

**RECOMMENDATIONS FOR THE
DIPLOMATIC CONFERENCE ON
THE DRAFT CONVENTION ON
INTERNATIONAL COOPERATION
IN THE INVESTIGATION AND
PROSECUTION OF GENOCIDE,
CRIMES AGAINST HUMANITY,
WAR CRIMES AND OTHER
INTERNATIONAL CRIMES
(LJUBLJANA, SLOVENIA, 15-26
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I. INTRODUCTION

The Diplomatic Conference on the Draft Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes ('Draft MLA Convention')¹ is scheduled to take place in Ljubljana, Slovenia, 15-26 May 2023. Ahead of this Conference, Amnesty International shares some recommendations with states. Most of the recommendations raised in this paper, which revises and updates the 2020 Amnesty International Recommendations for a Convention on Mutual Legal Assistance,² have already been addressed to the attention of states during the drafting process, including the several informal consultations the organization has participated in.

Amnesty International encourages all states to adopt, duly amended, as recommended below, the Draft MLA Convention, since it significantly enhances inter-state cooperation in criminal matters and, thus, will be an effective tool in the fight against impunity for crimes under international law.

II. POSITIVE ASPECTS OF THE DRAFT CONVENTION (VERSION 30 NOVEMBER 2022)

Amnesty International considers that many draft provisions are positive and, therefore, recommends states to adopt them. Among these positive provisions, whose importance has been explained in previous papers,³ the organization counts (non-exhaustively):

- The abrogation of the definition of gender (as that definition does not fully acknowledge the social construction of gender, and the

¹ Available at: www.gov.si/assets/ministrstva/MZZ/projekti/MLA-pobuda/20221130-ENG-MLA-DRAFT-CONVENTION-CLEAN.pdf.

² Available at: www.amnesty.org/en/documents/ior51/1651/2020/en/.

³ See, Amnesty International, Key Observations and Recommendations, Second Preparatory Conference of States Party to the 'Mutual Legal Assistance Initiative', 11th–14th March 2019 and Recommendations for a Convention on Mutual Legal Assistance, www.amnesty.org/en/documents/ior51/1651/2020/en/. See, also, Joint NGO letter to the Core-Group and Co-Sponsoring States to the Mutual Legal Assistance (MLA) Initiative, available at www.amnesty.org/en/wp-content/uploads/2021/05/IOR5131232020ENGLISH.pdf.

- accompanying roles, behaviours, activities and attributes assigned to women and men, and to girls and boys);
- The inclusion of torture and, to some extent, enforced disappearance as crimes covered by the Draft Convention - through Annexes F and G (draft Article 3(1)) (although Amnesty International thinks both crimes should not be optional for states and be incorporated into the main text of the Draft Convention, not as annexes);
 - The exclusion of 'dual criminality' as a requirement for cooperation (draft Article 7) (as Amnesty International considers that genocide, crimes against humanity, war crimes, torture and enforced disappearance are crimes of customary international law which all states should prohibit under national law);
 - The clause on *aut dedere aut judicare* (draft Article 11);
 - The *non-refoulement* clause in draft Articles 27(1)(d) and 45(1)(d);
 - 'Sexual orientation' as a new ground for refusal of mutual legal assistance and extradition (draft Article 27(1)(a) and draft Article 45(1)(a)), as well as transit (draft Article 57(5));
 - The new provision defining the concept of 'victim', as in Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court (draft Article 73);
 - The amended provision on the Convention open to signature, ratification, acceptance, approval and accession by all states - and not only by UN Members states and UN Observers states (draft Article 82).

These provisions are steps in the right direction that deserve full support by all states.

III. CONCERNS ARISING FROM THE PROPOSED PREAMBLE AND ARTICLES

However, Amnesty International still has some concerns regarding specific provisions in the Preamble of the Draft Convention and certain draft articles. They are not meant to be an exhaustive account of Amnesty International's views on the Draft Articles. Therefore, failure to comment on a provision or part of a provision should not be taken to mean that the organization endorses it.

1. ON THE DRAFT PREAMBLE

There are some provisions which, if amended or incorporated into the Preamble, may stress some core elements of the Draft MLA Convention. For

example:

a) The prohibitions of genocide, crimes against humanity, war crimes, torture and enforced disappearance as peremptory norms of general international law (*jus cogens*)

The Preamble rightly recalls '[t]hat the crime of genocide, crimes against humanity and war crimes are among the most serious crimes of concern to the international community as a whole'. However, drafters may wish to go further by incorporating, like in the Draft Convention on the Prevention and Punishment of Crimes against Humanity, elaborated by the International Law Commission (ILC),⁴ a clause recognizing that the prohibitions of genocide, crimes against humanity, war crimes, torture and enforced disappearance are peremptory norms of general international law (*jus cogens*).

