WHAT’S THE PROTOCOL ON PROTOCOLS?

THE RISKS OF A LAST-MINUTE CYBERCRIME TREATY PROTOCOL

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NOTE
This brief is produced ahead of 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, 29 July–9 August 2024, New York.

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SUMMARY

Several points of disagreement have overshadowed the process of developing a UN convention on cybercrime ever since the Ad Hoc Committee negotiations began in New York in January 2022. The lack of consensus led to the process being extended in February 2024, with member states unable to reach an agreement on the scope of crimes to be covered by the proposed convention. One idea now gaining support among those countries seeking a broad scope of crimes in the convention (a bloc led by Russia) is to begin a process of drafting a protocol to the convention – a supplementary agreement that would add a list of ‘additional crimes’ to the original treaty – even though the text of the convention itself is not yet final. The negotiating process behind the UN Convention against Transnational Organized Crime (UNTOC) has been cited as an example of where this has been done effectively in the past. However, as this brief shows, the circumstances surrounding the UNTOC were very different – for political, practical and legal reasons. States should therefore proceed with caution in approving a secondary process at such a late stage, especially when there is still considerable disagreement over the text of the convention.

Ahead of the reconvened final session of the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes (UN cybercrime convention) in July and August 2024, this brief assesses how the supplementary protocols to the UNTOC were negotiated and what lessons can be learned from this.
INTRODUCTION

State representatives are set to convene in New York from 29 July to 9 August 2024 for the final negotiating session of the UN Ad Hoc Committee to negotiate a cybercrime convention. One of the issues on the agenda is how the new convention could make use of supplementary protocols, and when and how they should be negotiated. This question is at once practical and political, and is linked to the central disagreements that negotiators have had to confront – such as whether the convention’s scope for criminalization and international cooperation should be narrow and focused on a fixed set of criminal offences, or broad and flexible. Some member states have argued for a narrow scope to avoid an overly punitive approach that criminalizes activities that should not be criminalized or do not merit international cooperation; others have argued for a more open-ended treaty, which would pose greater risks to rights and freedoms, and pave the way for increased state control and surveillance, rather than simply ushering in a more effective global response to cybercrime. This impasse has not been resolved – and is unlikely to be until the pressure of the final negotiating session is brought to bear.

There are various compromise solutions that could emerge from the final negotiating session, but the official drafts tabled so far and the discussions that have taken place suggest that a compromise convention would end up with a targeted scope of criminalization, coupled with a broader and more flexible approach to cooperation and law enforcement measures. The level of clarity and how this will be codified are at the heart of the ongoing and unresolved discussions. Civil society groups that have been monitoring the process have been clear about the risks to human rights and privacy, not only from broad criminalization, but also from unclear and ambiguous compromises on international cooperation. One aspect of this debate is the issue of supplementary protocols and how these might affect or facilitate agreement on the broader consensus on the scope of the convention. The idea of drafting a protocol to the treaty, which was proposed by Russia and discussed at the original final session in early 2024, has been tabled as part of the overall compromise package.

Throughout the negotiation of the proposed cybercrime convention, the UNTOC and the work of the Ad Hoc Committee that negotiated that convention have been held up as inspiration. However, as the Global Initiative Against Transnational Organized Crime (GI-TOC) has pointed out in its analysis, based on ongoing monitoring of the cybercrime treaty negotiation process, the situation and context of the UNTOC Ad Hoc Committee is different from that of the cybercrime Ad Hoc Committee. There are clear differences in context, mandate and substance, from the UNTOC negotiations, which concluded almost 25 years ago. These differences need to be clearly understood as states embark on a decision on whether to negotiate protocols to the cybercrime treaty.

