



8 March 2019

**Joint NGO Letter to the Core Group and Co-Sponsoring States to the initiative for the creation of a new multilateral treaty for the domestic prosecution of the most serious international crimes, also known as the 'Mutual Legal Assistance (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 ('Draft Convention') and in advance of the Second Preparatory Conference of the MLA initiative (11-14 March 2019)**

**Dear Core-Group and Co-Sponsoring States to the MLA Initiative,**

The negotiation and eventual adoption of a comprehensive multilateral convention on mutual legal assistance and extradition will go a long way towards addressing a legal gap in the international legal framework which currently hampers efforts to ensure accountability for genocide, crimes against humanity and war crimes. We, the undersigned organizations, wish to express our sincere appreciation for the role civil society has been given in the negotiation process and welcome your commitment to fighting impunity for these crimes. We share this commitment, as well as a commitment to victims' access to truth, justice and reparation at both the international and national level. Building on this shared commitment, we are writing to express some initial comments, recommendations, and concerns regarding the Draft Convention, with a particular focus on **the rights of victims**.

Investigation and prosecution of those accused of committing the gravest violations of human rights and international humanitarian law is a fundamental aspect of victims' right to justice. The significance of holding perpetrators accountable cannot be overestimated. Effective investigations and prosecutions provide victims with redress and establish recognition of the wrongs committed against them. They also serve as a reaffirmation of the importance of respect for human rights and the rule of law, and as a deterrent against future atrocities. In circumstances where international courts are unable to address such crimes, recourse to national courts often represents the last resort for victims. Whether those national courts are in the State where the crimes were committed or in a third State exercising universal or extraterritorial jurisdiction to prosecute crimes committed abroad, a strong framework for international cooperation is essential.

Victims play an important role in investigations and prosecutions of international crimes before domestic courts and tribunals. Without the courage and determination of those victims who act as complainants or witnesses, many such cases would never reach trial. As such, States at the forefront of investigating and prosecuting international crimes at the domestic level are increasingly recognising that supporting, protecting and empowering victims is crucial to building strong cases. Moreover, States are coming to appreciate that victims are not a homogeneous group and that they must ensure expertise in investigations and prosecutions involving sexual and gender-based violence and involving children. The EU Genocide Network has recognised this trend, recommending that measures be taken by national authorities to address the rights and needs of victims and witnesses, and that victims' perspectives and their rights be integrated into investigation and prosecution strategies.<sup>1</sup>

Nevertheless, victims continue to face barriers which inhibit their access to justice and prevent them from benefiting from the same rights as other categories of victims. The unique character of such cases—usually involving crimes committed outside the territorial jurisdiction of the investigating/prosecuting State and involving victims who may not normally reside in that State—often means that victims fall outside the scope of national laws providing for victims' rights. At best, victims can rely on *ad hoc* measures and the support of strong civil society organisations to obtain access to justice. At worst, they are excluded from participating in proceedings altogether. Therefore, it is imperative that strong and appropriate provisions on victims' rights are included in the Draft Convention. This will ensure that efforts to improve victims' access to justice are not hampered by deficiencies in the proposed framework for State cooperation.

Thus, while we recognise the need to move quickly to provide a robust procedural legal framework for mutual legal assistance and extradition, we call on States to **expand and strengthen Part VI of the Draft Convention** and to **ensure victims' rights are embedded throughout the text where necessary**.

A number of widely-ratified treaties concerning mutual legal assistance and extradition provide examples of provisions concerning victims' rights which can be adapted for the purposes of the Draft Convention. For example, the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* requires States Parties to adopt appropriate measures to protect the rights and interests of victims at all stages of the criminal process.<sup>2</sup> The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* provides for assistance to and protection of victims.<sup>3</sup> The *International Convention for the*

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<sup>1</sup> Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide, Crimes against Humanity and War Crimes within the European Union and its Member States, November 2014, pp. 45-46.

<sup>2</sup> Article 8 of the Protocol (which has 175 States Parties) requires, for example, that States Parties: inform child victims of their rights and the progress of the proceedings; allow their views, needs and concerns to be presented and considered in proceedings where their personal interests are affected; provide them with appropriate support services; protect them from intimidation and retaliation; protect their privacy; ensure appropriate training for persons who work with victims. It also requires States Parties to protect the safety and integrity of persons and organizations in the prevention, protection and rehabilitation of victims.