As the ILC has stated, the prohibition of most crimes under international law is a peremptory norm of general international law (*jus cogens*).⁵

Article 53 of the Vienna Convention on the Law of Treaties provides that a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁶ In other words, peremptory norms - like the absolute prohibitions of slavery⁷ and torture⁸ are hierarchically superior to other norms of international law and, therefore, override such norms in the case of conflict.

A leading scholarly authority has explained that among the *erga omnes* legal obligations arising out of *jus cogens* are the duty to prosecute or extradite (*aut dedere aut judicare*), the non-applicability of statutory limitations, the non-applicability of the defense of 'obedience to superior orders', the

⁴ 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 IV. See fourth para. at Preamble.

⁵ ILC, Report on the Work of the Seventy-Third Session (2022), UN Doc. A/77/10, Chapter IV, Conclusion 23 and its commentary.

⁶ Vienna Convention on the Law of Treaties (adopted in Vienna on 23 May 1969; entry into force: 27 January 1980), 1155 UNTS 331.

⁷ Chambre Africaine Extraordinaire D'Assises, *Ministère Public c. Hisssein Habré*, Jugement, 30 mai 2016, para.1484. See, also, G. Mettraux, *International Crimes, Law and Practise*, Volume II: Crimes against Humanity, OUP 2020, 415.

⁸ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports 2012, para. 99.

universal application of these obligations whether in time of peace or armed conflict and the non-derogation under 'states of emergency'.⁹

b) Victims' right to justice, truth and reparation

Although the Preamble makes reference in general terms to 'the rights of victims', it does not recall the specific right of victims to justice, truth and reparation, as recognized, for example, in the Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED)¹⁰ and the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of International Human Rights Law and Serious Violations of International Humanitarian Law.¹¹

Since the Preamble summarizes the aims and purposes of the Draft Convention, and since any measure tackling crimes under international law should be victims-centered (see below section 9), it would be advisable to include a new paragraph emphasizing or recalling in full the right of victims to justice, truth and reparation as a fundamental component in the fight against impunity.

2. ON THE DEFINITION OF CRIMES UNDER INTERNATIONAL LAW – GENERAL CONSIDERATION

Amnesty International agrees in general with the approach taken by the drafters of replicating the definitions in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court (ICC) into the Draft MLA Convention. However, wherever international treaties or customary international law contain broader definitions than those in the Rome Statute, those definitions should be preferred and incorporated into the Draft MLA Convention.

It should be noted that the Rome Statute was adopted 25 years ago. The Draft MLA Convention poses an opportunity to remedy some of the compromises made by states at the time, and to reflect the progression of international law since. Amnesty International would like to note that in some respects, the provisions of the Rome Statute in fact constitute an exception rather than the rule as expressed in general international law and

⁹ C. Cheriff Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, Law and Contemporary Problems, Vol.59, No. 4, 63.

¹⁰ International Convention for the Protection of All Persons from Enforced Disappearance (signed 20 December 2006; entered into force 23 December 2010), 2716 UNTS 3.

¹¹ UNGA Res. 60/147 (16 Dec. 2005).

are the product of a specific negotiation process. There is no reason to only replicate these provisions without considering how improvements can be made to better enable the fulfilment of the object and purpose of the present Convention.

In particular, two of the crimes against humanity set out in Draft Article 2 (enforced disappearance and persecution) contain *jurisdictional thresholds* – as they do in Article 7 of the Rome Statute. These additional *jurisdictional thresholds* are not to be found in the crimes' definitions under customary international law. While states negotiating the Rome Statute may have wished to restrict the International Criminal Court's competence on some crimes, these *jurisdictional thresholds* are inappropriate for a treaty that is to be applied only by states parties to the present Convention in their own national courts and not by any international criminal court.

That said, Draft Article 2 could be improved without substantially altering the spirit of the Rome Statute definitions.

3. ON THE FLAWED DEFINITION OF THE CRIME AGAINST HUMANITY OF ENFORCED DISAPPEARANCE

Following the Rome Statute, draft Article 2(4)(i) defines enforced disappearance as follows:

“Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, *with the intention of removing them from the protection of the law for a prolonged period of time* (emphasis added)

The Draft MLA Convention should not include the restrictive language in Article 7 of the Rome Statute that defines an enforced disappearance as one requiring the perpetrator to have had the double intent to remove a person from the protection of the law and to do so for a prolonged period of time.

