



Comments on the Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes

September 2020

Submitted on behalf of the Crimes Against Humanity Initiative Steering Committee

I. Introduction

The Mutual Legal Assistance (MLA) Initiative emerged in conjunction with discussions during the Whitney R. Harris World Law Institutes' Crimes Against Humanity Initiative.¹ Such an initiative was briefly discussed within Experts' Meetings. The MLA Initiative subsequently took a separate path from the effort to negotiate a new global crimes against humanity treaty, which has proceeded through the U.N. International Law Commission (ILC). The MLA Initiative now exists outside the U.N. system under the direction of a Core Group of six States. It has received support from 74 States.²

We have carefully followed the work of the MLA Initiative and are pleased to see that the current text includes many improvements over early versions. We respectfully submit these comments for further consideration.

II. The Relationship between a Crimes against Humanity Convention and the MLA Initiative

The Crimes Against Humanity Initiative was launched at Washington University in St. Louis School of Law in 2008 to study the need for a comprehensive convention on the prevention and punishment of crimes against humanity. It consulted more than 300 experts and published the world's first draft convention on the prevention and punishment of crimes against humanity in 2010.³ The UN Sixth

¹ The work of the *Crimes Against Humanity Initiative* is described in L.N. Sadat (Ed.), *Forging a Convention for Crimes Against Humanity*, 2nd ed., Cambridge, Cambridge University Press, 2013.

² See Republic of Slovenia, MLA Initiative, available at: <https://www.gov.si/en/registries/projects/mla-initiative/> (last visited 21 September 2020).

³ The Crimes Against Humanity Initiative published a *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity* in English and French in August 2010, available at:

(Legal) Committee began to formally engage with the topic after the International Law Commission (ILC) added “crimes against humanity” to its long-term programme of work in 2013.⁴ State support for a new convention on crimes against humanity grew with each successive report of the ILC introducing new draft articles and commentaries.⁵ By 2017, when the First Reading of a complete set of Draft Articles was submitted to the Sixth Committee, only four States out of fifty-five – China, India, Iran, and Sudan – questioned the need for the ILC’s proposal. In 2019, when the ILC presented its final text of Articles on Prevention and Punishment of Crimes Against Humanity to the UN General Assembly, 70% of States commenting supported the adoption of a new convention on the basis of the ILC’s Draft Articles. Only three States – China, India, and Vietnam – demurred. The ILC’s project will again be addressed by the UN Sixth Committee in October 2020.

During the most recent Sixth Committee discussions of the ILC’s Articles on Prevention and Punishment of Crimes against Humanity, nearly all States that commented on both the crimes against humanity work and the MLA Initiative saw the two as complementary (including all five of the MLA Initiative’s core sponsors that commented).⁶ The Russian Federation stated that “the simultaneous realization of two projects on a similar topic may be complicating, and in the end neither of them may be crowned with success.”⁷ Cyprus and Greece recognized that the two projects could complement each other, but encouraged further clarification to avoid duplication or confusion, with Greece stating that “the two projects can indeed become mutually complementary only if their respective scope and objectives become clearly distinct.”⁸ Portugal and Slovakia urged other States not to use the MLA Initiative as an excuse to not support the elaboration of a new convention on crimes against humanity.⁹ We agree, and hope that further work on the MLA Initiative will take into account the evolution of the crimes against humanity treaty.

<http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/convention-text/>. *The Proposed Convention* is now available in Arabic, Chinese, German, Portuguese, Spanish and Russian. *Id.*

⁴ L.N. Sadat, ‘A Contextual and Historical Analysis of the International Law Commission’s 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity’, *Journal of International Criminal Law*, Vol. 16, No. 4, 2018, pp. 683-704.

⁵ Whitney R. Harris World Law Institute, Compilation of Government Reactions to the UN International Law Commission’s Project on Crimes Against Humanity During UN Sixth Committee Meetings: 68th Session (2013) – 74th Session (2019), available at: <https://law.wustl.edu/wp-content/uploads/2020/08/Compilation-of-6th-Committee-Responses-to-CAH-2013-2019.pdf>.