The UNTOC Ad Hoc Committee negotiated three supplementary protocols to the UNTOC. It was prepared to do so from the outset, having begun its work with a mandate from the UN General Assembly to consider three related legal instruments when negotiating the convention. The protocols on trafficking in persons and smuggling of migrants were adopted alongside the main convention, and a further protocol on trafficking in firearms was adopted a few months later. However, there remain several criminal markets for which there is no corresponding UNTOC protocol, including cybercrime and environmental crime. In recent years, in the context of the UN Commission on Crime Prevention and Criminal Justice (CCPCJ), states have been discussing whether to negotiate a further protocol to the UNTOC on some forms of environmental crime. And in fact, there is a strong argument to be made that some forms of cybercrime should or could be addressed through a supplementary protocol to the UNTOC, rather than a stand-alone new treaty.

Given the overlaps in content between the cybercrime convention and the UNTOC, it may not be surprising that states have already agreed to include provisions in the cybercrime convention to allow for the future negotiation
of supplementary protocols. However, during the seventh session of the cybercrime Ad Hoc Committee in early 2024, discussions on the draft General Assembly resolution that would adopt the convention opened up a debate on making the intention to include such protocols more concrete and time-specific (no longer being an undefined ‘future’), on which there was no consensus. Despite this lack of consensus, the Chair of the cybercrime Ad Hoc Committee has opted to table the negotiation of a protocol on ‘additional crimes’ through a UN General Assembly Resolution for the final resumed session, as part of the compromise package deal on the convention as a whole. Through this resolution, the AHC would have its life extended, with three further meetings held after the adoption of the convention: two meetings dedicated to negotiating a protocol and one to preparing the rules of procedure of the convention’s Conference of the Parties – its treaty governing body.

**FIGURE 1** Comparing the UNTOC and cybercrime ad hoc committees.

This paper analyzes the negotiation of the UNTOC protocols in order to develop insights that may be useful to negotiators as they prepare for the resumed final session of the cybercrime Ad Hoc Committee. It does so by examining the context of the UNTOC protocol negotiations and comparing this with the situation faced by negotiators at the cybercrime Ad Hoc Committee. It finds that despite there being an apparent precedent in the UNTOC protocols, the approach being considered through the cybercrime negotiations is in fact unprecedented. In contrast to the parallel, mandated and well-understood approach to negotiating the UNTOC and its three protocols concurrently, the cybercrime Ad Hoc Committee is potentially tacking a last-minute protocol negotiation on to the end of its process, without an agreement on what this protocol should do.

Given the stakes and complexity at play in the cybercrime treaty negotiations, and the mandate under which the Ad Hoc Committee works, the committee should try to reach a compromise – and ultimately make a decision – on the convention, before any protocol can be considered. Any future protocol should help address specific issues or challenges dealt with in the convention and should not, even inadvertently, expand on or confuse the scope of the convention.
THE UNTOC PROTOCOLS

It is clear from the records on the negotiation of the UNTOC that the idea to have protocols on specific illicit markets was a core part of the discussion from before the Ad Hoc Committee was even constituted. Its first meeting had the draft protocols on trafficking in persons and firearms tabled by member states, along with elements of a draft protocol on the smuggling of migrants.10

On 15 November 2000, the UN General Assembly adopted the UNTOC and two supplementary protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air. It noted that the UNTOC Ad Hoc Committee had not yet completed its work on the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, and requested it to continue its work and finalize negotiations ‘as soon as possible’. The UNTOC Ad Hoc Committee was also given the task of preparing the draft rules and procedure of the UNTOC’s Conference of Parties, before its first session.

Facing more political and legal difficulties than the other protocols, the firearms protocol was adopted a few months later, in May 2001, and the UNTOC entered into force in September 2003. The trafficking in persons protocol entered into force in December 2003, the smuggling of migrants protocol entered into force in January 2004, and the firearms trafficking protocol entered into force in July 2005.11

There were also discussions on whether corruption and money-laundering should be dealt with through a separate protocol – with the UNTOC Ad Hoc Committee eventually recommending that corruption should in fact have its own convention, with the UN Convention against Corruption signed in December 2003.

