20 January 2020

Joint NGO Letter to the Core Group and Co-Sponsoring States of the initiative for the creation of a new multilateral treaty for the domestic prosecution of the most serious international crimes, the 'Mutual Legal Assistance Initiative' ("MLA Initiative") in response to the *Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (version 02/10/2019)* ('Draft Convention') and in advance of the Informal Consultations to be held in The Hague on 27-29 January 2020

Dear Core Group and Co-Sponsoring States,

The undersigned commend the efforts of the Core Group and Co-Sponsoring States in their continued consultations on the MLA Initiative. Such a multilateral convention will go a long way towards addressing the practical hurdles and legal gaps existing in the international legal framework which currently hamper cross-border efforts to ensure accountability for the most egregious crimes, including those of genocide, crimes against humanity and war crimes.

We, the undersigned organizations, wish to reiterate our sincere appreciation for the role civil society has been given in the consultation process and note the inclusion of some of our comments addressed in our letter dated 8 March 2019 ('Letter')[1] in the current draft.

We share your commitment to promoting the effective investigation and prosecution of persons suspected or accused of international crimes at both the international and domestic levels. Equally important, we note our related commitment to enhance victims' rights, including the right to justice, truth, reparation and guarantees of non-recurrence. To this end, we support the MLA Initiative in that the investigation and prosecution of those suspected or accused of committing the gravest violations of human rights and international humanitarian law is a fundamental aspect of victims' rights.

We still have three main concerns with the Draft Convention. These relate to: (1) the jurisdictional scope (*ratione materiae* and *ratione loci*); (2) the effective protection of victims'

[1] Available at: https://www.fidh.org/en/issues/international-justice/ngos-call-for-the-inclusion-of-victims-rights-into-the-mutual-legal.

rights; and (3) asset recovery and disposal. We also note other areas that require attention from a human rights' perspective but we are focusing on these three areas of concern.[2]

As mentioned in the Letter, many of our recommendations are drawn from widely ratified treaties concerning mutual legal assistance and extradition which can be adapted for the purposes of the Draft Convention.[3] Moreover, our suggestions seek to ensure the Draft Convention is consistent with international human rights and criminal law, as reflected in the jurisprudence and statutes of international and regional courts.

We, therefore, recommend that the Draft Convention be amended as follows:

1. **Jurisdiction *ratione materiae*: Draft Articles 2 – 3**

The undersigned note that the Draft Convention includes the crimes of genocide, crimes against humanity and war crimes defined in Article 2 ('Article 2 Crimes') and that States have the option of extending its scope under Article 3 ('Article 3 Crimes') to additional crimes defined in the Annexes. While noting the value of this pragmatic approach, the undersigned organizations stress, however, the need for the treaty: (1) to be flexible enough to apply to evolving definitions of crimes; and (2) to facilitate States' efforts to obtain assistance where needed, rather than hampering those efforts through an overly technical or restrictive regime.

In that regard, we reiterate our recommendation[4] that **Article 2 define crimes in accordance with broad and inclusive definitions in conventional and customary international law, and include other crimes under international law, including torture, enforced disappearance, extrajudicial executions, and other war crimes under customary international law, for example the use of biological and chemical weapons**. [5]

The undersigned organizations strongly recommend that **the crimes of torture and enforced disappearance be included under Article 2 Crimes to form stand-alone crimes**, together with

[2] See e.g. Article 20(1)(b) on Grounds for refusal and Article 23 on the Temporary transfer of detainees which are not in line with current international human rights and criminal law in that they are overly broad.

[3] Letter, p.2. See e.g. *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Art. 8; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, Art. 6; *International Convention for the Protection of All Persons from Enforced Disappearance*, Arts. 8(2), 15, 24.

[4] Letter, Recommendation 3.

[5] On the customary law nature of the prohibition of the use of biological weapons, see ICRC, *IHL Database*, (Volume II, Chapter 24, Section A,) Rule 74, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule74; Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, 26 March 1975 (183 State Parties). On the customary law nature of the prohibition of the use of chemical weapons, see ICRC, *IHL Database*, (Volume II, Chapter 23) Rule 73, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter23_rule73; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 29 April 1997 (193 State Parties).

genocide, crimes against humanity and war crimes. The prohibitions of torture[6] and enforced disappearance[7] are part of customary international law and have attained the status of *ius cogens*. A violation thereof generates an *erga omnes* obligation to prosecute (or extradite) upon all states.[8]

The undersigned consider that a new Article 2(7) should be included to safeguard States' existing obligations under international law[9] and adequately ensure evolving definitions of

[6] 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.