⁶ Argentina, Belgium, the Netherlands, Senegal, and Slovenia all made statements to that effect. Other States that made this point include Bulgaria, Cyprus, Portugal, and Slovakia. For an analysis of how States have commented on the relationship between the ILC’s work on crimes against humanity and the MLA Initiative over the past seven years, see Leila Sadat & Madaline George, An Analysis of State Reactions to the ILC’s Work on Crimes Against Humanity: A Pattern of Growing Support, *African Journal of International Criminal Justice*, Vol. 6 (2020), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684796.

⁷ Statement by Russia, 74th Session of the General Assembly, 6th Committee, under agenda item 79, at 3 (30 October 2019) (unofficial translation).

⁸ Statement by M. Telalian, 74th Session of the General Assembly, 6th Committee, under agenda item 79, at 2-3 (29 October 2019).

⁹ Statement by S. Vaz Pato, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 8 (30 October 2019); Statement by M. Špaček, 74th Session of the General Assembly, Sixth Committee, under agenda item 79, at 1 (28 October 2019).

III. Specific Comments and Recommendations on Proposed Articles

Preamble

As noted by the Crimes Against Humanity Initiative Steering Committee in its comments on the ILC's Draft Articles on Crimes against Humanity,¹⁰ the preamble is a critical element of any treaty. The preamble guides courts, tribunals, academics, and government officials in understanding the instrument's 'object and purpose', which will be the basis of interpreting any ambiguous language.¹¹ Thus, it is important that the preamble not only set forth the reasons for the convention's adoption, but also situate it as part of a system of international criminal justice. The preamble ties into the expressive function of international criminal law, allowing the reader to understand the important social values the treaty enshrines and protects.¹²

We are pleased that the Draft Preamble now contains (since its second iteration in 2019), an explicit reference to the Rome Statute. This signals the intended complementarity of the Draft Articles with the Rome Statute, which has been a major preoccupation of States and civil society as this new contemplated treaty has taken shape. We note, however, that there is no reference to the *jus cogens* nature of these core crimes. We respectfully suggest it would be added to the text. Doing so would emphasize the peremptory and non-derogable character of the prohibitions.

We also note the inclusion of a clause about non-interference with State sovereignty.¹³ It is found in clause 8 of the Rome Statute's Preamble ('nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State') and will likely provide some reassurance to States. It may be useful to add the words 'in any manner inconsistent with the United Nations Charter'.

Definition of Crimes Against Humanity (Draft Article 2(3))

We are pleased that the draft MLA Convention includes a definition of crimes against humanity that is consistent with Article 7 of the Rome Statute as well as the ILC's Draft Articles on Prevention and Punishment of Crimes against Humanity. There are good reasons to take this approach even though several participants in our project (and even Members of the ILC) have expressed varying levels of frustration with the text of Article 7.¹⁴ After extensive discussion, we concluded that a new convention

¹⁰ Crimes Against Humanity Initiative Steering Committee, Whitney R. Harris World Law Institute, *Comments and Observations on the 2017 Draft Articles on Crimes against Humanity as Adopted on First Reading at the Sixty-ninth Session of the International Law Commission*, 30 November 2018, available at <http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2019/02/HarrisInstituteCrimesAgainstHumanityILCCommentsNovember302018.pdf> [hereinafter '*Crimes Against Humanity Initiative Steering Committee, 2018 Comments and Observations*'], at p. 3.

¹¹ Art. 31(1), (2) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

¹² See D. M. Amann, 'Group Mentality, Expressivism, and Genocide', *International Criminal Law Review*, Vol. 2 No. 2, 2002, pp. 92-143.

¹³ "Recalling the principles of sovereign equality and territorial integrity of States and that of non- intervention in the internal affairs of other States."