The removal of the person from the protection of the law is a natural result or, at most, a purely objective element, not requiring intent, of the crime of enforced disappearance as recognized in international law. Similarly, there is no requirement that the removal be 'for a prolonged period of time'. For example, when the period of time in which a person should already have been brought before a judicial authority for control of the lawfulness of his or her detention (as required by national and international law) has elapsed,

but the person has not in fact been brought before a judicial authority, there can be no question that the person has been placed outside the protection of the law, even if the period has not been 'prolonged'. Moreover, the initial stage of disappearance is often when the disappeared person is in an increased situation of vulnerability and at heightened risk of torture or extrajudicial execution. It is of utmost importance that the definition of this crime against humanity includes this period.

Drafters should note that the expression 'with the intention of removing them [the disappeared persons] from the protection of the law for a prolonged period of time',¹² is absent in the definition of the crime contained in the International Convention for the Protection of All Persons from Enforced Disappearance (CPED),¹³ as well as in the 1992 Declaration on the Protection of all Persons from Enforced Disappearance.¹⁴

Neither of these two additional elements should be retained in the adopted definition. Each poses an additional and unnecessary obstacle to the effective protection of victims and potential prosecutions.

4. ON THE FLAWED DEFINITION OF THE CRIME AGAINST HUMANITY OF PERSECUTION

Draft Article 2(3)(h) demands that persecution must be committed 'in connection with any act referred to in this paragraph or any crime covered by this Convention'. As the organization has previously explained in detail,¹⁵ the crime against humanity of persecution should be an autonomous crime, independent of any other crime against humanity.

a) The absence of the 'connection requirement' in major precedents to the Rome Statute and in subsequent texts

Unlike Article 2(3)(h) of the Draft MLA Convention and Article 7(1)(h) of the Rome Statute, most of their major precedents, like the 1945 Control

¹² Amnesty International, No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance, available at www.amnesty.org/en/documents/ior51/006/2011/en/, pp.5-6.

¹³ International Convention for the Protection of All Persons from Enforced Disappearance (adopted in New York on 20 December 2006; entry into force, 23 December 2010), 2716 UNTS 3.

¹⁴ Declaration on the Protection of all Persons from Enforced Disappearance, GA Res. 47/133 of 18 Dec. 1992.

¹⁵ See, Amnesty International, The problematic formulation of persecution under the Draft Convention on Crimes against Humanity, available at www.amnesty.org/en/documents/ior40/9248/2018/en/.

Council Law No.10,¹⁶ the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia,¹⁷ and the 1994 Statute of the International Criminal Tribunal for Rwanda,¹⁸ do not require any additional link or connection with another crime under international law for the crime against humanity of persecution.

Likewise, subsequent instruments to the Rome Statute, like the Statute of the Special Court for Sierra Leone,¹⁹ the Law on the Extraordinary Chambers in the Courts of Cambodia,²⁰ the Kosovo Law on Specialist Chambers and Specialist Prosecutor's Office,²¹ and the Statute of the African Court of Justice and Human Rights (as amended by the Malabo Protocol),²² do not require any additional connection whatsoever with other crimes for the crime against humanity of persecution.

Scholars have explained that the 'connection requirement' added in the Rome Statute just for the crime of persecution is a *jurisdictional threshold* to restrict the competence of the International Criminal Court, because

¹⁶ Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, done at Berlin, 20 December 1945, Article II(1)(c) ('(a) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated').

¹⁷ Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 5(h) ('Persecutions on political, racial and religious grounds').

¹⁸ Statute of the International Criminal Tribunal for Rwanda, Article 3(h) ('Persecutions on political, racial and religious grounds'). Statute of the Extraordinary Chambers in the Courts of Cambodia, Article 5.

¹⁹ Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, Article 2(h) ('Persecution on political, racial, ethnic or religious grounds;').

²⁰ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 5 ('persecutions on political, racial, and religious grounds').

²¹ Law No.05/L-053, Article 13(h) ('persecution on political, racial, ethnic or religious grounds;'), 3 Aug. 2015.

²² Malabo Protocol, adopted by the twentieth-third Ordinary Session of the Assembly, Malabo, Equatorial Guinea, 27 June 2014, Article 28C(1)(h) ('Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law'). The Malabo Protocol has not yet entered into force.

some delegations at the Rome Conference 'considered the notion of persecution to be vague and potentially elastic'.²³ The organization thinks this would be inappropriate here because the crime is defined in very precise terms ('the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity') thus excluding vagueness.