[7] See *International Convention for the Protection of All Persons from Enforced Disappearance*, Art. 9; *Declaration on the Protection of all Persons from Enforced Disappearance*, Art. 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/customary-ihl/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.

[8] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 7; *International Convention for the Protection of All Persons from Enforced Disappearance*, Arts. 9-11; ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, 20 July 2012, *ICJ Reports 2012*, pp. 422, paras. 68-69. See also *EU Guidelines*, para. 39; *Declaration on the Protection of all Persons from Enforced Disappearance*, Art. 14; *UN Human Rights Committee General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Convention* (29 March 2004), paras. 17-18; *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).

[9] Genocide, crimes against humanity and war crimes are also prohibited by numerous international conventions which are widely ratified. See e.g. *Convention on the Prevention and Punishment of the Crime of Genocide*, 12 January 1951, (152 State Parties), Arts I, VI; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Arts 4(2), 7; *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 21 October 1950 (196 State Parties), Art. 49; *Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 21 October 1950 (196 State Parties), Art. 50; *Geneva Convention III Relative to the Treatment of Prisoners of War*, 21 October 1950 (196 State Parties), Art. 129; *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War,* 21 October 1950 (196 State Parties), Art. 146; *Rome Statute of the International Criminal Court* ('Rome Statute'), 1 July 2002 (123 State Parties), Preamble, Arts. 5-8.

crimes under statutory and customary international law.[10] **This should read:**

- **(a) Nothing in this Convention shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.**
  (b) This article is without prejudice to any international instrument or national legislation which may contain provisions of wider application.

2. Jurisdiction *ratione loci* – Draft Article 5

With respect to territorial jurisdiction, the undersigned note that this article of the Draft Convention refers to the establishment of jurisdiction and not its exercise. While this has been the approach taken in a few other comparable multilateral treaties, it fails to sufficiently acknowledge that more than one State may *exercise* jurisdiction or that genocide, crimes against humanity, war crimes, torture and enforced disappearance give rise to universal jurisdiction. As such, we suggest the **following amendments (underlined) and a new provision to the Draft Convention to further clarify the establishment and exercise of jurisdiction *ratione loci***:

- Article 5(1)(a): When ~~the crimes are~~ a crime is committed in any territory under its jurisdiction or on board a ~~ship~~ vessel or aircraft registered in that State;

This will eliminate any doubt that one crime is sufficient for the establishment of jurisdiction.

- Article 5(1) (b): When the alleged offender is a national of that State or, if that State considers it appropriate, a foreign national who is habitually resident in that State's territory;

- Article 5(2): Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such crimes in cases where the alleged offender is present in any territory under its jurisdiction unless it extradites or surrenders him or her to any other State [or State Party]~~of the States mentioned in paragraph 1~~ or surrender him or her to an international or hybrid criminal tribunal whose jurisdiction it has recognized or which has been set up by a United Nations Security Council or General Assembly resolution.[11]

[10] With regard to Article 2(3), in particular, the undersigned organizations note that this relies upon the Rome Statute definition of crimes against humanity. As the International Bar Association has noted in a report on the International Law Commission's Draft Convention on Crimes against Humanity, the Rome Statute does not provide an exhaustive compilation of customary international law in this regard. As such, it should not be read to limit the application of broader definitions and interpretations of the elements of crimes against humanity and the underlying acts under customary international law. See *Comments on the International Law Commission's Draft Articles on Crimes against Humanity*, IBA War Crimes Committee, November 2018, pp. 6-7, available at: https://www.ibanet.org/PPID/Constituent/War_Crimes_Committee/Default.aspx

[11] See *United Nations Convention against Transnational Organized Crime* ("TOC"), 15 November 2000 (190 State Parties), Art. 15(4); *Convention against Corruption* ("Corruption Convention"), Art. 42(3)-(4).

- New provision: If a State Party exercising its jurisdiction under this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.[12]

3. Victims' rights as an integral part of the MLA Initiative – Draft Preamble, Articles 17, 53-54

At the outset, we note that victims are an integral part of mutual legal assistance as they are often the cornerstone of any viable investigation and prosecution. The undersigned organizations continue to advocate for a holistic approach to the prevention of and accountability for Article 2 and Article 3 Crimes and the protection of the rights of victims, be they involved as witnesses or complainants or otherwise affected by the investigation or prosecution of such crimes. A human rights-based approach to mutual legal assistance is necessary to ensure not only that a prompt, effective, independent and impartial investigation and prosecution takes place to bring alleged perpetrators to justice, but that victims' rights to justice, truth and reparation are safeguarded.

