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War Crimes Committee of the International Bar Association

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

October 2020

The crimes of genocide, war crimes, and crimes against humanity know no borders: in addition to the crimes themselves often being transnational in character,¹ the victims, suspects, witnesses, and evidence of the crimes are frequently dispersed around the globe. For years, States' efforts to investigate and prosecute these atrocity crimes have been inhibited by legal and logistical challenges around securing a valid basis for transnational cooperation, specifically on issues of mutual legal assistance and extradition. Too often, arrangements must be drawn up on an *ad hoc* basis, creating needless delay and challenge to the investigation and prosecution of crimes which, by their very nature, are inherently already difficult to pursue.

For this reason, the War Crimes Committee of the International Bar Association supports and commends the work of the MLA Initiative for its ongoing work on the draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (**'the Draft Convention'**).² The Initiative, led by a Core Group of States,³ has demonstrated important leadership in addressing the significant gaps existing in relation to the transnational cooperation needed to effectively address these crimes, particularly the need for mutual legal assistance in all its varied forms, such as the exchange of information and evidence, the execution of searches and seizures, the ability to examine crime scenes, to facilitate the appearance of witnesses, to effect the service of legal documents, to freeze or recover assets pursuant to existing regulations and protections, and to ensure a fair and legitimate process that protects the rights of the accused.

The IBA War Crimes Committee focuses its efforts specifically on atrocity crimes and international criminal law and practice. With more than 350 members worldwide, it constitutes a network of global lawyers specialised in international criminal and humanitarian law, and is directly involved with the IBA's programme in support of international, ad hoc and domestic war crimes tribunals. Having reviewed the Draft Convention in detail, the War Crimes Committee provides the below comments and recommendations, aimed at making the draft as effective as possible. These comments are not intended to be exhaustive, but rather to assist the Core Group

¹ See, e.g., ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019.

² MLA Initiative, Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes, available at <<https://www.gov.si/en/registries/projects/mla-initiative/>> (last accessed 1 October 2020).

³ The initiative is led by Slovenia, Argentina, Belgium, Mongolia, the Netherlands and Senegal.

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by highlighting areas where the draft might be strengthened or clarified. In addition, the views/comments expressed are those of the War Crimes Committee, and does not necessarily represent the view of the International Bar Association. To the extent that any of these comments raise additional questions, we would welcome the opportunity to engage further in assisting with the Draft Convention.

Over the past few years, the War Crimes Committee has also closely followed and strongly supported the work of the International Law Commission in relation to its Draft Articles on the Prevention and Punishment of Crimes Against Humanity.⁴ The War Crimes Committee submitted comments to the Commission on the Draft Articles in 2018, which were referenced multiple times in the Special Rapporteur's fourth and final report in 2019.⁵ In addition, the Committee held a side event to the Commission's 71st Session in 2019, where the Committee hosted a panel of experts from academia, civil society, and government to discuss the merits of the Draft Articles.⁶ Today, the ILC's Draft Articles are before the UN General Assembly for consideration, and the War Crimes Committee remains a staunch advocate for their adoption as the world's first multilateral convention on crimes against humanity.

Although the ILC Draft Articles contain provisions on mutual legal assistance in the context of crimes against humanity, there is to date no dedicated treaty comprehensively addressing mutual legal assistance, cooperation, and extradition in the context of all atrocity crimes. This has resulted in significant gaps in the coverage of the current legal framework governing international cooperation, and an untenable situation if the international community is serious about pursuing accountability for these gravest of crimes. The words of the Canadian Supreme Court, in the context of extradition, remain relevant and, if anything, have gained force in the thirty years since they were delivered:

“The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries.”⁷

⁴ International Law Commission, Draft Articles on Prevention and Punishment of Crimes Against Humanity (2019), available at <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf>.

⁵ War Crimes Committee of the International Bar Association, *Comments on the International Law Commission's Draft Articles on Crimes Against Humanity* (November 2018), available at <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7C9D9595-E033-4AE4-A53A-2F51835609AB>>; Sean D. Murphy (Special Rapporteur), *Fourth report on crimes against humanity*, U.N. Doc. A/CN.4/725, 18 February 2019.

