



Parliamentarians for Global Action  
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برلمانيون من أجل التحرك العالمي

**Preparatory Conference on the Mutual Legal Assistance (MLA) Initiative  
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***Position paper of Parliamentarians for Global Action (PGA) on MLA Initiative and  
recommendations towards the way forward***

- I. MLA treaty as a tool for effective operation of the complementarity principle**
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**I. MLA treaty as a tool for effective operation of the complementarity principle**

The creation of the Rome Statute system rests on the premise of the complementarity principle, according to which the primary competence and authority to initiate investigations of international crimes rests with States national jurisdictions.

Under this principle, States have the primary obligation to investigate and prosecute those responsible for international crimes, with the International Criminal Court (ICC) intervening only when States do not have the genuine will or the capacities to do so. The legal basis for the duty to investigate and prosecute crimes under International Law stems from a wide array of legal instruments that preceded the adoption of the Rome Statute almost 20 years ago. However, the Rome Statute contributed to consolidate the obligation to investigate and prosecute on the basis of the principle of “no-impunity” for the most serious crimes of concern to the International Community as a whole.

The successful investigation, prosecution and adjudication of international crimes at the national level depend not only on the existence of legislation that incorporates in national laws the crimes and general principles of law contained in the Rome Statute and other relevant instruments, but also on effective cooperation amongst States through mutual legal assistance in criminal matters, including extradition. This means that in order for States to effectively fulfil their duty under the principle of complementarity to exercise criminal jurisdiction, they must be able to rely on effective international cooperation in criminal matters to conduct the pertinent investigations.

This is further accentuated by the nature of the atrocity crimes which are in most cases of transnational character- the crimes are committed on the territory of more than one State, with the perpetrators, commanders, victims and witnesses being nationals of more than one State, who may leave the State in which the crimes had been committed. More often than not, elements of evidence are not localised in, or confined to, the territory of a single State. Effective cooperation between States is thus a key to achievement of a proper investigation of international crimes and ensuring that these crimes do not remain unpunished and consequently, that no safe haven will be created as a result of lack of sufficient means of cooperation. Therefore, the efficient prosecution must be ensured through both national law and strengthened international cooperation.

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<sup>1</sup> PGA is the largest transnational network of more than 1300 members from 142 parliament from all regions of the world that, in their personal capacity, support the effective functioning of the ICC and national courts to end impunity for crimes of international law. For more information on PGA's Campaign on the Universality and Effectiveness of the Rome Statute, please contact the PGA Programme Officer **Ms. Frederika Schweighoferova** at: [schweighoferova@pgaction.org](mailto:schweighoferova@pgaction.org).

## II. MLA treaty as a creation of a common and improved cooperation standard amongst States

Gathering evidence in some territories is challenging due to disharmony in laws or lack of authorizing laws for law enforcement agencies to cooperate. There is often a lack of common standards and accepted practices. At the EU level, the obligations to cooperate among its Member States are contained in EU legal instruments, such as the EU Regulation on the European Arrest Warrant, which facilitates the cooperation among the 28 EU Member States. However, there is no such international legal framework aimed at international cooperation in criminal matters between States outside of the EU for the investigation and prosecution at the national level of crimes falling under the jurisdiction of the ICC.<sup>2</sup>

The MLA initiative fills an existing gap in the existing legislative framework to address the problems emanating from the lack of common standards and harmonised laws on cooperation which result in undue delay, or lack of legal basis to cooperate amongst States regarding the extradition of perpetrators of international crimes.

The MLA treaty, once adopted, would enable expedition the proceedings and reduction of the costs relating to the investigations that in most cases need to be carried out in more than one State. Mutual legal assistance is necessary to enable prosecutors and investigators in gathering and providing evidence in order to prosecute the perpetrators. As it is in the nature of these crimes that perpetrators – for a variety of reasons – cannot always be brought to trial in the country where the crimes have been committed. These makes extradition and mutual legal assistance a crucial part of prosecution of international crimes.

Such a treaty on multilateral state cooperation would be also facilitate States to fully implement cooperation obligations under the Rome Statute into their domestic systems, deriving from the Art. 86 and 88 of the Rome Statute, thereby fulfilling the principle of complementarity.