¹⁴ They criticized *inter alia* the 'civilian population' requirement, the policy element, and the definitions of gender crimes. L.N. Sadat, 'A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of

would either have to leave the definition open, along the lines of Article 5 of the Convention on Enforced Disappearance ('crimes against humanity as defined in applicable international law') or essentially track the Rome Statute definition, which was negotiated by 165 States and has now been adopted by 123. We agree with the drafters of the MLA Initiative that it is most sensible to build upon the Rome Statute for this and many other elements of a new inter-State convention in order to solidify and build upon the 'Rome consensus'. In implementing the new treaty, however, States may vary the terms of the text, which can be seen as a 'floor' rather than a 'ceiling'. Thus, they need not 'supercopy' Draft Article 3 verbatim in order to benefit from and participate in the treaty regime. States have often done this with other international criminal law conventions, including the Rome Statute.¹⁵

There are certain elements of Article 7 which are not found in customary international law and are particularly tied to the Rome Statute's negotiation.¹⁶ To that end, we are pleased that the MLA Initiative has removed Rome Statute Article 7(3)'s definition of 'gender' which was inserted as part of a negotiating compromise and has been repeatedly challenged. Indeed, as many Members and States noted, even the ICC Prosecutor herself has adopted a different approach.¹⁷

The second change is the language in Draft Article 2(3)(h) (persecution) which speaks of persecutory acts 'in connection with any act referred to in this paragraph or any crime covered by this Convention'. This only partially tracks Article 7(1)(h) which refers to 'any crimes with the jurisdiction of the Court', which now includes the crime of aggression. While this is more expansive than the ILC's Draft Article 3(1)(h), which only covers persecutory crimes committed in connection with another crime against humanity, the MLA Initiative's codification provides for even narrower jurisdiction than the Rome Statute. The codification eliminates persecutory campaigns linked to some war crimes, as well as those linked to genocide and the crime of aggression. Most major precedents¹⁸ do not include the Rome

Crimes Against Humanity', in L.N. Sadat (ed.) *Forging a Convention for Crimes Against Humanity* (2nd ed., Cambridge University Press, 2013), 323-344, para. 27.

¹⁵ See, e.g., French Penal Code, C. PÉN. Art. 212-1 (Fr.) (requiring 'a concerted plan' to prove criminal responsibility for crimes against humanity, as opposed to a 'State or organizational policy'); French Penal Code, C. PÉN. Art. 211-1 (Fr.) (including political groups in the definition of genocide); Canadian Criminal Code, Canada: Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24), 2000 (including multiple textual variations, such as omitting the requirement that persecution be committed 'in connection with' another crime under the statute); Spain: Penal Code arts. 607-616 bis, B.O.E., 24. November 1995, revised 24 April 2015 (Sp.) (including political groups in the definition of genocide). See also A.J. Carrillo & A.K. Nelson, 'Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction', *George Washington International Law Review*, Vol. 46, 2014, pp. 481-530 (showing differences between national laws on crimes against humanity).

¹⁶ During our meetings and subsequent seminars and conferences on the Commission's work many proposals were advanced to remove aspects of the Rome Statute definition that seem tied to Article 7's status as a crime defined, by its own terms, '[f]or the purpose of this Statute'.

¹⁷ See, e.g., V. Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court', *International Feminist Journal of Politics*, Vol. 16, 2014, pp. 563-580; Office of the Prosecutor of the International Criminal Court, 'Policy Paper on Sexual and Gender-based Crimes' (2014), available at: www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-BasedCrimes--June-2014.pdf.

¹⁸ See, e.g., Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, done at Berlin, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Art. II(1)(c); Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 5(h); Statute of the International Criminal Tribunal for Rwanda, Art. 3(h).

Statute requirement that persecution must be linked or connected to another international crime, as do instruments adopted after the Rome Statute.¹⁹