⁶ War Crimes Committee of the International Bar Association, *Discussion on the Draft Articles on Crimes Against Humanity* (May 2019) (recording available at <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7C9D9595-E033-4AE4-A53A-2F51835609AB>>.

⁷ *United States of America v. Cotroni* (1989) 48 CCC (3d) 193, 215.

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In an era where international cooperation has waned and new multilateral commitments are few and far between, the Committee welcomes the MLA Initiative, and makes the following suggestions and recommendations on the Draft Convention.

* * * * *

General recommendation: Addressing the role of international criminal mechanisms, courts, and tribunals

As an initial matter, the War Crimes Committee recommends that the Draft Convention provides State Parties with an additional optional provision to afford mutual legal assistance or extradition to international mechanisms, courts, and tribunals alongside other States. At present, the articles are directed at facilitating transnational cooperation in the prosecution and punishment of the grave crimes within the scope of the Draft Convention, a welcome and much needed part of the international legal framework. Limiting the remit of the Draft Convention to transnational cooperation, however, fundamentally ignores the important role that international mechanisms, courts, and tribunals play in the prosecution and punishment of atrocity crimes, and the fact that in many instances these institutions themselves represent an attempt at transnational cooperation to address these egregious crimes.

Requiring international criminal tribunals to negotiate individually with States to obtain basic evidence or a transfer of witnesses expands the length of already protracted proceedings and requires new institutions to reinvent the wheel in terms of detailing the terms of engagement on issues of mutual legal assistance and extradition.⁸ This neither serves States interested in pursuing accountability, nor the needs of victims and survivors of the crimes within these institutions' remit.

At the same time, many States that are not currently parties to the Rome Statute or other international courts regularly engage in mutual legal assistance, extradition, and other forms of cooperation aimed at international criminal offences. If we seek to truly encourage more domestic prosecutions of these crimes, any solution adopted should be inclusive of States that take a variety of approaches towards the establishment of international courts and tribunals on atrocity crimes.

Expanding the Draft Convention's scope to allow for this cooperation with international mechanisms, courts, and tribunals might be achieved through the voluntary adoption of an annex, in the same way that State Parties can agree to expand the applicable crimes in the Convention to the additional crimes set out in an annex. This may mitigate concerns of State Parties that have not

⁸ See, e.g., Bert Swart, 'Cooperation Challenges for the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1153, 1158.

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recognized the jurisdiction of particular courts or institutions, while facilitating that broader cooperation for those that have.

General recommendation: addressing evidentiary issues

In addition, the Committee recommends that further attention be given to evidentiary issues in the Draft Convention, such as addressing concerns related to chain of custody and preservation of evidence, as well as issues pertaining to prosecutorial and judicial ethics and misconduct. Though much of the Draft Convention is directed at obtaining evidence, the prosecution of these crimes also includes the ability to challenge evidence and ensure that convictions stand up to scrutiny. These are vital issues for States to consider if they are expected to turn over evidence pursuant to these provisions.

General recommendation: considering extension to select civil cases

Finally, the Committee would respectfully inquire as to whether consideration has been given to extending the scope of the Draft Convention to civil cases alleging atrocity crimes, in view of the uptick in civil litigation brought in domestic jurisdictions that allege war crimes, crimes against humanity, and genocide. Such cases represent an important avenue to accountability when criminal prosecution may not be feasible. While extending the Draft Convention to all civil litigation is certainly not desirable, limiting them to those civil cases specifically alleging atrocity crimes may be of great benefit to litigants and victims.