<sup>3</sup> Article 6 of the Protocol (which has 173 States Parties) requires, for example, that States Parties: protect the privacy and identity of victims; enable victims' views and concerns to be presented and considered at appropriate

*Protection of All Persons from Enforced Disappearance* requires States Parties to afford mutual assistance with a view to assisting victims of enforced disappearance and provides for the right to reparation and prompt, fair and adequate compensation.<sup>4</sup>

Mindful that discussions on the Draft Convention are currently in the preparatory phase, we wish to draw your attention to the following non-exhaustive list of issues which may require attention and further consideration. In this regard, the following preliminary recommendations—including suggestions of possible amendments—are made with a view to assisting in future negotiations on the text.

**We recommend that:**

1. The **Preamble** to the Draft Convention explicitly acknowledge the rights of victims to access truth, justice and reparation and the crucial role played by victims and witnesses who support domestic investigations and prosecutions, as well as the need to strengthen efforts aimed at ensuring their protection, support and empowerment.<sup>5</sup>
2. **Part I (General provisions)** include a provision expressly providing for the right to complain to relevant authorities regarding the commission of one of the crimes within the scope of the Draft Convention. Such a provision should require States Parties to examine complaints lodged in order to determine whether there are reasonable grounds to believe that acts constituting crimes within the scope of the Draft Convention have been or are being committed.<sup>6</sup>
3. **Article 2 (Crimes covered by this Convention)** define crimes in accordance with broad and inclusive definitions in conventional and customary international law, and include other crimes under international law among the crimes covered by the Draft Convention, including: torture; enforced disappearance; extrajudicial executions; and other war crimes under customary international law, for example the use of biological weapons.<sup>7</sup>
4. **Article 16 (Purpose of the request)** provide explicitly that mutual legal assistance may be afforded to ensure access to adequate protective measures, as set out in Article 56 of the Draft Convention.
5. The reference to 'amnesty' be deleted from **Article 52 (Pardon, amnesty, commutation)**. The duty to prosecute or extradite perpetrators of serious international crimes has been gradually recognised as a customary international law duty and granting

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stages of criminal proceedings; and provide for the physical, psychological and social recovery of victims, such as information regarding their rights and medical/psychological assistance.

<sup>4</sup> See Articles 8(2), 15 and 24 of the Convention (which has 59 States Parties).

<sup>5</sup> Compare e.g. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, Preamble (declaring that effective action requires a comprehensive international approach *inter alia* to protect victims, including by protecting their internationally recognized human rights), Article 2 (noting that the purposes of the Protocol include protection and assistance to victims); *International Convention for the Protection of All Persons from Enforced Disappearance*, Preamble (considering the right of victims to justice and reparation and affirming victims' right to the truth).

<sup>6</sup> Compare e.g. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 13 (requiring States Parties to ensure that any individual who alleges he has been subjected to torture has the right to complain to, and to have his case promptly and impartially examined by, the competent authorities). See also *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 12.

<sup>7</sup> See e.g. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (which has 164 States Parties); *International Convention for the Protection of All Persons from Enforced Disappearance* (which has 59 States Parties); and *International Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* (which has 182 States Parties).

amnesty or *de facto* impunity to the perpetrators of these crimes would constitute a violation of international law and deprive victims of their right to justice.<sup>8</sup> Additionally, since the execution of the sentence is part of the obligation of States to investigate, prosecute, and punish, and also a component of victims' right to justice, there should not be any wrongful benefits that might lead to impunity.<sup>9</sup> As such, Article 52 should provide explicitly that pardons and commutation of sentences should not be granted if they can lead to *de facto* impunity for the crimes covered by the Draft Convention.