However, case law by other international criminal tribunals, many domestic implementations of the Rome Statute, as well as academic commentary and expert observations clearly show that such a threshold is neither demanded by general international law nor necessary for prosecutions on the national level.

b) Case law on persecution as a crime against humanity in international criminal tribunals

The International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Kupreškić* case, affirmed in the year 2000 that:

The Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal²⁴

And the Tribunal went on: 'A narrow definition of persecution is not supported in customary international law'.²⁵ A similar conclusion was reached in the *Kordić & Čerkez* case a year later.²⁶

In a similar sense, in 2014, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the *Nuon Chea and Khieu Samphan* case rejected the argument that a link must exist between the acts of persecution and any other underlying offence within the jurisdiction of the ECCC. Contrary to the submission of the accused, the ECCC found that, in accordance with the principle of legality, the Chamber is required to apply the definition of persecution as a crime against humanity as it existed under customary international law in 1975, which contains no requirement that persecution

²³ K. Kittichaisaree, *International Criminal Law* (Oxford University Press, 2002) 121.

²⁴ Judgment, *Kupreškić* (IT-95-16) 'Lašva Valley', Trial Chamber, 14 January 2000, § 581.

²⁵ *Ibid.*, § 615.

²⁶ Judgment, *Kordić & Čerkez* (IT-95-14/2), Trial Chamber, 26 February 2001, § 197.

be linked to another crime within the jurisdiction of that court.²⁷

c) National legislation defining persecution without requesting any additional connection

A number of states, when implementing the Rome Statute into national law, considered that no 'connection requirement' for the crime against humanity of persecution was necessary.

For example, the French *Code pénal* provides as a crime against humanity:

La persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international²⁸

The German Code of Crimes against International Law punish the persecution of 'an identifiable group or collectivity by depriving such a group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognized as impermissible under the general rules of international law'.²⁹

Burkina Faso,³⁰ Burundi,³¹ Congo (Republic of),³² Canada,³³ Czech

²⁷ Extraordinary Chambers in the Courts of Cambodia, *Nuon Chea and Khieu Samphan case*, 002/19-09-2007/ECCC/TC, Trial Chamber, 7 August 2014, §§ 431-432.

²⁸ France, Code pénal, Article 212-1(8).

²⁹ Germany, Code of Crimes against International Law, 2002, Section 7(10).

³⁰ Burkina Faso, Code pénal (2018), Article 422-1.

³¹ Burundi, Loi N°1/004 du 8 mai 2003, portant la répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre, Article 3(h).

³² Republic of Congo, Loi N°8-98 du 31 octobre 1998, Article 6(h).

³³ Canada, Crimes Against Humanity and War Crimes Act, 2000, S.4(3) and 6(3).

Republic,³⁴ Ecuador,³⁵ Estonia,³⁶ Finland,³⁷ Georgia,³⁸ Hungary,³⁹ Korea (Republic of),⁴⁰ Lithuania,⁴¹ Montenegro,⁴² Panama,⁴³ Portugal,⁴⁴ Serbia⁴⁵ and Spain,⁴⁶ are other examples of states which do not require a connection for persecution as a crime against humanity. These legislations further confirm that there is no connection requirement in customary international law.

d) Leading scholars and commentators' views

Leading scholars and commentators have stated that, for the crime against humanity of persecution, no additional link or connection is required under customary international law. For example, Professor Antonio Cassese was of the following view:

Article 7 [of the Rome Statute] is less liberal than customary international law with regard to one element of the definition of persecution. Under Article 7(1)(h), in order to fall under the jurisdiction of the ICC, must be perpetrated 'in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'. It would seem that under customary international law, no such link is required.

Professor Cassese went on to say: 'In addition to adding a requirement not

³⁴ Czech Republic, Criminal Code, Sec 401 (1) (e).

³⁵ Ecuador, Código Orgánico Integral Penal, Artículo 86.

³⁶ Estonia, Penal Code, § 89(1).

³⁷ Finland, Criminal Code, Chapter 11 (War Crimes and Crimes against Humanity), Section 3(5).

³⁸ Georgia, Criminal Code, Article 408.

³⁹ Hungary, Act C of 2012 on the Criminal Code, Section 143(h).

⁴⁰ Republic of Korea, Act on the punishment of crimes within the jurisdiction of the International Criminal Court, Article 9(7) (December 21, 2007, Act 8719).

⁴¹ Lithuania, Criminal Code, Article 100.

⁴² Montenegro, Criminal Code, Article 427.

⁴³ Código Penal de Panamá, 2007, Artículo 432(10).

⁴⁴ Portugal, Lei No.31/2004 de 22 de julho adapta a legislação penal portuguesa ao Estatuto do Tribunal Penal Internacional, Artigo 5(h).

⁴⁵ Serbia, Criminal Code, Article 371 (Crimes against Humanity).