Article 1. Purpose

The Committee echoes calls for more explicit reference to the victims and survivors of atrocity crimes in Article 1's statement of the purpose of the Draft Convention.⁹ As articulated by REDRESS and others, victims play a critical role in supporting the investigation and prosecution of atrocity crimes, and the Committee supports the general reframing of accountability efforts around the rights and needs of affected communities.¹⁰ Recognizing the centrality of victims' rights in any discussion of the purpose of the Draft Convention would assist in ensuring that

⁹ FIDH, REDRESS, and European Center for Constitutional and Human Rights, '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' (1 May 2020) 8-9, available at <<https://redress.org/wp-content/uploads/2020/05/PolicySubmission750a.pdf>> (accessed 1 September 2020.)

¹⁰ *Id.* (explaining that "recognising the crucial role played by victims and promoting their rights in the Convention will enhance its ability to function as a 'practical tool' for States working to end impunity for serious international crimes through national investigations and prosecutions").

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victims are regarded at the outset as important partners in the pursuit of justice in respect of atrocity crimes.

Similarly, the rights of the accused, and protections aimed at ensuring a fair and legitimate judicial process, need to have greater prominence when framing the purpose of the Draft Convention. The prosecutions of atrocity crimes are often highly politicized and seen as biased,¹¹ and may be lacking appropriate protections or due process. For accountability efforts to be seen as legitimate and for convictions to not be shrouded in a veil of corruption or questions regarding process, there must be a clear commitment to protecting the rights of the accused as well.

Article 2. Crimes Covered by this Convention

The War Crimes Committee supports the use of the Rome Statute's definitions of genocide, and crimes against humanity in Article 2 of the Draft Convention. With respect to the definition of war crimes, the Committee respectfully questions the divergence of the definition used in Article 2 of the Draft Convention from the text of Article 8 of the Rome Statute, including in relation to the use of poisoned weapons, asphyxiating or poisonous gases and devices, and bullets which expand or flatten easily in the human body during armed conflicts not of an international character.¹² As the Committee argued in relation to the ILC Draft Articles on Crimes Against Humanity,¹³ the Rome Statute definition has the benefit of the consensus of 123 States Parties,¹⁴ and its retention serves to build upon the jurisprudence developed using that definition of the crime and to reinforce a consistent definition of atrocity crimes across national and international jurisdictions.¹⁵ The Committee recommends faithfully transposing the definition of war crimes into Article 2 of the Draft Convention, rather than separating the definition of particular war crimes out into an annex.

¹¹ See, e.g., Lara Jakes and Michael Crowley, 'US to Penalize War Crimes Investigators Looking Into American Troops' *The New York Times* (11 June 2020), available at <<https://www.nytimes.com/2020/06/11/us/politics/international-criminal-court-troops-trump.html>>; Niharika Mandhana and Feliz Solomon, 'Rohingya Genocide Case Against Myanmar Opens Before U.N. Court' *The Wall Street Journal* (10 December 2019), available at <<https://www.wsj.com/articles/rohingya-genocide-case-against-myanmar-opens-before-u-n-court-11575990274>>.

¹² See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Art 8.

¹³ War Crimes Committee of the International Bar Association, *Comments on the International Law Commission's Draft Articles on Crimes Against Humanity* (November 2018), available at <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7C9D9595-E033-4AE4-A53A-2F51835609AB>>.

¹⁴ UN Treaty Collection, Chapter XVIII: Penal Matters, 10. Rome Statute of the International Criminal Court (2020), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

¹⁵ See Whitney R. Harris World Law Institute, *Comments on the Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes* (October 2020) 4 (describing the importance of the "Rome consensus").

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Article 3. Optional Extension of the Scope of this Convention

The War Crimes Committee commends the MLA Initiative for its approach to the range of crimes to which the Draft Convention is to apply. Atrocity crimes are a unique category, denoting the most egregious offences known to humankind. In the interest of preserving that primary focus of the Convention and ensuring its widespread adoption, the Committee agrees with the MLA Initiative's decision to limit the scope of the Draft Convention to genocide, war crimes, and crimes against humanity. By permitting States Parties, however, to mutually agree to apply the provisions of the Draft Convention to additional crimes listed in an annex, the MLA Initiative takes a judicious approach to expanding the scope of these articles to additional crimes which may benefit of their provisions.