The linkage requirement is also inconsistent with the case law of the international tribunals²⁰ and the national legislation of many States.²¹ It is largely understood that the 'in connection with' requirement was included in the Rome Statute as a jurisdictional threshold.²² Along with several governments, including Chile, France, Peru, Sierra Leone and Uruguay,²³ we recommended the deletion of this language from the ILC's Draft Articles and the codification of the crime of persecution as an independent crime, following customary international law.²⁴ Alternatively, ILC Commissioner Grossman has previously suggested that the 'in connection with language' refers only to *acts* of similar gravity, rather than specific crimes. However, it seems simpler to delete the entire last phrase. Although a concern about 'gravity' has been advanced as warranting the retention of the 'in connection with' language, none of the comments invoking this difficulty have cited to any case in which the prosecution of persecution at a national or international court was actually problematic. Indeed, the cases cited from the ICTY and ICTR – which do not have the requirement that persecution be linked to other crimes – have all been cases in which persecution was clearly a serious crime. Thus, the concern about ensuring that the crime of persecution is not too broad appears speculative when compared to the actual experience of the past 25 years. As Sierra Leone noted in its comments to the ILC on crimes against humanity,²⁵ the ILC's work on this question has recognized the need to 'delink' persecution from other international crimes.

¹⁹ See, e.g., 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, Art. 2(h); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 5; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII) (27 June 2014), Art. 28C(1)(h).

²⁰ See, e.g., Prosecutor v. Kupreškić, Judgment, Case No. IT-95-16, 14 January 2000, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, paras. 580-581, 615 ('[Rome Statute] Article 7(1)(h) is not consonant with customary international law. ... The Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. ... A narrow definition of persecution is not supported in customary international law.').; Prosecutor v. Nuon Chea & Khieu Samphan, Case No. 002/19-09-2007/ECCC/TC, 7 August 2014, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, paras. 431-432 (rejecting the argument that a link must exist between the acts of persecution and another underlying offence within the jurisdiction of the ECCC).

²¹ See, e.g., Canada, Crimes Against Humanity and War Crimes Act, 2000, S.4(3) and 6(3); Republic of Congo, Loi N°8-98 du 31 Octobre 1998, Article 6(h); French Penal Code, C. PÉN., Art. 212-1(8); Germany, Code of Crimes against International Law, 2002, Section 7(10); Spain, Código Penal, Artículo 607 bis (1)(1°).

²² See, e.g., K. Kittichaisaree, *International Criminal Law* (Oxford University Press, 2002), at p. 121; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press, 2016), at pp. 194-202.

²³ Sean Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/725, 18 February 2019, para. 64.

²⁴ *Crimes Against Humanity Initiative Steering Committee, 2018 Comments and Observations*, *supra* note 10, at pp. 5-6.

²⁵ Crimes Against Humanity: Comments and Observations received from Governments, International Organizations and Others, International Law Commission, Seventy-first session, Geneva, 29 April -7 June and 8 July-9 August 2019, U.N.G.A., Doc. No. A/CN.4/726 [hereinafter 'Crimes Against Humanity Comments and Observations'], at p. 47.

Other definitional issues that were raised by many States and Members of the Commission during the negotiation of the ILC's definition of crimes against humanity include the policy element,²⁶ the definition of enforced disappearance,²⁷ the definition of deportation,²⁸ and the notion of civilian population.²⁹ The relevant comments are thoughtful and important. It may be useful for the MLA Initiative to consider these comments, while at the same time keeping in mind the ultimately goal of complementarity between the ILC treaty and MLA Initiative.

Definition of War Crimes (Draft Article 2(6))

We respectfully question the MLA Initiative's decision to diverge from Article 8 of the Rome Statute in its definition of war crimes. We note that this decision was amended in 2019 to delete the paragraph covering weapons that cause "superfluous injury or unnecessary suffering or which are inherently indiscriminate." This omission was retained in the most recent version of the MLA Convention. We note that the Annex does include several specific weapons that would meet that definition, although the Annex requires individual ad-hoc agreements between States to apply its terms, creating different legal standards. We therefore recommend faithfully transposing the definition of war crimes into Article 2 of the Draft Convention, rather than separating the definition of a particular war crime out into an Annex. This would also have the benefit of not requiring further amendments to keep track of technological developments.

The Crime of Aggression (including Annex H)

We recommend that the MLA Convention should include the crime of aggression in the main body of the treaty. Currently, the crime of aggression is included in Annex H as a crime for which States can optionally extend their obligations under Article 3 through individual *ad-hoc* agreements, resulting in potentially differing legal standards. It seems paradoxical that the crime of aggression is placed in an Annex when the other Rome Statute crimes are included in Article 2. The crime of aggression is defined as one of the most serious crimes of concern to the international community as a whole by the Rome Statute. We would encourage the drafters to include aggression as a core crime, befitting its recognized status as the "supreme international crime."