## III. PGA`s activities to endorse MLA initiative

PGA supports the MLA initiative and encourages all States to join it and advance the process of its adoption further in the international arena. The treaty has the potential to significantly improve interstate cooperation in fighting impunity for international crimes and ensuring accountability and as such, enables the States to be better equipped to prevent effectively genocide, crimes against humanity and war crimes.

PGA is one of the few organisations actively working on promoting the development of implementing legislation of international treaties into domestic legislation worldwide. The role of the Secretariat of PGA is to provide technical and political assistance, and cooperation, as well as facilitate peer-to-peer trans-national dialogue amongst Lawmakers and relevant stakeholders to generate political will and ensure the usage of parliamentary prerogatives to

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<sup>2</sup> The international cooperation in criminal matters has been governed in legal frameworks for crimes as torture, organized crime, corruption and enforced disappearances: *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1985) (art. 8-9) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (2006) (art. 13-15) contain both provisions on extradition and provisions on mutual legal assistance in criminal matters; the *United Nations Convention against Transnational Organized Crime* (2000) (art. 18 -21) and the *United Nations Convention against Corruption* (2003) (Chapter IV) provide for a comprehensive legal framework for the international cooperation in criminal matters, including extradition and mutual legal assistance in criminal matters as joint investigations and special investigative techniques.

achieve the implementation of the international law provisions to promote domestic prosecutions and ensure full cooperation amongst States.

PGA, through its parliamentary network, would promote a global campaign to create political will for this treaty and provide technical assistance in implementing it. In particular,

- PGA can use the above-mentioned venues to **promote the conclusion of the MLA treaty through its members from parliaments** worldwide and encourage effective cooperation amongst States.
- PGA can assist its parliamentarians **in drafting any legislation** as required to enable MLA treaty to be implemented into domestic legislation.
- PGA can **review and enhance national law frameworks** to enable extradition as required by all treaties to which the States are parties to ensure that appropriate criminal acts are extraditable and establishing legal jurisdiction over those criminal acts.
- If the **stand-alone option** or a **UN diplomatic conference** is to be determined as an appropriate forum for the adoption of the treaty, PGA could use its network **to encourage Parliamentarians** of the State hosting the inter-governmental conference **to adopt a law enabling to set up the conference** (similarly to the process that led the Italian Parliament to adopt a comprehensive legislation for Italy to host and fund the Rome Diplomatic Conference of 15 June-17 July 1998).

#### IV. Specific recommendations

1. In addition to the inclusion of the definition of the three core crimes, *i.e.* crimes of genocide, crimes against humanity and war crimes, the MLA Treaty should establish the same obligatory mechanisms to support the fight against these crimes as well as general principles to support inter-state cooperation and mutual legal assistance, as guaranteed for the crimes within the scope of the United Nations (UN) Convention against Transnational Organized Crime and UN Convention against Corruption.<sup>3</sup> In order to ensure effective prosecution of the three core crimes, the principles could be further extended to encompass the general principles of international crimes, as stipulated in the Part III of the Rome Statute.<sup>4</sup>
2. The MLA Treaty should equally stipulate that States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the atrocity crimes. The types of mutual legal assistance that can be requested should include all types which are enlisted in the UN Convention against Transnational Organized Crime and UN Convention against Corruption.<sup>5</sup>

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<sup>3</sup> E.g. establishment of a long statute of limitations of the crimes; principle of reciprocity; relevant provisions on dual criminality and recognizing the offences listed in the MLA Treaty as being extraditable offences; limited grounds for refusal of a mutual legal assistance and extradition request; designation of appropriate central authority for the purposes of mutual legal assistance (...)

<sup>4</sup> E.g. the irrelevance of official capacity; non- applicability of statute of limitations

<sup>5</sup> E.g. the UN Convention against Transnational Organized Crime enlists the following types of assistance: Art. 18 (3) (a) Taking evidence or statements from persons; (b) Effecting service of judicial documents; (c) Executing searches and seizures, and freezing; (d) Examining objects and sites; (e) Providing information, evidentiary items and expert evaluations; (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; (h) Facilitating the voluntary appearance of persons in the requesting State Party; (i) Any other type of assistance that is not contrary to the domestic law of