Negotiating a comprehensive legal instrument in two years, by consensus, is impressive on its own terms. It is not widely appreciated that in fact what the UNTOC Ad Hoc Committee managed to achieve was to negotiate four legal instruments in that timeframe. All three protocols had their own backstory, which led to the idea of a legal instrument on each topic, for which the UNTOC negotiation provided a platform. The political will, and geopolitical context, of the UNTOC negotiations made this possible.12 But alongside that, practical considerations had to be made, considering that there were over 100 states represented in the Ad Hoc Committee, all from different regions, with different legal traditions.13

Why were the protocols necessary?

The UNTOC negotiation process provided an ideal opportunity for member states to discuss new legal instruments to human trafficking, human smuggling and firearms trafficking. All of these illicit economies had already been considered independently in relevant UN forums, with countries and civil society advocating for new legal instruments to address them. Their negotiation and finalization occurred in parallel and in an integrated manner with the negotiation and finalization of the UNTOC. At the same time, as stated in the official records (travaux preparatoires) of the UNTOC,14 delegates saw the negotiation of protocols as complementary to the convention’s need for a broad and flexible scope (rather than attempting to list specific offences) even before the UNTOC Ad Hoc Committee had formally begun its work.

As noted in the travaux preparatoires, some member states felt that attempting to be exhaustive in listing criminal activities would not only be challenging, not least because of the possibility of new forms of criminal activity emerging, but could also result in a convention that was too limited in scope. This risked undermining the
effectiveness and applicability of the convention while posing challenges to other UNTOC provisions, as specific crimes would require tailored responses. Addressing some offences through additional protocols, separate from the main convention, could therefore facilitate a more expeditious negotiation process and thus bring the convention into force more quickly.¹⁵

The negotiation and adoption of the three supplementary protocols to the UNTOC was therefore considered necessary and desirable. Once the Ad Hoc Committee discussions got underway, the protocols were seen as essential as detailed counterparts to the convention’s broad and flexible scope while addressing specific forms of transnational organized crime (as understood by the convention) and providing more details for law enforcement and judicial bodies on how to address these crimes. However, they still come under the umbrella of the UNTOC, with states not able to sign up to single protocols without being party to the convention (see the box below). Dimitri Vlassis, in his account of the negotiations as a key member of the UN Secretariat, therefore describes the Ad Hoc Committee as having been ‘charged with a dual task’ from the outset.¹⁶

As a treaty designed to address transnational organized criminal activity through criminalization, the UNTOC has as its core purpose the facilitation of international cooperation between countries. The protocols therefore provide more focused guidance and detailed frameworks on what is needed to tackle the specific criminal activities that they cover, each with its own unique context and needs: the firearms protocol, for example, offers technical guidance on marking; the trafficking in persons protocol provides guidance on the treatment of victims; and the smuggling of migrants protocol addresses issues related to maritime law.

The approach behind the negotiation of the UNTOC and its protocols can be considered highly successful in terms of the level of ratification. The main convention has 192 parties, almost all of them UN member states – as well as the Holy See, the State of Palestine and the European Union.¹⁷ Only a handful of countries have not ratified the convention – some of them notable for their roles as hubs of illicit economies, such as Iran and Somalia. Importantly, the protocols were negotiated by the same Ad Hoc Committee as the convention, and are not standalone instruments; governments who sign up to the protocols must also be parties to the UNTOC.