Criminalization (Article 4) and Liability of Legal Persons (Draft Article 8)

We commend the MLA Initiative for its articles on criminalization and liability of legal persons, which are vital components in fighting impunity for atrocity crimes. Article 4(1) requires States Parties to "take the necessary measures to ensure that the crimes as defined in article 2, paragraphs 2 to 5, as well as any other international crime it applies this Convention to in accordance with article 3, paragraph 1, constitute offences under its criminal law." Article 8 requires States Parties to "adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal

²⁶ *Ibid.*, at p. 34 (Chile); *ibid.*, pp. 39-40 (Estonia). *See also* Mexico, Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting, U.N. Doc. A/C.6/70/SR.21, paras. 52-54; Mexico, Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting, U.N. Doc. A/C.6/72/SR.18, para. 110.

²⁷ Crimes Against Humanity Comments and Observations, *supra* note 25, at p. 54 (Uruguay); *ibid.*, p. 30 (Argentina); *ibid.*, pp. 34-35 (Chile); *ibid.*, p. 36 (Costa Rica); *ibid.*, p. 43 (Peru); *ibid.*, p. 44 Sierra Leone. *See also ibid.*, p. 136 (OHCHR); *ibid.*, pp. 148-150 (United Nations Working Group on Enforced Disappearances).

²⁸ *Ibid.*, at p. 34 (Chile). *See also ibid.*, p. 135 (International Organization for Migration).

²⁹ *Ibid.*, at pp. 44-45 (Sierra Leone); *ibid.*, pp. 39-40 (Estonia).

persons for participation” in the crimes covered by the Convention. Although some have argued that the ILC’s Draft Article 6 on criminalization is too complex in its articulation of modes of liability and forms of criminal participation, we note that these provisions are entirely absent from the MLA Initiative’s text.

If the drafters opt to incorporate modes of liability into the text of the MLA Convention, we recommend that language be added to cover some form of common purpose liability, whether it be labeled ‘common purpose’, ‘joint criminal enterprise’, or ‘conspiracy.’ This is particularly important given the retention of the ‘policy’ element of crimes against humanity, which suggests that the crimes will almost always be committed through concerted action, and is reminiscent of the gap in the ICTY and ICTR Statutes which caused those tribunals to interpret ‘commission’ as including joint criminal enterprise liability. The Genocide Convention refers to ‘conspiracy’; the Convention for the Suppression of Terrorist Bombings refers to ‘common purpose’ liability. We also recommend that incitement is added as an explicit mode of liability, noting that it is absent in the ILC’s Draft Articles on crimes against humanity.

Jurisdiction (Draft Article 5)

We commend the MLA Initiative for the text of Article 5 and are also pleased that it was amended in 2020 to cover habitual residents.

***Aut dedere, aut judicare* (Draft Article 7)**

We are pleased that the MLA Initiative chose to follow the example of the ILC to include a reference to prosecutions before international criminal tribunals in relation to the *aut dedere, aut judicare* provision in Article 7. This so-called “triple alternative” of surrender to an international tribunal for the fulfillment of a State’s obligation under this article is a vital provision of a future Convention.

Provisional Measures (Draft Article 19)

We welcome the inclusion of Article 19 on provisional measures, which establishes that States Parties may request that provisional measures be taken for the purpose of preserving evidence, maintaining a situation, or protecting endangered legal interests. We are particularly pleased at the breadth of this provision, covering the preservation of evidence generally. This is more extensive than the ILC’s Draft Article 9 on crimes against humanity (covering provisional measures), which is limited to taking people into custody and does not cover evidence more generally. Given the difficulties national authorities and international courts have had in gathering and presenting evidence of atrocities, and the incentives for individuals to destroy as much evidence as possible,³⁰ this is a vital step in increasing accountability.

