cover the offences listed in Question 1, including when those offences are committed online.
- For instance, offences related to discrimination, racism and xenophobia are adequately addressed, among others, by international instruments such as the UN international Convention on the Elimination of All Forms of Racial Discrimination.
- Similarly, offences related to the distribution of narcotic drugs and psychotropic substances are sufficiently addressed by several international treaties, in particular the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
- Offences related to illicit manufacturing and trafficking of firearms, are also already addressed by existing instruments such as the additional protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition supplementing UNTOC.
- Finally, the offence of trafficking in human beings is already addressed in instruments such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing UNTOC.
- Furthermore, we believe that the use of information systems does not substantively change the characteristics or impact of the offences listed in Question 1. In our view, what characterizes the offense is not the use of information systems but the material element at the heart of the offence.
- In conclusion, for the highlighted reasons, the offences listed in Question 1 should not be included in the future convention.

On question 2 (*“terrorism-related offences and extremism-related offences”*)

- The EU and its MS are firmly committed to the prevention and the fight against terrorism. A high level of cooperation in the fight against terrorism already exists in the UN framework, as well at regional and bilateral level.
- There are several international and regional treaties which criminalize certain aspects of terrorism, e.g. terrorist financing or public provocation to commit a terrorist offence.

But so far, it was not possible to agree at the UN on a universal definition of terrorism. It would therefore be highly unlikely that we would be able to do so in our process.

- Though perpetrators might be using the internet for communication, incitement and recruitment etc., terrorist offences as such remain the same and are largely committed offline. The nature of the offence does therefore not change by the use of information systems.
- Should that be the case, criminalization of cyber-dependent crimes, like illegal access or illegal system interference, would provide an effective solution in this regard.
- Moreover, with regard to the collection of electronic evidence for criminal investigations into terrorism, we would like to recall our openness to debate the scope of provisions on the collection of e-evidence, provided, as already underlined, that strong conditions and safeguards are also agreed.
- We are also opposed to the inclusion of the term “extremism-related offences” most of all because the notion is very vague and unclear and we can see in some countries that the term is used to persecute legitimate political actors and to silence any form of democratic dissent. This is also true for the term “terrorism”.
- Therefore, these provisions should not be included in the future convention.

On Question 3 (*incitement to subversive or armed activity*)

- it will not be possible to agree on the definition of an offence related to incitement to subversive or armed activity amongst UN Member States. The scope of what could constitute incitement to such activity is overly broad and insufficiently precise.
- Such a provision would pose substantive and disproportionate risks for the protection of human rights and fundamental freedoms, especially for the freedom of expression. It would therefore not constitute a universally recognised offence.
- Therefore, this provision should not be included in the future convention.

On question 4 (*rehabilitation of Nazism, justification of genocide or crimes against peace and humanity*)

- In view of the pattern of completely false and baseless accusations relating to Nazism made by the regime of the Russian Federation against Ukraine to justify its military invasion and violation of the territorial integrity of Ukraine, we have a clear evidence of the reasons why agreeing on such a provision amongst UN Member States is absolutely out of reach.
- The same applies to provisions on the justification of genocide or crimes against peace and humanity.
- Therefore, such provisions should not be included in the future convention.

On Question 5 (*the use of ICT to commit acts established as offences under international law*)

- This very broad and vague provision would not fit one of the elements we have mentioned, i. e. whether we can agree on a definition, which is sufficiently clear and commonly understood.
- Moreover, international law primarily regulates actions of states in the international realm and in principle entails obligations of states. State behaviour has no place in the criminal law instrument we are negotiating, as there is broad agreement that we are not negotiating an instrument regulating national security or state behaviour.

- Such a provision would also fall short of fulfilling the basic criteria of legal certainty, which, among other things, requires laws to be clear.

Group 5

On Question 1 (*inclusion of provisions on the criminalization of obstruction of justice and the laundering of proceeds of crimes*)

- We are not convinced these provisions on the obstruction of justice and the laundering of proceeds of crime should be included in the future convention. As regards the way the future convention should deal with the proceeds of serious cybercrime, more analysis and inputs are needed before any decision is made.
- These provisions still raise many questions. For instance, how relevant are they in the context of cybercrime, which may not always constitute organised crime (e.g. if you compare it to the scope of UNTOC)? How would they be applied in practice?
- In any case, such provisions should be compatible with other international instruments in the area of organised crime or cybercrime and where they are subject to strong conditions and safeguards that ensure a sufficiently high level of protection that is compatible with international human rights standards and fundamental freedoms.
- For the obstruction of justice: for which crimes should the obstruction of justice be criminalised? In line with e.g. UNTOC, such a provision should be restricted to the crimes defined in the future Convention.
- For the laundering of proceeds of crime: which crimes should be considered as predicate offences? With regard to this issue, the principle of proportionality should be taken into due consideration.

On Question 2 (*participation in, attempt of, as well as aiding and abetting in a crime*)

- We are supportive of articles that provide for rules on aiding and abetting of the crimes as set out in the future Convention.
- State Parties should be encouraged to ensure the criminalisation of the attempt of the crimes as set out in the future Convention, but should be offered more discretion in that regard taking into account the specifics of the individual crimes set out in the future Convention.

On Question 3 (*Should criminal liability be extended beyond individuals to legal persons*)

- We are supportive of articles that provide for rules that extend criminal liability beyond natural persons also to legal persons.

On Question 4 (*Could the convention follow the formulation of liability of legal persons contained in article 10 of UNTOC? Would there be a need for a separate offence punishing the negligence of legal persons in maintaining required security measures?)*

- The formulation of liability of legal persons in line with Article 10 UNTOC could be acceptable.
- There should be no separate offence punishing the negligence of legal persons in maintaining required security measures. Such requirements that relate to cybersecurity are beyond the scope of this Convention that should relate to criminal law.

On Question 5 (*Do you think that the convention should include a provision on aggravating circumstances? If so, should this be a general provision on aggravating circumstances, or should specific articles include a qualifying element of aggravating circumstances? What about mitigating circumstances?*)

- The future Convention could include a provision on aggravating circumstances, but it should be left to the discretion of State Parties so that they provide for effective, proportionate and dissuasive sanctions and measures that take into account the gravity of certain specific circumstances.
- State Parties to the future Convention should also be left discretion with regard to mitigating circumstances and these are best left to be determined by the domestic law of the State Parties.

On Question 6 (*Regarding “other illegal acts”, could para. 3 of art. 34 of UNTOC (“States parties may adopt more strict or severe measures than those provided in this Convention...”) be a solution to cover all these offences?*)

- This convention is meant to establish minimum harmonisation, and should not stand in the way of UNMS to go further in their domestic systems.