The Committee, however, suggests clarifying the intention of Article 3(3) in permitting State Parties to agree to apply the Convention to acts qualifying as a crime of genocide, crimes against humanity, war crimes, crimes of aggression, torture or enforced disappearance "as defined in international law." The ambiguity of the latter phrase might be mitigated with the provision of commentary explaining the aim of this provision.

Article 4. Criminalization

The War Crimes Committee welcomes the requirement that State Parties take all necessary measures to ensure that genocide, war crimes, and crimes against humanity constitute offences under their domestic legal frameworks, as set forth in Article 4, as well as the requirement that State Parties make these crimes punishable by penalties appropriate to their gravity. Despite widespread adoption of the Rome Statute, a number of states lack domestic legislation criminalizing atrocity crimes, and particularly criminalizing them according to a consistent definition. This measure alone will make significant inroads into harmonizing the ability to prosecute and punish atrocity crimes across jurisdictions.

Article 6. Preliminary Inquiry

In addition to the important right of consular notification, this section should also include a provision setting forth the right to legal counsel. Relatedly, during the Preliminary Inquiry phase, States should be required to hold a hearing, with the assistance of counsel, as to the conditions of detention or release until such time as criminal or extradition proceedings are commenced.

Article 7. Aut dedere, aut judicare

The War Crimes Committee takes note of and commends the inclusion of a reference to prosecutions before international criminal tribunals in relation to the *aut dedere, aut judicare* provision in Article 7. It is important to recognize that the commission of crimes within the scope of the Draft Convention may under certain circumstances fall under the jurisdiction of international

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criminal courts and tribunals, and that State Parties may be able to satisfy their obligations under this provision by surrendering an individual to an international court whose jurisdiction it has recognized. The possibility of surrender to an international criminal tribunal (the so-called “triple option”),¹⁶ is therefore a vital provision within the Draft Convention. The Committee notes that it is in relation to provisions such as Article 7 that an accompanying commentary would assist national authorities to better understand their legal obligations.

Article 8. Liability of legal persons

The War Crimes Committee applauds the MLA Initiative for its inclusion of an article providing for the liability of legal persons, given that transnational corporations have a history of participation in international crimes but are rarely sanctioned.¹⁷ The Committee expressed similar support for an analogous provision in the ILC Draft Articles on Crimes Against Humanity, noting that such a provision “represents an important step forward with regard to the forward progress and development of international law, and assists in building a global framework in which legal persons can be held accountable for their involvement in atrocity crimes.”¹⁸ As we seek to promote accountability for these gravest of crimes, efforts to close loopholes that allow corporate actors to operate with impunity are welcomed, while preserving States’ ability to take varied approaches to the issue at their discretion. The Committee commends the MLA Initiative’s approach here, which promotes such accountability while requiring States only to adopt measures as consistent with their legal principles.

That being said, the Committee would also urge the drafters to consider whether the inclusion of a provision on the liability of legal persons necessitates additional drafting to address issues such as complex corporate structure, the use of agents, the legal concept of *respondeat superior*, and the location and storage of data and evidence sought, which may be outside of the State from which it is requested.

Article 13. Central authority

The Committee notes that, like many other provisions within the Draft Convention, this article is largely derived from an existing treaty, in this case the Convention on Transnational Organised

¹⁶ See Amnesty International, ‘International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere, Aut Judicare*)’ (AI Publications 2009), available at <<https://www.amnesty.org/download/Documents/48000/ior400012009en.pdf>> 9-10.

¹⁷ See D. De Vos, ‘The emerging norm of corporate criminal accountability for international crimes,’ European University Institute Blog (9 December 2017), available at <<https://me.eui.eu/dieneke-de-vos/blog/the-emerging-norm-of-corporate-criminal-accountability-for-international-crimes/>> (accessed 9 September 2020); STL, *In the case against Akhbar Beirut SAL et al*, Public Redacted Version of the Judgment, STL-14-06/T/CJ (15 July 2016) (the first conviction of a legal person before an international criminal tribunal, albeit not for an atrocity crime); see also STL, *In the case against Akhbar Beirut SAT et al*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings) STL-14-06/PT/AP/AR126.1 (23 January 2015).