Origins of the protocols

**Trafficking in persons protocol**

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (ratified by 182 parties) has the longest history, with forms of trafficking as an issue having been addressed through the international system by previous conventions since the beginning of the 20th century. However, reflecting the values of the time, earlier agreements on this issue were aimed solely at protecting ‘white’ women and children. Similarly, the problem of trafficking in women was linked to the issue of sex work (and the widespread disapproval of it), rather than addressing the broader issue of human trafficking.¹⁸

Decades later, in the 1990s, Argentina led the call for a new legal instrument focusing on trafficking in women and children. This call was heeded by the General Assembly, which requested that the UNTOC Ad Hoc Committee include a possible instrument on trafficking in women and children in its work, in parallel with the negotiation of the main convention. At the beginning of the UNTOC Ad Hoc Committee process, the US intervened to propose a draft that would expand the protocol to cover trafficking in persons more generally, an approach that was subsequently endorsed by the General Assembly during the timeframe of the UNTOC Ad Hoc Committee.¹⁹ The protocol, which was adopted together with the main convention in November 2000, remains the only global legal instrument on the issue.
The ratification rate of the trafficking in persons protocol is high, but as is the case with the UNTOC in general, its actual impact on criminal markets is difficult to quantify. Indeed, human trafficking has been ranked as the second most prevalent organized criminal activity in the world. Experts have also pointed to weaknesses in the human rights protections offered by the protocol, and there are debates about the agreed definition and scope. Nevertheless, the protocol is recognized for its usefulness in raising awareness and catalyzing action against human trafficking.

TIMELINE

- 1904: The International Agreement for the Suppression of White Slave Traffic is signed between 12 European powers, with the aim of protecting women and girls from criminal trafficking.
- 1910: The International Convention for the Suppression of White Slave Traffic is adopted, covering criminalization and extradition.
- 1949: The UN General Assembly adopts the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, with a focus on criminalization, information sharing and extradition.
- 1979: The UN General Assembly adopts the Convention on the Elimination of All Forms of Discrimination Against Women, which includes articles on the suppression of trafficking in women.
- 1997: Argentina proposes to the CCPCJ the development of an international legal instrument on trafficking in women and children.
- December 1998: UN General Assembly resolution 53/111 requests that the UNTOC Ad Hoc Committee consider the establishment of a legal instrument on trafficking in women and children.
- January 1999: The US presents a full draft instrument to the UNTOC Ad Hoc Committee, while Argentina presents elements of a protocol to the first session of committee.
- March 1999: A combined text of the US and Argentinian proposals is presented to the second meeting of the UNTOC Ad Hoc Committee, where states consider the different angles being proposed: Argentina’s proposal focuses on women and children (as per the UN General Assembly mandate) while the US looks at trafficking in persons more generally.
- December 1999: UN General Assembly resolution 54/126 decides that the protocol can focus on the broader issue of trafficking in persons, and Ad Hoc Committee negotiations continue throughout the remaining sessions.


Smuggling of migrants protocol

The Protocol against the Smuggling of Migrants by Land, Sea and Air (ratified by 152 parties) developed out of the growing concern in Europe about the smuggling of people towards Western Europe in the post-Cold War era. For Italy, which submitted the first formal draft instrument to the International Maritime Organization (IMO), the concern was about people arriving by sea, while for Austria, which tabled a broader instrument, the focus was more general. Similar to the merging of the proposals behind the trafficking in persons protocol, the Italian and Austrian ideas were drafted into a single protocol that was negotiated alongside the convention and the other two protocols, as requested by UN General Assembly resolution 53/111. The protocol provides law enforcement and criminal justice institutions with a basis for prosecution and international cooperation in the area of migrant smuggling.
The protocol has a high rate of ratification, but has faced criticism regarding its provisions for human rights, and migrant rights in particular, and discussions on its implementation have been more politically charged than those on the trafficking in persons protocol because of its links to broader migration and security policies and national attitudes. Human smuggling, including to Western Europe and by sea to Italy, remains rampant and is recognized as the fifth most prevalent criminal market in the world.