⁴⁶ Spain, Código Penal, Artículo 607 bis (1)(1º).

provided for in general international law, Article 7 uses the phrase “in connection with” which is unclear and susceptible to many interpretations.⁴⁷

Professor Gerhard Werle holds a similar view. He explained:

The requirement of a connection was intended to take account of the concerns about the breadth of the crime of persecution. With this accessory design, the ICC Statute lags behind customary international law, since the crime of persecution, like crimes against humanity, has developed into an independent crime.⁴⁸

Other distinguished scholars and commentators have reached the same conclusion.⁴⁹

e) Amnesty International position on the formulation of the crime against humanity of persecution

Amnesty International considers that persecution is a separate crime against humanity, independent of the other crimes and, therefore, may be committed even in the absence of other crimes,⁵⁰ as long as the acts of the accused is part of a pattern of widespread or systematic crimes directed against a civilian population.⁵¹ The organization rejects the notion that persecution as a crime against humanity must be committed in connection

⁴⁷ A. Cassese, 'Crimes against Humanity', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.) (OUP, Oxford 2009) 376.

⁴⁸ G. Werle, *Principles of International Criminal Law* (TMC Asser Press, The Hague, 2009), 332.

⁴⁹ P. Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*, (Bruylant, L.G.D.J., Schulthess, 2006), 456 ('Cette exigence du Statut de la Cour pénale internationale s'éloigne de l'état actuel du droit international coutumier, qui n'exige plus un tel lien'); Y. Jurovics, 'Article 7 Crimes contre l'humanité', in J. Fernandez et X. Pacreau, *Statut de Rome de la Cour pénale internationale, Commentaire Article par Article* (Pedone, Paris 2012) 448 ('Cette exigence d'une corrélation avec un autre crime peut sembler dépassée. Elle constitue même certainement une restriction par rapport au droit international coutumier'); J.R.W.D. Jones and S. Powles, *International Criminal Practise*, third ed. (OUP, Oxford 2003) 216 ('The definition of 'persecution' in the Rome Statute, which maintains the hitherto defunct requirement at Nuremberg that 'persecution-type' crimes against humanity must be committed in connection with another act or crime under the Statute, has been held to be 'more restrictive than is necessary under customary international law' (Kordić and Čerkez Trial Judgment, para.197)').

⁵⁰ Amnesty International, *The International Criminal Court: Making the Right Choices*, Part I, p.45 (AI Index: IOR 40/01/1997, January 1997).

⁵¹ Judgment, *Duško Tadić* (IT-94-1-A), AC, 15 July 1999, § 248.

with other crimes under international law.

Prosecution of 'persecution' should be separated from other potential charges, and the Draft MLA Convention, which is aimed at national implementation, should follow the customary international law binding on all states, rather than the restrictive formulation specific to the Rome Statute.

5. ON THE UNNECESSARY OMISSION OF DISAPPEARANCES COMMITTED BY ARMED NON-STATE AGENTS IN ANNEX F

Annex F provides for the Draft MLA Convention to also apply to the crime of enforced disappearance, in respect of states parties which make a declaration at the time of ratification, acceptance or approval of or accession to the Draft Convention, or at any later time.

The second paragraph of Annex F is verbatim the text of Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), and provides:

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

However, Annex F does not include Article 3 of CPED, which criminalizes the same act but when 'committed by persons or groups of persons acting *without* the authorization, support or acquiescence of the State' (emphasis added).

Amnesty International recalls that conduct defined in Article 3 of CPED is also a crime under international law.⁵² Likewise, in international humanitarian law, the prohibition of enforced disappearance is applicable to all parties to the conflict, state and non-state actors.

In sum, there is no reason for drafters to relieve armed non-state actors from

⁵² See, Non-state actors and enforced disappearances – Observations to inform the Draft Statement by the Committee on Enforced Disappearances, 7 Feb. 2023, www.amnesty.org/en/documents/ior40/6426/2023/en/.

the provisions of the Draft MLA Convention when they are suspected of criminal responsibility for a disappearance.

6. ON THE RESTRICTIVE GEOGRAPHICAL SCOPE OF SOME PROVISIONS

Draft Article 43(1), applicable to Part IV (Extradition), provides:

The provisions of this Part shall apply to the crimes covered by this Convention where the person who is the subject of a State Party's request for extradition is present in the territory of the requested State Party.

Requesting that the person whose extradition is sought be 'present in the territory of the requested State Party' unnecessarily excludes those situations where the person concerned may be found 'in any place subject to the State Party's jurisdiction' – e.g., in an occupied territory, in a place of detention under the authority and responsibility of the requested state but outside its territory, in an embassy or consulate of the requested state, etc., or other places where the requested state exercises authority.