6. **Part VI (Witnesses and experts):**

- be renamed 'Victims and witnesses';
- contain a definition of 'victim' to avoid leaving the definition to States Parties' domestic legislation;<sup>10</sup>
- include an additional provision expressly providing that States Parties must inform victims of the progress and results of the examination of the complaint and any subsequent investigation,<sup>11</sup> in order to ensure that States Parties fulfil their obligations to investigate and prosecute and that victims have access to effective remedies; and
- include a dedicated provision on victim participation, clarifying that victims should be able to present their views and concerns where their personal interests are affected and that victims should be provided with legal representation.<sup>12</sup>

7. **Article 56 (Protection of witnesses and experts)** be expanded:

- to ensure adequate protection and support to *all* individuals whose safety or wellbeing might be affected by participation or cooperation in an investigation, prosecution, extradition or other proceeding within the scope of the Draft Convention—not only those who give testimony. This will require significant amendment to Article 56, which currently provides that victims are only entitled to protection 'insofar as they are witnesses'. In particular, Article 56 should cover complainants (including third parties, where third-party reporting is provided for under national law) and victims who are engaged in proceedings other than as witnesses (*e.g.* as *parties civiles* or injured parties seeking compensation);<sup>13</sup> and

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<sup>8</sup> See M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', 59 *Law and Contemporary Problems* 9-28 (Fall 1996), p. 17.

<sup>9</sup> I/A Court H.R., *Case of Barrios Altos and Case of La Cantuta v. Peru*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of 30 May 2018.

<sup>10</sup> Compare *e.g.* *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 24(1).

<sup>11</sup> Compare *e.g.* *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 24(2); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Article 8(1)(b); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 12 (the Committee against Torture has found that Article 12 is violated when the failure to inform the complainant of the results of an investigation obstructs other legal processes, including private prosecutions, available to victims).

<sup>12</sup> Compare *e.g.* *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, Article 6(2)(b) (requiring assistance to enable victims' views and concerns to be presented and considered at appropriate stages of criminal proceedings, in a manner not prejudicial to the rights of the defence); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Article 8(1)(c) (allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law).

<sup>13</sup> Compare *e.g.* *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 13 (requiring that steps be taken to ensure that both complainants and witnesses are protected as a

- to ensure protection against secondary victimisation—that is, harm caused during the investigation or prosecution as a result of victims’ engagement with the authorities. The measures envisaged by Article 56 should also be expanded to include the establishment of procedures to permit victims to participate in proceedings in a manner that ensures their safety and well-being (such as allowing for provision of psycho-social support and measures to protect victims’ privacy).<sup>14</sup>
8. **Article 57 (Access to assistance for victims)** be amended:
    - to reflect the full scope of the right of victims to prompt, fair and adequate reparation (including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition), as well as access to national reparations programs (where they exist) and other assistance in the event that the individuals liable for the crimes are unable or unwilling to meet their obligations;<sup>15</sup> and
    - include an obligation on States Parties to enforce valid domestic and foreign legal judgments for reparation against individuals or entities liable for the harm suffered in accordance with domestic law and international legal obligations.<sup>16</sup>
  9. **Articles 21 (Confiscation) and 22 (Proceeds of crime)** include a definition of ‘proceeds of crime’ similar to that contained in other mutual legal assistance treaties (that is, meaning any property derived from or obtained, directly or indirectly, through the commission of a crime covered by the Convention’).<sup>17</sup>
  10. **Article 22(4) (Proceeds of crime)** be amended to ensure 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.<sup>18</sup>

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

Yours sincerely,

**International Federation for Human Rights (FIDH)**

**REDRESS**

**Amnesty International**

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consequence of any complaint or evidence given); International Law Commission’s *Draft Articles on Crimes against Humanity*, Draft Article 12(1)(b) (requiring protective measures be applied to complainants, victims, witnesses, and their relatives and representatives, as well as any other persons participating in any investigation, prosecution, extradition or other proceeding).

<sup>14</sup> Compare e.g. *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*, Articles 18 (requiring that EU Member States ensure measures are available to protect victims and their family members from secondary and repeat victimisation, as well as from intimidation and retaliation), 19-24 (setting out protective measures to be applied during criminal investigations and proceedings).

<sup>15</sup> Compare e.g. *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 25(4)-(5); *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Principle 16.

<sup>16</sup> Compare e.g. *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Principle 17.

<sup>17</sup> Compare e.g. *United Nations Convention against Transnational Organized Crime*, Article 2(e); *United Nations Convention Against Corruption*, Article 2(e).

<sup>18</sup> Compare e.g. *United Nations Convention against Transnational Organized Crime*, Article 14(2).

**European Center for Constitutional and Human Rights**

**Parliamentarians for Global Action**

**Women's Initiative for Gender Justice**

**International Commission of Jurists**

**TRIAL International**

**Coalition for the International Criminal Court**

**Civitas Maxima**