**TIMELINE**

- **1990**: The UN General Assembly adopts the International Convention on the Rights of All Migrant Workers and Members of their Families, which came into force in 2003 and has not been signed by any industrialized country.
- **December 1993**: UN General Assembly resolution 48/102 on the Prevention of the smuggling of aliens calls on member states to strengthen their efforts and cooperation in preventing and combating migrant smuggling. It calls on the CCPCJ to pay special attention to this issue at its next meeting.
- **April–May 1994**: The third session of the CCPCJ notes the ‘grave concern’ of the issue and recommends that legislation should be developed to combat ‘alien smuggling’. During this meeting, the US delegation introduces a resolution on the topic, which calls for the enactment and amendment of legislation to combat the ‘smuggling and transport of illegal migrants’. The resolution is revised and adopted, and later adopted by the Economic and Social Council of the UN (ECOSOC). The issue is then discussed at subsequent sessions of the CCPCJ, ECOSOC and the General Assembly.
- **Mid-1997**: Italy tables a draft convention on maritime migrant smuggling to the IMO.
- **September 1997**: Austria submits a full draft convention on the ‘smuggling of illegal migrants’ to the UN Secretary General, recommending that the CCPCJ should be complemented by this new legal instrument.
- **December 1998**: UN General Assembly resolution 53/111 mandates that the UNTOC Ad Hoc Committee should discuss the elaboration of an international instrument against illegal trafficking in migrants. Italy supports the Austrian initiative, and the maritime elements of the Italian proposal are incorporated into the Austrian draft, which forms the basis of the negotiations of the protocol to the UNTOC.
- **15 November 2000**: The migrant smuggling protocol is adopted in New York.


**Firearms protocol**

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (ratified by 123 parties) had the most difficult path to adoption of the three protocols, with the Ad Hoc Committee having to meet to finalize it after agreement had been reached on the main convention and the other two protocols. The protocol emerged from two parallel processes at the UN – one focusing on the illicit arms trade and its links to conflict, and one more focused on criminal justice, regulation and the civilian use of firearms. All of these aspects of the use of firearms continue to pose serious challenges to peace and security at the levels of conflict, terrorism and civilian use, and therefore deserve UN attention. The firearms protocol focuses on preventing and combating illicit trafficking, with an emphasis on improving regulation, providing guidance on seizure and destruction, and encouraging systems for marking and tracing firearms. The firearms protocol has always been seen as insufficient to address the wider problem of the illicit arms trade (especially when major exporters such as the US are not party to it). Two months after the adoption of the firearms protocol in 2001, the UN adopted the Programme of Action Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons, and in 2013, the Arms Trade Treaty was adopted.

The illicit arms trade is ranked as the fourth most prevalent criminal market globally, and its effects continue to cause serious and visible harm in a variety of ways, fuelling criminal markets and conflicts. Of the three protocols, the firearms protocol faces the most politically charged debates about its implementation, given the lack of ratification by major markets, most notably the US.
TIMELINE