It is worth mentioning that some other provisions in the Draft MLA Convention containing a geographical scope of an obligation are not subject to such a limitation. For example, draft Article 6(1)(a) and 6(2) provide for the expression 'in any territory under its jurisdiction' and draft Article 11 'in the territory under whose jurisdiction', thus not restricting the scope of the obligations just to the territory of the state concerned.

7. ON THE GENERAL GROUNDS FOR REFUSAL OF MUTUAL LEGAL ASSISTANCE (DRAFT ARTICLE 27)

Improper grounds for refusal of assistance are one of the main problems with the currently existing legal framework around mutual legal assistance. This state becomes untenable when 'the most serious crimes of concern to the international community as a whole' (draft Preamble) are under consideration. Consequently, the Draft MLA Convention should limit grounds for refusal to the narrowest list possible, while ensuring that the rights of the victims, witnesses and the accused persons are always protected.

a) On pardon as a new ground for refusal of mutual legal assistance

New draft Article 27(1)(c) provides that mutual legal assistance 'shall be refused if ... [the] request concerns facts on the basis of which the prosecuted person has been finally acquitted, *pardoned* or convicted' (emphasis added).

As the organization has explained in detail before, and bar a few very exceptional cases, pardons may not apply to those suspected of criminal

responsibility for crimes under international law or gross human rights violations or to those found guilty for such crimes and violations.⁵³ Therefore, the addition of this new ground for refusal of mutual legal assistance should be removed.

b) On sovereignty, security, *ordre public* or other essential interests as grounds for refusal or mutual legal assistance

Draft Article 27(2)(b) reads as follows:

Mutual legal assistance may be refused if...

(b) The requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

The organization considers that it would be counterproductive if the vague and subjective set of grounds for refusal of mutual legal assistance of 'sovereignty, security, *ordre public* or other essential interests' were included in a Draft Convention designed to improve state cooperation with regard to crimes under international law and for which each state has a duty to investigate and prosecute (or extradite).

In addition, many states do not even include grounds for refusal as listed in draft Article 27(2)(b) in their national law or in bilateral treaties on mutual legal assistance and it is not found in many multilateral treaties.

In sum, drafters must guard against vague terms that are open to abuse and difficult to challenge. Mutual legal assistance should be facilitated by this Convention as much as possible, so exceptions such as grounds for refusal must be constructed as narrowly and specific as possible.

8. ON THE DEATH PENALTY

Amnesty International welcomes the provision whereby any extradition request made with regard to an offence punishable with the death penalty under the law of the requesting state party shall be refused by the requested state. However, draft Article 45(1)(b), *in fine*, permits the extradition request to proceed in those cases where the death penalty 'if imposed, will not be carried out'.

Amnesty International considers that the death penalty constitutes *per se* a violation of the right to life, as proclaimed in the Universal Declaration of Human Rights. In addition, the death penalty is the ultimate cruel, inhuman

⁵³ See, Amnesty International, Peru: IACHR: *Amicus Curiae* brief in the cases of "*La Cantuta*" and "*Barrios Altos*" vs. Peru (Monitoring compliance with judgments), February 2018, available at www.amnesty.org/es/documents/AMR46/7821/2018/en/.

and degrading punishment. Consequently, the organization recommends the deletion of the expressions 'or will not be carried out if imposed' in draft Article 27(1)(b) and 'or, if imposed, will not be carried out' in draft Article 45(1)(b).

The Human Rights Committee has made clear that assurances in this context must be 'credible and effective' and must already remove the threat of the imposition of the death penalty as such, not only of its implementation.⁵⁴ Furthermore, the Committee has demanded that:

When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards⁵⁵

Moreover, while assurances that the death penalty will not be sought or applied may be provided by the requesting state and allow the requested state to proceed with the extradition, they should not be seen as a sustainable response to the scourge of the death penalty nor be seen as a viable substitute or otherwise long-term alternative to the desirable and necessary total abolition of the death penalty everywhere, including in the requested state.⁵⁶

9. ON VICTIMS

Amnesty International has previously called on states to expand and strengthen Part VI of the Draft MLA Convention ('Victims, Witnesses, Experts and Others') to ensure victims' rights are embedded throughout the text where necessary.⁵⁷ In particular, international criminal law and international human rights law provides that victims have rights to: (i) effective protection; (ii) effective support; (iii) notice of their rights; (iv) timely notice of developments during the proceedings; (v) participate in proceedings; (vi) have legal representation during proceedings; (vii) obtain full and effective reparation; and (viii) have reparation awards enforced, including through tracing, freezing, seizing and forfeiting assets.