Grounds for Refusal (mutual legal assistance) (Article 21) & Grounds for Refusal (extradition) (Draft Article 35)

We commend the MLA Initiative for re-inserting, as a mandatory reason for refusal to extradite or provide mutual legal assistance, instances when a request has been made for the purpose of

³⁰ The ICC’s Kenya investigation is a case in point.

prosecuting or punishing a person on account of their 'political opinion'.³¹ An exemption to extradition is commonplace for "political offenses", however leaving this to national courts' interpretations results in differing standards. A number of States have modified their extradition treaties to explicitly exclude certain categories of offenses³², and have inserted text into treaties specifying that they are not political offenses.³³ Such language is included in Draft Article 1(1), however we are pleased by the additional language concerning persecution on political opinion. This language will cover not only political offenses, but other crimes which are prosecuted solely to discriminate on the grounds of political opinions.

We do, however, recommend that the MLA Initiative consider punishment or discrimination on account of "sexual orientation and gender" as a ground upon which States shall refuse mutual legal assistance and extradition in both Draft Article 21 and Draft Article 35. Although discrimination and punishment on the basis of "sex" has in some instances been interpreted to cover sexual orientation and gender discrimination, the explicit inclusion of these grounds would leave less room for interpretation.

The MLA Initiative should consider adding as a mandatory ground for refusal to extradite an exception for States that impose the death penalty for the crimes for which the requested person is being sought. We note that Article 4(2), which requires States Parties to "make these crimes punishable by appropriate penalties which take into account their grave nature," does not explicitly preclude the possibility that States apply the death penalty to such offences. There is a growing international consensus against application of the death penalty, even for the most heinous crimes. The international community has adopted several instruments that ban the use of the death penalty, such as the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocols No. 6 and 13 to the European Convention on Human Rights.

Transit (Draft Article 45)

Article 45(5) refers to the need to avoid the transit of extradited persons through any territory where there is a high risk of his or her rights being violated for reasons of his or her race, sex, religion, nationality, ethnic origin or other grounds universally recognized as impermissible under international law. For the same reasons articulated above, we recommend the explicit inclusion of "gender and sexual orientation" to this list.

Definition of victims (Draft Article 60)

We commend the MLA Initiative for including a definition of victim in Article 60. Although the ILC Draft Articles do not contain a definition of victim, several States and NGOs felt strongly that a

³¹ We note that it was included in the 2018 MLA Draft Articles but removed in 2019, before appearing again in the 2020 MLA Draft Articles.

³² *E.g.*, Spain Extradition Treaty-Supplementary with the United States, signed 9 February 1988, entered into force 2 July 1993.

³³ *See generally* A.C. Petersen, 'Extradition and the Political Offense Exception in the Suppression of Terrorism', *Indiana Law Journal*, Vol. 67, No. 3, 1992, pp. 767-796.

definition should be included.³⁴ Inclusion of a definition provides clarity and avoids overly restrictive interpretations.

There is no agreed upon definition of victim in comparable treaties. Draft Article 60 is less specific than that elaborated by the U.N. Committee Against Torture,³⁵ yet is broader than that of the Enforced Disappearances Convention.³⁶ As such, we recommend that the drafters consider adding language to the effect that this definition of 'victim' is 'without prejudice to any broader definition provided for in international or national law'. The drafters may also consider whether the definition of victim should specifically address families, as it does in the Draft Business and Human Rights Treaty, which states that

“victims” shall mean any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse as defined in Article 1 paragraph 2 below. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim.³⁷

The MLA Initiative may also wish to consider Article 60's limitation to “natural” persons in the definition of victim. This seems to be a feature solely of the ICC Rules of Procedure and is lacking from other international instruments. It has been recommended for removal by NGOs such as REDRESS³⁸. The current draft MLA convention also omits a subsection of the Rules of Procedure which deals with organizations or institutions that suffer harm to their property. Given the above, we recommend that the drafters consider this issue in more depth.

Right to Reparations (Draft Article 60(2))

³⁴ See Sean Murphy (Special Rapporteur on Crimes Against Humanity), Fourth Report on Crimes Against Humanity, para. 222, U.N. Doc. A/CN.4/725 (2019).

