

24 September 2020.

To the Core-Group and Co-Sponsoring States to the MLA Initiative

The undersigned non-governmental organizations welcome a number of improvements made in the March 2020 version of the Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (MLA Draft Convention).

Among them, we see several amendments proposed by civil society organizations. In particular, we welcome: a new paragraph in the Preamble related to the rights of victims, witnesses and others, as well as the right of alleged offenders to fair treatment; the reference to prosecutions of international crimes and to customary international law in the preamble; the removal of the expression ‘in the States concerned’ from the third preambular paragraph; the reintroduction of ‘political opinions’ as one of the explicit discriminatory grounds for refusing mutual legal assistance (draft article 21(1)(a)) and extradition (draft article 35(1)(a)); and a provision permitting UN Observer states to become parties to the Convention (draft article 66).

We especially appreciate the inclusion of a definition of ‘victim’ (which we believe may still be further improved) (draft article 60(1)); the incorporation of measures that allow the adequate protection of victims and witnesses as part of the mutual legal assistance to be afforded among States (draft article 17(1)); a new provision on the obligation of States Parties to take the necessary measures to ensure that any person who alleges that crimes covered by the Convention have been or are being committed has the right to complain to the competent authorities (draft article 59(2)); the inclusion of Article 23(4) on the return of proceeds of crimes for the purpose of compensation of victims; and last, but not least, the replacement of the expression ‘may be refused’ by ‘shall be refused’ in draft article 21(1), thus preventing any State Party to provide mutual legal assistance whenever such assistance might collide with mandatory human rights safeguards.

That said, there are a number of further amendments which we believe are necessary for the MLA Draft Convention to become a powerful instrument for cooperation and a useful tool for effective investigations and prosecutions of crimes under international law.

To that end, and as explained more extensively in separate papers,<sup>1</sup> we call on the Core Group of the MLA initiative (reserving our right to comment further in the future) to amend the Draft in the following ways:

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<sup>1</sup> See, among others, FIDH, REDRESS and ECCHR, [Enhancing Victims’ Rights in Mutual Legal Assistance Frameworks](#), 1 May 2020; Joint NGO Letters to the Core Group of Co-Sponsoring States on the MLA Initiative, dated [20 January 2020](#) and [8 March 2019](#); Amnesty International, “Key Observations and Recommendations, Second Preparatory Conference of States Party to the ‘Mutual Legal Assistance Initiative’”, 11<sup>TH</sup> – 14<sup>TH</sup> March 2019; Amnesty International, ‘Recommendations for a Convention on Mutual Legal Assistance’, 16 January 2020; Parliamentarians for Global Action, [“Position paper on Mutual Legal Assistance Initiative and recommendations towards the way forward”](#), 16-19 October 2017.

- The Preamble should recall that the prohibition of genocide, crimes against humanity, war crimes, torture and enforced disappearance is a peremptory norm of general international law (*jus cogens*);<sup>2</sup>
- We welcome the inclusion of the crimes of torture, enforced disappearances and aggression in Article 3, providing States with the option of extending the scope of the Convention. However, we strongly recommend that the crimes of torture and enforced disappearance (including also the arrest, detention, abduction or any other form of deprivation of liberty of a person, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, when committed by persons or groups of persons acting *without* the authorization, support or acquiescence of the State) be included under Article 2 to form stand-alone crimes, together with genocide, crimes against humanity and war crimes. The prohibitions of torture<sup>3</sup> and enforced disappearance<sup>4</sup> are part of customary international law and have attained the status of *jus cogens*. They are also recognized as serious crimes under international law and under general international law this status necessarily entails an obligation upon up all States to prosecution or extradite, rather than simply permissive jurisdiction to do so.<sup>5</sup> This obligation is also contained in particular treaties applicable to such crimes;

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<sup>2</sup> Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, Chapter V. See Conclusion 23, non-exhaustive list, and its Commentary.

<sup>3</sup> ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgement, 20 July 2012, ICJ Reports 2012, pp. 422, para. 99; ICTY, *Prosecutor v Furundžija*, Judgment, IT-95-17/1-T, Trial Chamber, 10 December 1998, paras 137-139, 151, 155-157; ECtHR, *Al-Adsani v the United Kingdom*, Judgement, 5763/97, 21 November 2001, paras. 59-61; IACtHR, *Caesar v. Trinidad and Tobago*, Merits, Reparations and Costs, Judgement of 11 March 2005, Series C No. 123, para. 70. See also ACommHPR, General Comment No.4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, Article 5, 2017, para.63; Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2019 Revision of Guidelines (“EU Guidelines”) 12107/19, 16 September 2019, para. 30.

<sup>4</sup> See International Convention for the Protection of All Persons from Enforced Disappearance, Article 9; Declaration on the Protection of all Persons from Enforced Disappearance, Article 14. The Inter American Court of Human Rights (IACtHR) has repeatedly held that “the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*”. IACtH.R., *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs, Judgment of September 22, 2006, Series C No. 153, para. 84. On the customary law nature of the prohibition of enforced disappearance, see ICRC, Practice Relating to Rule 98. Enforced Disappearance, which highlights treaties and declaration referring to the prohibition of enforced disappearances as well as State practice, available at: [https://ihl-databases.icrc.org/customaryihl/eng/docs/v2\\_cha\\_chapter32\\_rule98](https://ihl-databases.icrc.org/customaryihl/eng/docs/v2_cha_chapter32_rule98). See also UN Human Rights Committee, General Comment 29, States of Emergency (article 4), 24 July 2001, para.13 (b); Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, Chapter V, Conclusion 23, non-exhaustive list, and its Commentary.