As discussed above, the Preamble to the Draft Convention should explicitly acknowledge the rights of victims to truth, justice and reparation.

⁵⁴ Human Rights Committee, GC No. 36 on Article 6: Right to Life, UN Doc. CCPR/C/GC/36, para 34.

⁵⁵ Human Rights Committee, GC No. 36, para 30.

⁵⁶ Human Rights Committee, GC No. 36, para 50.

⁵⁷ Amnesty International, Key Observations and Recommendations, pp.8-10.

a) The right to full and effective reparations

A significant omission in the current Draft Convention concerns the victims' right to full and effective reparations. The current draft Article 75(1) provides for victims' right to 'seek reparation' [emphasis added], rather than a 'right to' reparation.

The amended formulation is crucially important, as it articulates victims' concrete rights to access remedy and reparation. Indeed, the right of victims to an effective remedy, including reparations, is a well-established right in international human rights law and international humanitarian law, and is enshrined in various international instruments and treaties.⁵⁸ In the organization's view, maintaining a provision which would only provide for a right to 'seek' reparations, rather than a right to reparations, risks a regression in international law on victims' rights.

It is also noted that the Draft MLA Convention cites to the ILC Draft Articles on Crimes against Humanity in relation to the five forms of reparation, at footnote 151.⁵⁹ The organization proposes that the Draft Convention instead cites to the Basic Principles (Part IX), which provides a more detailed explanation of the types of reparation.⁶⁰

b) On 'material and moral damages'

Draft Article 75(1) specifies reparation for 'material and moral damages', consisting of the five forms of reparation as listed in the Basic Principles – restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.

However, in the Basic Principles, material and moral damage are referenced specifically in relation to compensation only. It is incoherent, as well as potentially limiting, to restrict the right to reparation to material and moral damage – which is one of five economically assessable types of damage for the purpose of one form of reparation (*compensation*) – when the article

⁵⁸ These include, among others, Article 8 of the Universal Declaration of Human Rights; Article 2 of the International Covenant on Civil and Political Rights; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances; Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 75 of the Rome Statute of the International Criminal Court; Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land; and Rule 150 of ICRC Customary International Humanitarian Law.

⁵⁹ Draft MLA Convention, footnote 151 reads as follows: 'Based on ILC Draft Articles on Crimes against Humanity Article 12(3)'.

⁶⁰ UNGA Res. 60/147 (16 Dec. 2005), Sec. IX. Reparation for harm suffered.

relates to the five forms of reparation.

c) On the right to complain or report and the right to be informed

Draft Article 9 now provides for the right of any person who alleges that crimes covered by this Convention have been or are being committed has the 'right to report' to the competent authorities. In relation to the 'right to report' to the competent authorities, other conventions which include such rights – to complain or to report – also include obligations that, following a complaint, 'a case [will be] promptly and impartially examined by [...] competent authorities' or that, having received a report, the competent authorities 'shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation'.

With these examples in mind, the current formulation of the right to report could be further strengthened, with reference to the requirements of promptness and impartiality of examination of the complaint. Draft Article 9 should also more clearly provide that, having examined a complaint, where necessary, and without delay, a thorough and impartial investigation into the allegations shall be undertaken.

Further, draft Article 9, or a separate article, should expressly provide that states parties must verify the facts of the reports they receive, and inform victims of the progress and results of the examination of the complaint and any subsequent investigation and include a specific right to the verification of the facts and full and public disclosure of the truth- in order to ensure that states fulfil their obligation to investigate and prosecute in fair trials and that victims have access to effective remedies – which includes rights to the verification of facts and full and public disclosure of the truth (where appropriate having considered issues of further harm and the interests of victims).

d) On legal representation

Draft Article 75 should provide, like Rule 16 of the Rules of Procedure and Evidence of the International Criminal Court (Responsibilities of the Registrar relating to victims and witnesses), that whenever the interests of victims may be affected, they should be provided with the right to legal representation.

e) On assets recovery for the purpose of reparations within an international criminal proceeding

As Amnesty International and several other non-governmental organizations have said in the past, the provisions on assets recovery in the Draft

Convention may be considerably improved.⁶¹

Draft Article 41 ('Restitution and confiscation') only enables the confiscation of assets that are the proceeds of crimes covered by the Convention, or which represent the value of such proceeds, or which are destined for use in such crimes. However, where those found guilty of criminal responsibility for crimes under international law have acquired significant wealth through wide-reaching systems of corruption and abuse, it may be difficult, or even impossible, to link their wealth directly to their crimes, to prove that it is the 'proceeds of crime' or 'destined for use in such crimes'. Accordingly, it is critical that the confiscation or forfeiture of assets under the Draft MLA Convention not be limited to the 'proceeds of crime' but encompass any assets that can be legally secured for the purposes of reparations including, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶²

Likewise, draft Article 41 does not provide for the confiscation of assets for the purpose of providing reparation to victims. Rather, it is limited to 'restituting' the proceeds of crime to the victim and/or its prior legitimate owner. The ordinary meaning of 'restitution' is restoring something lost or stolen to its proper owner. A provision premised on restitution would not amount to meaningful reparation in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation. Restitution is only one of the five forms of reparation outlined in the Basic Principles.

