

Comments of the Czech Republic on the draft Convention on International Cooperation in Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (version of 20 March 2020)

General comments:

In the opinion of the Czech Republic, the draft convention should contain the definitions of crimes and the obligations concerning the criminalization of these crimes under national law.

Further, the scope of the draft convention should be limited to three categories of crimes under international law mentioned in the title of the draft convention, namely the crime of genocide, crimes against humanity and war crimes, since (unlike the crimes of torture or enforced disappearance) there is no comprehensive treaty framework regulating international cooperation in criminal matters with respect to these three categories of crimes. Thus, the attachments to the convention should include only the amendments to the definitions of war crimes (annexes A – E).

1st preambular paragraph: We suggest to modify its wording in line with the title of the draft convention.

Article 3, paragraph 2: The first sentence of this paragraph does not seem to be clear. Under the law of treaties, the annexes should form an integral part of the convention. We suggest to consider deleting paragraph 2; the issue may be already sufficiently covered by article 3, paragraph 1.

Article 3, paragraph 3: The draft provision does not seem to be conducive to the harmonization of national laws with respect to the three categories of crimes under international law. We would appreciate an explanation of the reasons why this provision is included in the draft, also having regard to the fact that similar conventions (UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention for the Protection of All Persons from Enforced Disappearance) does not contain similar provision.

Article 4: We would appreciate an explanation why the draft convention does not contain at least brief provision on the modes of individual criminal responsibility (such as participation, complicity and attempt) – following the example of several other similar criminal law conventions, e.g. article III of the Convention on the Prevention and Punishment of the Crime of Genocide, article 4 of the UN Convention against Torture, or article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance.

Article 5, paragraph 1 (b): The term „foreign national“ should be replaced by the term „stateless person“ – following the example of e.g. article 7, paragraph 2 (d) of the International Convention for the Suppression of the Financing of Terrorism or article 7, paragraph 1 (h) of the International Law Commission’s Draft articles on Prevention and Punishment of Crimes against Humanity.

Article 7, paragraph 1: We suggest to amend the provision as follows (e.g. following the example of article 10 of the Draft articles on Prevention and Punishment of Crimes against Humanity): „The State Party in the territory under whose jurisdiction a person alleged to have committed any crime as defined in article 2, paragraphs 2 to 5, or any other international crime it applies this Convention to in accordance with article 3, paragraph 1, is found shall in the cases contemplated in article 5, if it does not extradite or surrender the person to another State or an international criminal tribunal whose jurisdiction it has recognized ~~him or her~~, submit the case to its competent authorities for the purpose of prosecution ~~or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized.~~“

Article 13, paragraph 4: We suggest to expressly provide that the list of central authorities is shared and updated by the depositary („A list of designated central authorities shall be shared and updated by the depositary annually.“).

Article 14: We suggest to explicitly exclude the obligation to authenticate the transmitted documents, since it could facilitate international cooperation (following e.g. the example of article 17 of the European Convention on Mutual Assistance in Criminal Matters: „Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication.“).

Article 14, paragraph 3: We suggest to replace, in the first sentence, the term „shall“ by the term „may“, since the identification of points of contact may be problematic and should rather be done voluntarily.

Article 21, paragraph 2 (d) and article 35, paragraph 1 (e): We suggest to consider deleting these provisions, as the crimes covered by the draft convention are quite often committed in connection with civil strife ending up in a change of political regime and the establishment of ad hoc or special tribunals may be an integral part of such process.

Article 25, paragraph 2: We suggest to delete the words „of his or her own free will“, since such limitation could complicate possible future extradition proceedings etc.

Article 33, paragraph 2 (a): The inclusion of the „dual criminality“ requirement might be considered again. As stated by the International Law Commission in its commentary to article 16 of the Draft articles on Prevention and Punishment of Crimes against Humanity: „... treaties focused on a particular type of crime that only establish mandatory offences typically do not contain a dual criminality requirement ... The rationale for not doing so is that when an extradition request arises under either convention, the offence should already be criminalized under the laws of both States parties, such that there is no need to impose a dual criminality requirement. ... Moreover, the *aut dedere aut judicare* obligation ... does not obligate States to extradite; rather, the State can satisfy its obligation under draft article 10 by submitting the case to its competent authorities for the purpose of prosecution.“

Article 36: We suggest to include also the possibility of excluding the application of the rule of speciality in case the person sought expressly renounces his/her entitlement to the rule of speciality (see article 4, paragraph 1 of the Third Additional Protocol to the European Convention on Extradition). The same possibility could be included also in article 25 with respect to the witnesses, experts etc.

Article 43, paragraph 5: We suggest to delete the words „of the person sought“ (because of redundancy), since the text of the provision already refers to „*his* or *her* extradition“.

Article 45, paragraph 2: We suggest to include the word „expeditiously“ in the first sentence (after the words „deal with this request“). With such an amendment, the second sentence could be omitted. Further, the second sentence, as currently worded, could inappropriately indicate that the reasons for the refusal of transit are limited only to „essential interests“, which could be problematic, having regard to diverse national regulations of this aspect of extradition.

Article 49, paragraph 5 (b): We suggest to delete the word „pre-trial“, since it could lead to the situation when only pre-trial detention would be taken into account, leaving aside the detention during the trial.

Article 62: It is not clear what would be the purpose and agenda of regularly convened Conference of States Parties. We suggest to delete article 62 and to limit the tasks of the conference only to the adoption of amendments to the Convention, as envisaged in articles 64 and 65; such a conference should be convened at the proposal of at least one third of the States Parties to the Convention. Under such conditions, certain elements of article 62 could be included in article 64 – following the example of article 29, paragraph 1 of the UN Convention against Torture and article 44, paragraph 1 of the International Convention for the Protection of All Persons from Enforced Disappearance.

Article 63, paragraph 4: We suggest to replace the term „reservation“ with the term „declaration“ (following the example of article 45, paragraph 2 of the International Convention for the Protection of All Persons from Enforced Disappearance or article 15, paragraph 3 of the Draft articles on Prevention and Punishment of Crimes against Humanity).

Article 64, paragraph 2: In our opinion, proposals for an amendment should be communicated (for further circulation to all States Parties) directly to the depositary of the Convention, not to the host State of the Conference of States Parties. In addition, we suggest to delete the words „next meeting“, in line with our comment concerning article 62.

Article 64, paragraph 5: The reference to non-existent paragraph 6 („Without prejudice to paragraph 6“) should be deleted.

Article 65: We refer to our general comments above on the scope of the draft Convention.

Article 65, paragraph 3: The wording of this provision should conform to the wording of article 64, paragraph 5.

Article 68: We would appreciate it if the reasons for the inclusion of this provision in the draft convention were explained and the draft provision compared with other relevant criminal law treaties (there is no reference to other criminal law treaty as a model for the inclusion of the draft article on provisional application).