- April–May 1995: The ninth UN Crime Congress, held in Cairo, adopts a resolution on Firearms regulation for the purposes of crime prevention and public safety, which requests the CCPCJ to consider how firearms can be regulated through prevention and suppression measures. The resolution asks the CCPCJ to call on the UN secretary general to produce a study on the use of firearms in crime and responses to it, and calls for further action, including the preparation of a declaration on the issue.
- July 1995: ECOSOC adopts a follow-up resolution to the Crime Congress resolution, requesting the UN Centre for International Crime Prevention (a predecessor of the UNODC) to undertake a study on the feasibility of international firearm regulation, resulting in the International Study on Firearm Regulation.
- December 1995: The General Assembly requests that the UN secretary general prepare a panel of experts report on the use of small arms and light weapons (SALW) in conflicts, with an emphasis on their illicit manufacture and trafficking.
- 1996: The UN secretary general initiates a separate study on state regulation of civilian-owned firearms.
- March 1997: Based on the findings of the study, the secretary general publishes a report titled ‘Criminal justice reform and strengthening of legal institutions: measures to regulate firearms’. The annexed conclusions and recommendations including suggestions for harmonization of national regulations, and that the secretariat should facilitate discussions on the need to implement regional or multilateral agreements on firearms trafficking.
- August 1997: The panel of expert’s report calls for greater international cooperation and regional cooperation to control illicit flows of SALW, including prevention, and recommends that the UN consider holding an international conference on the illicit arms trade.
- 1997: The first binding treaty addressing the trade in SALW is adopted – the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, under the auspices of the Organization of American States (the US and Canada do not ratify it). The Inter-American Drug Abuse Control Commission produces related materials, including model regulations, which form the basis of the Canadian draft firearms protocol submitted to the UNTOC Ad Hoc Committee.
- 1998: UN General Assembly resolution 53/77 E mandates a group of government experts to support the secretary general in preparing a report for an international conference on the illicit trade in firearms. Three further resolutions on SALW are adopted in the same year.
- May 1998: The Group of Eight (G8) asks its Roma-Lyon Group (focused on terrorism and organized crime) to develop an international firearms treaty.
- July 1998: Based on the work of the Roma-Lyon group, 21 states meet in Oslo to discuss the outline of a global convention regulating firearms manufacturing and trafficking, but no consensus document is agreed to.
- November 1998: The UN Security Council adopts a resolution on illicit arms flows, with a focus on conflict zones and the violation of arms embargoes by traffickers.
- December 1998: The UN General Assembly decides to hold an international conference on the illicit arms trade by 2001 at the latest.
- December 1998: UN General Assembly resolution 53/111 resolves to commence negotiations on a firearms protocol as part of the UNTOC Ad Hoc Committee mandate.
- January 1999: A draft protocol prepared by Canada is submitted to the first session of the UNTOC Ad Hoc Committee.
- Mid-1999: UN reports recommend a series of actions to prevent and combat the illicit trade in SALW, including developing and strengthening norms, international measures, mobilizing political will, and promoting the responsibility of states. The UN General Assembly accepts the recommendations and outlines the plans for the 2001 international conference on SALW.
- August 2000: In the context of the international conference preparations, the UN secretary general makes reference to the importance of the Vienna UNTOC negotiations, and the proposed firearms protocol.
- 2000–2001: In the lead-up to the conference, NGOs lobby calls for a legally binding treaty with a global scope.
- 31 May 2001: The firearms protocol is adopted by the General Assembly.
- July 2001: The conference leads to no legally binding treaty on SALW, but adopts the UN Plan of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons, which makes reference to the limited role of the protocol in the context of broader efforts to address the trade in SALW.
- April 2013: The Arms Trade Treaty is adopted by the UN General Assembly. It now has 113 state parties.

WHAT THE CYBERCRIME AD HOC COMMITTEE IS CONSIDERING

Although the Ad Hoc Committee tasked with negotiating the UN cybercrime convention is mandated to negotiate a single legal instrument,²⁹ the current draft text of the convention (see below) does allow for the inclusion of supplementary protocols.³⁰ It envisages, unlike the negotiation process for the UNTOC protocols, that responsibility for their elaboration would lie with the Conference of the States Parties.

CURRENT DRAFT OF THE CONVENTION

Chapter VIII: Mechanism of implementation

Article 57. Conference of the States Parties to the Convention

5. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including: [agreed ad referendum] [...] (g) Elaborating and adopting supplementary protocols to this Convention on the basis of article 61; [agreed ad referendum] [...].

Chapter IX: Final provisions

Article 61. Relation with protocols [agreed ad referendum]

1. This Convention may be supplemented by one or more protocols.
2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.
3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.
4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.

The draft resolution accompanying the convention for adoption,³¹ which was released ahead of the resumed concluding session but has not yet been discussed or adopted, would mandate that the Ad Hoc Committee hold one more meeting to draft the rules of procedure of the Conference of the States Parties, and two meetings specifically to elaborate a protocol on ‘additional criminal offences’, as per Russia’s proposal, and then submit the outcomes to the future Conference of the States Parties.