3. Expeditious cooperation through the use of alternatives to formal mutual assistance requests should be explored. These could include informal police channels, Director of Public Prosecutions to Director of Public Prosecutions, Interpol, and other communication mechanisms in particular if evidence is voluntarily given or publicly available or through the use of joint investigation teams with a capacity to directly transmit and satisfy informal requests for assistance.
4. In order to ensure timely response to requests, it is important to designate an officer in all prosecution agencies to deal with Mutual legal assistance matters and, to exchange the contacts of the designated officers to expedite coordination and cooperation.
5. Effective witness and victim protection is of particular importance to enable the witnesses, including victims who survived inhumane acts, to be involved and to cooperate in the prosecution of alleged offenders without fear of potential revenge and intimidation and while preserving their safety, security, privacy and well-being. For this purpose, it is necessary to provide rules enabling witnesses and victims to give evidence in a way that ensures the absolute safety of persons willing to cooperate in criminal procedures. Therefore, procedures guaranteeing protection of witnesses and victims need to be devised, adopted, standardized and mutually recognized by cooperating States. These procedures may include protection of identity, relocation and other measures to be applied outside the investigating state, in relevant foreign jurisdictions.
6. The ways of extending the cooperation to outreaches in foreign states should be explored in order to stress to potential witnesses and victims the importance of participating in trials as a means to fight impunity. This could equally relate to mobilizing resources for victim reparations.
7. The matter of financing of joint investigations should be addressed. Can States who are availing officers to jointly investigate cases contribute in part towards facilitating its nationals, or do we leave it to the aggrieved state to foot the expenses? How can states be obliged in this respect?
8. Specific training should be developed and provided for the State's law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the crimes included in the MLA Treaty.
9. Fully pledged research units in the prosecution agencies should be set up and empowered financially. The units can make follow up on laws that need updating, domestication and or recommending for the revision of laws.
10. As an appropriate forum for discussion, the MLA Initiative should be discussed at a forum that requires a majority vote as a quorum, since, based on past experience, consensus might not be reached on this issue.

## **V. Suggestions to questions for working groups' discussion**

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the requested State Party. The UN Convention against Corruption enlists two additional types (Art. 46(3): Identifying, freezing and tracing proceeds of crime (...); (k) The recovery of assets (...)

- In relation to drafting options for incorporating the crimes' definitions into the MLA treaty, PGA recommends copy-paste of the existing definitions, with, the possibility to broaden the legal protection they offer. The explicit definition of crimes would seem preferable for two reasons:
  - It would provide legal certainty and protection to individuals on which law is applicable as it would directly enlist all acts falling within the definition of the crimes
  - It would facilitate and expedite the procedure and work of competent authorities
  - The provisions would not have to copy the wording enshrined in treaties that had been concluded in the past and thus their provisions might not reflect development of international law. As such, the provisions used in MLA Treaty could also extend their wording in line with developing international human rights standard.

### **War Crimes**

In the respective provision on war crimes, PGA would suggest incorporating a text in *Chapeau* of the provision of war crimes that would eliminate the distinction between international and non- international armed conflict, if applicable under relevant principles of International Humanitarian Law.

Currently, there is a general tendency to reduce the difference between international humanitarian law applicable in international armed conflicts and in non-international armed conflicts. The jurisprudence of international criminal jurisdictions, the influence of human rights and even some treaty rules adopted by States (e.g. the Kampala Amendments on war crimes) have moved the law of non-international armed conflicts closer to the law of international armed conflicts and it has even been suggested that the difference be eliminated altogether, whenever possible under IHL. In the many fields where treaty rules still differ, this convergence was rationalized on the grounds that in customary international law the differences between the two categories of conflict have gradually disappeared.<sup>6</sup>

The study on customary International Humanitarian Law conducted by the International Committee of the Red Cross comes to the conclusion that 136 (and arguably even 141) of the 161 norms of customary IHL, many of which are based on provisions of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts, thus considerably broadening the applicable law in those situations.<sup>7</sup>

Therefore, the suggested *Chapeau* of the provision on War Crimes would include in the definition following phrase: “(...) *when committed in the context of international or non-international armed conflict* (...)”

- PGA endorses the option for the MLA treaty to provide for a possibility that two States Parties could use the MLA treaty as a basis for their mutual legal assistance and extradition, under the condition of reciprocity, in situations where the crimes' definitions under their respective national law would be broader than definitions incorporated into the MLA treaty, as long as this extension is in line with international law and human rights standards and does not result in using the extradition for the purpose of persecuting political crimes.

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<sup>6</sup> M. Sasoli, A. A. Bouvier & A. Quintin: *How Does Law Protect in War?* 24-25 (3d ed. 2011)

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