<sup>5</sup> Updated Set of Principles for the Protection of Human Rights Through Action to Combat Impunity, Principles 19 and 21 and definition B (serious crimes under international law), UN Doc E/CN.4/2005/102/Add.1 8 February 2005 , Recommended by the UN Human Rights Commission in resolution 2005/81, paras. 21-23. In Resolution 2005/81, the UN Human Rights Commission (the predecessor body of the UN Human Rights Council), unanimously “ *Reaffirm[ed]* the duty of all States to put an end to impunity and to prosecute or extradite, in accordance with their obligations under international law, those responsible for all violations of human rights and international humanitarian law that constitute crimes.”

- The definition of enforced disappearance should delete the expression ‘with the intention of removing them from the protection of the law for a prolonged period of time’;
- Drafters should entirely remove draft Article 21(2)(b), which provides for a vague and subjective set of grounds for refusal of mutual legal assistance (‘sovereignty, security, *ordre public* or other essential interests’) – such provision containing broad grounds for refusal runs counter to the purpose of the convention, which is to ensure inter-state cooperation, rather than providing how such cooperation can be avoided;
- We reiterate that the heading of Part VI should be amended to read “Victims, Witnesses and Others” and the heading of Article 59 to “Protection of victims, witnesses and others”. Further, Article 59(1) should include the following amendment: “Each State Party shall take the necessary measures to ensure that victims, witnesses and their relatives and representatives, experts, as well as other persons participating in or cooperating with any investigation, prosecution, extradition or other proceedings within the scope of this Convention, shall be protected against violence, threats of violence or any other form of intimidation, secondary victimisation or reprisal as a consequence of such participation or cooperation.”<sup>6</sup>
- Article 59(3)(b) should be amended to read: “Establishing procedures or providing evidentiary rules to permit victims to participate in the proceedings, and witnesses and experts to give testimony in a manner that ensures the safety, well-being and privacy of such persons, such as permitting the use of communications technology.”<sup>7</sup>
- Article 59(2) should be moved in Article 60, as a second paragraph;
- Article 60 should be amended to add another paragraph as follows: “Each State Party shall take the necessary measures to ensure that the following rights of victims are also safeguarded: (a) the right to receive information on an ongoing investigation, prosecution or judicial proceedings in a language they understand; (b) the right to access support services when needed.”
- The Draft MLA Convention should provide, in draft article 60(1) for a definition of victim which also includes ‘organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’ – the drafters may wish to consider language provided in Rule 85(b) in the Rules of Procedure and Evidence of the International Criminal Court;
- Draft article 60(2) should be amended to reaffirm the right of victims to “full and effective reparation”, as provided in the UN Basic Principles on the Right to an Effective Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted with the assent of all States in GA Resolution 60/147 of 16 December 2005. The

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<sup>6</sup> See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (“EU Directive”), Arts. 18-24. See also EU Guidelines, p. 29.

<sup>7</sup> *Ibid.*

present wording does not ensure “full and effective” reparative forms appropriate and necessary to meet the needs of victims of such violations. Rather the wording suggests a limitation of the reparation to only a few discretionary forms selected by States Parties. To that end, we suggest the removal of the expression ‘of one or more’, so as to read: ‘[v]ictims (...) have the right to obtain full and effective reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, ~~of one or more~~ of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition’;

- Finally, we reiterate that Article 23 on Confiscation should include a definition similar to that contained in other mutual legal assistance treaties (that is, “any property derived from or obtained, directly or indirectly, through the commission of a crime covered by the Convention”).<sup>8</sup> It would also be advisable to have a definition of “tracing”, “freezing”, “seizure” and “confiscation” in line with other international crime conventions for the purpose of Article 23.<sup>9</sup> This will avoid legal uncertainty when a request for mutual legal assistance is made pursuant to Article 17 (i), (k) or (l).

We reiterate our appreciation for this renewed opportunity to provide comments on the Draft Convention, as well as by the openness to ample NGO participation in the discussions and meetings and, we hope, in the Diplomatic Conference.

Amnesty International (AI)

European Center for Constitutional and Human Rights (ECCHR)

Fédération Internationale pour les Droits Humains (FIDH)

Human Rights Watch (HRW)

International Commission of Jurists (ICJ)

Open Society Justice Initiative (OSJI)

Parliamentarians for Global Action (PGA)

REDRESS

TRIAL International

Women’s Initiatives for Gender Justice (WIGJ)

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<sup>8</sup> See TOC, Art. 2(e); Corruption Convention, Art. 2(e).

<sup>9</sup> See TOC, Art. 2(f)-(g); Corruption Convention, Art. 2(f)-(g).