The protocol was not provided for in the original draft resolution submitted to the first concluding session in February 2024, but during that meeting, Russia proposed amending that resolution to request that the Ad Hoc Committee hold three more negotiating sessions to draft a protocol on additional offences, after the adoption of the convention. Subsequently, a middle-ground proposal was discussed, which suggested that a single additional Ad Hoc Committee meeting take place after the adoption of the convention, but before the first Conference of the States Parties could debate the possibility of elaborating a supplementary protocol. The Chair of the Ad Hoc Committee has opted to support the negotiation of an additional protocol as a core part of the package for agreement, by including two meetings for this sole purpose following the adoption of the convention.
The other parts of the compromise package on the fundamental parts of the convention that have yet to be agreed, prepared by the Chair for the last session of the Ad Hoc Committee, are as follows:

- The title and terminology of ‘cybercrime’ has been included in the final draft text, but defined as ‘criminal misuse of information and communications technology’ – a clear win for the Russian-led group on this front.
- The text includes versions of previously discussed articles on human rights conditions and safeguards, and a fixed list of offences for criminalization – something sought by Western countries, and more strongly by civil society and the private sector. This leans more towards Western priorities.
- Crucially, the ambiguous language on law enforcement measures and international cooperation can still be applied to an unending list of offences. This is particularly attractive to countries in the Global South and those most eager for opportunities for cooperation and capacity building, but it also enables authoritarian regimes to cooperate in targeting anyone they deem ‘criminal’ (subject to the final shape of the safeguards provisions).
- The inclusion of the protocol on yet-to-be-defined ‘additional offences’ is a way of offering the Russian-led group of authoritarian countries a way of keeping open the possibility of a longer list of criminalized offences (which is limited in the main convention).

With the additional protocol at its heart, this package leans heavily towards the more authoritarian approach to regulating cybercrime, and controlling the internet and society in general, favoured by Russia, China and their supporters.

The additional protocol, whether states sign up to it or not, is central to the ongoing disagreement over the scope of the convention, in terms of both criminalization and law enforcement cooperation. Russia and its supporters on this issue see the protocol as an opportunity to keep alive hopes for a broader convention that criminalizes a wide range of activities online and facilitates cooperation and evidence-sharing on all of these offences. Even if the convention and the protocol end up offering this broader scope of criminalization and law enforcement cooperation, and are therefore ultimately ratified only by authoritarian-minded states, they will still have gained a UN-flagged legal instrument to justify the targeting and persecution of anyone deemed to be guilty of any of the ‘crimes’ covered.
COMPARING AND CONTRASTING

From its outset, the UNTOC Ad Hoc Committee had a consensus-based mandate from the UN General Assembly to negotiate the convention while considering the elaboration of three specific legal instruments. The cybercrime Ad Hoc Committee, by contrast, has a General Assembly mandate (decided through a vote) to negotiate only one legal instrument. Although the draft convention (which has not yet been agreed) contains provisions for future protocols to be negotiated, the current Ad Hoc Committee does not yet have a mandate to do so. The original closing session has already concluded, and the forthcoming resumed session will be the last opportunity to address this issue. In fact, at this stage, the elaboration of any protocols is a task intended for the future Conference of the States Parties (for which the Ad Hoc Committee will have to provide rules of procedure), which may have a limited membership depending on the shape of the convention.

Proposed as part of a compromise between opposing camps on the scope of the convention, it is difficult to see how this approach can be pursued while maintaining the integrity of the convention. The UNTOC protocols do not affect the scope of the main convention and instead address issues already within its scope (three forms of transnational organized crime). By contrast, the scope of the cybercrime convention has not yet been agreed upon – and when it is, it should be clear in the main convention and not open to the interpretation through supplementary protocols.