In line with the foregoing, we submit that the purpose of the Draft Convention under Article 1 should be twofold: strengthening the fight against impunity *and* upholding victims' rights. This dual purpose should also be reflected in the Preamble. As such, and as highlighted in the Letter:

- The Preamble to the Draft Convention should **explicitly acknowledge the rights of victims to access truth, justice and reparation and the crucial role played by victims and witnesses in investigations and prosecutions**.
- Paragraphs 2-3 of the Preamble should **cover both *investigation and* prosecution**.
- Paragraph 7 **should also make reference to *customary international law*** and not only to statutory law instruments. Conventions and customary international law are equally important sources of international human rights law, humanitarian and criminal law.

We renew our recommendation[13] that **Article 17, Purpose of the request, explicitly provide that mutual legal assistance may be requested to ensure access to adequate protective measures**, as set out in Article 53 of the Draft Convention.

Further, the undersigned reiterate our earlier recommendation to **include a definition of the term 'victim'** so as not to leave its application entirely to States' discretion.[14] This will also

[12] See Corruption Convention, Art. 42(5). Cf. *Fourth Report on Crimes Against Humanity* ("Draft Crimes against Humanity"), International Law Commission, A/CN.4/725, Art. 9(3), 10.
[13] See Letter, Recommendation 4.
[14] See e.g. *International Convention for the Protection of All Persons from Enforced Disappearance*, 23 December 2010, Art. 24, para. 1.

ensure legal certainty and consistency in treatment across borders.[15] Victims should include both natural and legal persons who have suffered harm. The definition should extend to a non-exhaustive list of groups, such as 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.[16]

With regard to Part VI, the undersigned recommend **the heading be amended to read "Victims, Witnesses and Others"**. This change should also be reflected in the **heading of Article 53(1), to read: "Protection of victims, witnesses and others"**. Further, **Article 53(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."[17]

We further aver that **Article 53(2)(b) 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.[18]

Article 54(1) on Access to assistance for victims should be **renamed "Victims' Rights" and amended to read:**

- In addition to the right to protection under Article 53, each State Party shall take the necessary measures to ensure the following rights for victims are safeguarded:
    a) the right to complain to the competent authorities;

[15] For instance, the EU recommends that third countries with whom it deals enact domestic legislation providing for a definition of 'victim' in accordance with international standards, including victims' right to redress. See EU Guidelines, p. 21.

[16] See International Criminal Court, Rules of Evidence and Procedure, Art. 85(a)-(b); *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by General Assembly Resolution 40/34 of 29 November 1985, Arts. 1-3, 18.

[17] S*ee 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.

[18] *Ibid*.

b) the right to receive information on an ongoing investigation, prosecution or judicial proceedings in a language they understand;

c) the right to access support services when needed; and

d) the right to obtain 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-recurrence.[19]

4. Asset recovery and disposal – Draft Articles 21-22

To provide the framework for effective asset identification, tracing, freezing and recovery, the undersigned organizations reiterate their submission in the Letter that **Article 22, Proceeds of crime, 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").[20] 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 21, Confiscation**.[21] This will avoid legal uncertainty when a request for mutual legal assistance is made pursuant to Article 17 (i), (k) or (l).

Furthermore, **Article 22(4) should be amended to specifically provide that any proceeds of crime confiscated under the Draft Convention be returned to the requesting State so they can be provided to the victims of the crime by way of reparation**.[22]

5. Conclusion

In light of the foregoing, while we recognize the need to move expeditiously to provide a robust procedural legal framework for mutual legal assistance and extradition, we urge States to further strengthen the Draft Convention in line with our suggestions to ensure a stronger human rights-based approach to mutual legal assistance and extradition.

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[19] *Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Arts 12- 13; *International Convention for the Protection of All Persons from Enforced Disappearance*, Art. 24 (2), (4)-(5); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Art. 8(1)(b); TOC, Art. 25; EU Directive, Arts.3-8, 10-17. See also *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by General Assembly Resolution 40/34 of 29 November 1985, Arts. 4-17, 19-21; *Draft Crimes against Humanity*, Art. 12(1), (3); EU Guidelines, para. 40.

[20] *See* TOC, Art. 2(e); Corruption Convention, Art. 2(e).

[21] *See* TOC, Art. 2(f)-(g); Corruption Convention, Art. 2(f)–(g).

[22] See *e.g*. TOC, Art. 14(2).

We look forward to collaborating further on the negotiation of the Draft Convention.

Yours sincerely,

REDRESS
International Federation for Human Rights (FIDH)
European Center for Constitutional and Human Rights
Amnesty International
Parliamentarians for Global Action (PGA)
Women's Initiative for Gender Justice
International Commission of Jurists
TRIAL International
Civitas Maxima
Civil Rights Defenders
Victim Support Europe (VSE)
Nigerian Coalition for the ICC (NCICC)
No Peace Without Justice