It should also be noted that enabling the recovery of any assets (not just those connected to the crimes) for the purpose of reparations (not just restitution) would be consistent with the domestic criminal procedures of some states, which allow for compensation orders to be made against the defendant to the victim(s).

The current draft does not reference the rights of defendants to due process in the context of asset recovery procedure. To ensure the integrity of the Convention, the organization would urge participating states to ensure that these are explicitly recognised.

⁶¹ See, February 2022 submission: <https://redress.org/wp-content/uploads/2022/02/2022.02.23-MLA-Initiative-Submission-Asset-Recovery-.pdf>

⁶² It should also be noted that the proposed language in Article 41 reflects a regression from the position of the International Criminal Court. The ICC Appeals Chamber has held that '[T]here is no requirement that property and assets subject to a Chamber's request for cooperation under articles 57(3)(e) and 93 (1)(k) of the Statute be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court', Judgment on the Appeal of the Prosecutor against the Decision of [REDACTED], ICC-ACRed-01/16, 15 February 2016, I. 1.

Finally, draft Article 75(3) on ‘Victims’ rights’ requires states parties (to the greatest extent possible within their domestic legal systems) to provide reparations to victims in accordance with a judgment or order in criminal proceedings of the requesting State Party, by complying with the provisions in Article 41. It is unclear how a requested state could provide reparations to the victim, via the requesting State, relying on a provision which exclusively covers restitution. Addressing the matters in relation to draft Article 41 outlined above would remove this contradiction.

IV. RECOMMENDATIONS

Amnesty International makes the following recommendations to states participating in the Diplomatic Conference, namely:

- The Preamble should recall that the prohibition of genocide, crimes against humanity, war crimes, torture and enforced disappearance are peremptory norms of general international law (*jus cogens*);
- The Preamble should incorporate a new paragraph recalling the right of victims to justice, truth and reparation;
- The definition of the crime against humanity 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' from draft Article 2(4)(i);
- The formulation of the crime against humanity of persecution should remove the expression 'in connection with any act referred to in this paragraph or any crime covered by this Convention' contained in Draft Article 2(3)(h) and codify the formulation of the crime against humanity of persecution as provided by customary international law;
- Annex G should also include Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance, which criminalizes 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' (emphasis added);
- The restrictive expression 'in the territory of' in draft Article 43(1) should be replaced by 'in any place subject to the State Party's

jurisdiction' or a similar one;

- The term 'pardoned' should be deleted from draft Article 27(1)(c);
- Drafters should entirely remove draft Article 27(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');
- The expressions 'or will not be carried out if imposed' in draft Article 27(1)(b) and 'or, if imposed, will not be carried out' in draft Article 45(1)(b) should be deleted from the Draft Convention;
- Draft Article 9 should expressly provide that states parties must ensure that any complaint by victims shall be examine in a prompt and impartial manner and that victims shall be informed of the progress and results of the examination of the report or complaint and any subsequent investigation;
- Draft Article 75(1) should be amended to provide that victims have a 'right to' reparations rather than a right 'to seek reparation' - with the word 'seek' deleted. The organization suggests the following model text:
 - 'Each State Party shall take the necessary measures to ensure in its legal system that the victims of a crime covered by this Convention have the right to reparation, on an individual or collective basis, consisting of but not limited to, as appropriate, restitution; compensation (including material and moral damages); satisfaction; rehabilitation; cessation and guarantees of non-repetition insofar as [...]';
- Draft Article 75 should clarify that, whenever the interests of victims may be affected, they should be provided with the right to legal representation;
- Draft Article 41 should be expanded to include:
 - Any assets that can be legally confiscated for the purpose of reparation, not just the proceeds of crime, property representing such proceeds, or property destined to be used in such crimes;
 - Asset confiscation for the general purpose of reparation - not only restitution;
 - Priority consideration to transferring of assets for the purpose of reparations over other potential uses of that property or assets, without prejudice to the rights of *bona fide* third parties;

- Defendant rights to due process in the context of asset recovery procedure for the purpose of reparations.

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