³⁵ The Committee against Torture has defined the victims of an act of torture or ill-treatment as “persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention.” Committee Against Torture, General Comment No. 2, Implementation of art. 2 by States Parties, para. 3, U.N. Doc. CAT/C/GC/2, 24 January 2008.

³⁶ Article 24 of the Enforced Disappearances Convention stated that “[f]or the purposes of this Convention, “victim” means the disappeared person and any individual who has suffered harm as the *direct result* of an enforced disappearance.” (emphasis added). International Convention for the Protection of All Persons from Enforced Disappearance art. 24, adopted by General Assembly Resolution A/RES/61/177 on 20 December 2006 at New York, entered into force on 23 December 2010.

³⁷ Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, *Revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* (2019), available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf, article 1(1).

³⁸ REDRESS, *Enhancing Victims' Rights in Mutual Legal Assistance Frameworks - Recommendations for the Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes Redress*, 1 May 2020, pp. 19-20, available at: <https://redress.org/wp-content/uploads/2020/05/PolicySubmission750a.pdf> (last visited 21 September 2020).

We are pleased by the inclusion of Article 60(2) which establishes a right for victims to obtain reparations and which tracks the ILC Draft Articles on crimes against humanity entirely. Reparations are a fundamental part of remedying atrocities, as reflected by their inclusion in the Rome Statute. We welcome the broad language used, particularly the recognition of moral damages, the ability to obtain reparations individually or collectively, and the wide range of forms of reparation recognized by the draft.

Protection of victims, witnesses and experts (Draft Article 59)

We welcome the inclusion of a right to complain in Article 59. We note that the right to complain exists in other international treaties³⁹ and are pleased that the MLA strengthens the rights of victims. NGOs have advocated for an expansion of victims' rights more broadly, to include other rights guaranteed under international law⁴⁰, and we would encourage the drafters to consider this as well. Both the Torture Convention and the Enforced Disappearances Convention specify that a State must "promptly and impartially" examine the complaint. We note this language is missing from the MLA draft and encourage the drafting committee to consider its inclusion.

Other Provisions

We commend the MLA Initiative for deleting former article 52 on amnesty and take note that the MLA Convention is silent as to the irrelevance of official position, immunity, and amnesty. We are also pleased with the inclusion of a dispute resolution clause in Draft Article 63.

IV. Conclusion

The ILC's work on crimes against humanity and the MLA initiative are indeed mutually compatible and complementary. Given the strong support in the General Assembly for the ILC's work on crimes against humanity, it is important that progress on the MLA Initiative complement the work in the General Assembly on crimes against humanity. We recommend that the MLA Initiative work closely with the ILC and the Sixth Committee to support a crimes against humanity convention and ensure that concerns of sequencing be addressed, especially now that the adoption of a MLA Convention has been postponed due to the COVID-19 pandemic. So long as the MLA Initiative is pending, it may be difficult for some States to move forward on the crimes against humanity treaty.

We remain concerned that the MLA treaty process has been closed to all but supporter states,⁴¹ and that it only needs two ratifications to enter into force. Because article 69 prohibits reservations "other than those expressly provided for" in the treaty (which are limited to the dispute settlement and non-retroactive clauses), this makes broad participation in the final convention much less likely. We urge members of the Core Group to work closely with ILC and Sixth Committee to advocate for a universal

³⁹ *E.g.*, International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note **Error! Bookmark not defined.**, art. 12; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 13, 10 December 1984, 1465 U.N.T.S. 85, 113. This provision is also found in article 12(1)(a) of the ILC's Draft Articles on Prevention and Punishment of Crimes against Humanity.

⁴⁰ *See* REDRESS, *supra* note 38.

⁴¹ *See, e.g.*, M. George, 'Some Reflections on the Proposal for a New Mutual Legal Assistance Treaty for International Crimes', *Opinio Juris* (11 January 2019), available at: <http://opiniojuris.org/2019/01/11/some-reflections-on-the-proposal-for-a-new-mutual-legal-assistance-treaty-for-international-crimes/>.

crime against humanity treaty open to all States, while simultaneously proceeding with the elaboration of their MLA treaty with its specific focus on cooperation.