Following the successful approach of the UNTOC Ad Hoc Committee negotiation process would require that the convention and the protocol be negotiated in parallel in order to achieve a balanced agreement. The approach envisaged in the cybercrime Ad Hoc Committee draft resolution would leave the convention with a targeted scope for criminalization but a broad scope for cooperation. With this is the possibility that an unknown list of other offences could be tacked on through a protocol, potentially negotiated or agreed by a limited Conference of the Parties, which would not only potentially affect the criminalization scope but also further threaten human rights through unnecessary criminalization.

There is also no real foundation on which to base a protocol at present, as the idea was only seriously discussed for the first time at the concluding seventh session. This is in stark contrast to the UNTOC Ad Hoc Committee, which arrived at its first session with a textual basis for all three draft protocols and a common understanding of the relationship between the convention and its protocols.

The cybercrime Ad Hoc Committee has not yet agreed on the scope of the convention, with many delegations seeking a convention with a limited scope and others wanting a broader mandate. An additional protocol could aim to provide more detail on the response needed to some of the listed offences – for example, child sexual abuse material or computer-related fraud. This would add value to the convention, which has limited space to devote to specific offences. However, given the lack of clarity in the convention, it is unclear on what basis states would be able to agree which additional offences would appear in a protocol, and what the protocol would seek to achieve – other than to extend the scope of the convention beyond what was originally agreed.

Throughout the negotiation process, the GI-TOC has argued that an effective cybercrime convention should target specific, commonly understood cyber-dependent criminal activities, and should not be ambiguous or give a green light to authoritarian states to seek to prosecute a wide range of ‘undesirable’ online activities that threaten their interests or power. We maintain that a convention that undermines human rights and allows journalists and civil society to be threatened is not only undesirable as a question of principle, but is also detrimental to the fight against organized crime.
Pursuing a protocol at this stage of the negotiations, with unclear modalities for its negotiation and adoption, is clearly an eleventh-hour attempt to compromise between the considerably different versions of a treaty that states across the spectrum are advocating for. But it is unclear how states will be able to judge the compromise if the convention is adopted at the next session and the protocol is only negotiated afterwards. Not a single article of a supplementary protocol, or even its purpose, has been discussed in any detail at any Ad Hoc Committee session so far.

If states are looking for an effective legal instrument, perhaps supplemented by additional protocols to address specific challenges, that would be one thing, but agreeing now to negotiate a protocol on ‘additional offences’ muddies the waters and diminishes the compromises that need to be made by the Ad Hoc Committee under its current mandate. Using a potential protocol as a negotiating tool in this manner is not the appropriate way to try to reach a compromise on the scope of the convention. Indeed, given the circumstances in which the Ad Hoc Committee finds itself now, the fundamental issues of the convention should be resolved before any protocol can be considered.

Any future protocol should help to address specific issues or challenges addressed in the convention. Furthermore, it would ideally be discussed under the clear and inclusive modalities of the Ad Hoc Committee. The risk of a last-minute decision on a protocol on additional crimes is that it could, even inadvertently, confuse the scope of the convention and ultimately be developed without the input of the full membership of the Ad Hoc Committee. This would lay the convention open to potential abuses and therefore undermine its purpose as a tool of international cooperation against cybercrime.
Notes

5 Article 19, UN: Open letter warning against human rights risks of Cybercrime Convention, 14 February 2024, https://www.article19.org/resources/un-cybercrime
6 The compromise package incorporates the convention, the draft resolution adopting the convention and a set of “interpretable notes” for the resumed final session.
7 GI-TOC, UN cyberwatch initiative, https://globalinitiative.net/initiatives/un-cyberwatch.
15 Ibid
19 Ibid
20 This is according to the findings of the GI-TOC’s Global Organized Crime Index 2023; see https://ocindex.net/report/2023/03-global-overview-results.html#global-criminal-markets.
29 As per UN General Assembly resolutions 74/247 and 75/282.
31 Ibid.
32 Articles 6 and 24 of the draft convention.