¹⁸ War Crimes Committee of the International Bar Association, *supra* n. 5.

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Crime, Article 18(13), except for the words “speedy and proper execution or transmission of requests received.”¹⁹ It is unclear why those words were omitted. It is respectfully submitted that the need for urgency in the prosecution of atrocity crimes is clear and similar wording should be included here.

Article 21. Grounds for refusal

Pursuant to Article 21, mutual legal assistance shall be refused if the requested State Party “has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s race, sex, religion, nationality, ethnic origin, political opinion or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.” The War Crimes Committee strongly recommends that the list of grounds upon which mutual legal assistance shall be refused is expanded to include sexual orientation and gender. Although discrimination and punishment on the basis of “sex” has in some instances been interpreted to cover sexual orientation and gender discrimination,²⁰ we would recommend setting out each category to remove any room for doubt. This is of high importance in view of the widespread and ongoing arrests, detentions, and prosecutions of persons on the basis of their gender identity and sexual orientation, which has been widely documented by human rights groups around the world.²¹ According to Human Rights Watch, some 70 countries currently criminalize same-sex relations and at least nine criminalize forms of gender expression targeting transgender and gender nonconforming people.²² Permitting States to grant mutual legal assistance in relation to prosecutions that are not squarely aimed at the grave crimes within its scope, but are rather pretexts for the detention and prosecution of persons on the basis of their gender identity and sexual orientation would thwart the purpose of the Draft Convention.

The drafters may also consider revising Article 21(3) so that States are not forced to choose between their interest in pursuing accountability for atrocity crimes and their compliance with bank secrecy laws and related treaties and agreements. A revised version might indicate that if possible, State Parties should not refuse a request based on bank secrecy if adequate precautions

¹⁹ UN General Assembly, *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (adopted 15 November 2000), A/RES/55/25, Article 18(13),

²⁰ See, e.g., U.S. Equal Employment Opportunity Commission, ‘Sex-Based Discrimination’, available at <<https://www.eeoc.gov/sex-based-discrimination>> (accessed 10 September 2020).

²¹ See, e.g., Rasha Younes, ‘This Pride Month, Shame on You: Exposing Anti-LGBT Government Strategies in MENA’ *Human Rights Watch* (8 June 2020), available at <<https://www.hrw.org/news/2020/06/08/pride-month-shame-you-exposing-anti-lgbt-government-strategies-mena>>; RightsAfrica, ‘Repression in Egypt: 92 LGBTIQ+ arrests last year’ (8 March 2020), available at <<https://rightsafrika.com/2020/03/08/repression-in-egypt-92-lgbtqi-arrests-last-year/>>; Human Rights Watch, ‘Tunisia: Privacy Threatened by ‘Homosexuality’ Arrests’ (8 November 2018), available at <<https://www.hrw.org/news/2018/11/08/tunisia-privacy-threatened-homosexuality-arrests>>; Human Rights Watch, ‘#Outlawed: “The Love that Dare Not Speak its Name”’, available at <http://internap.hrw.org/features/features/lgbt_laws/>.

²² Human Rights Watch, ‘#Outlawed: “The Love that Dare Not Speak its Name”’, available at <http://internap.hrw.org/features/features/lgbt_laws/>.

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can be taken to protect the integrity of any existing investigation, and with prior authorization from authorities engaged in such an investigation.

Article 23. Confiscation

The War Crimes Committee supports the inclusion of a provision on confiscation in the context of atrocity crimes. Such a provision is absent from the ILC Draft Articles, which is an arguable shortcoming, particularly when it is recalled that in other contexts, the UN regards confiscation as “*an essential element of an effective strategy to obtain a criminal conviction...*”²³ The Committee respectfully queries whether it may be helpful to identify a definition of “the proceeds of crime,” noting that, in the case of atrocity crimes, a wider range of proceeds may be possible.

In addition, the Committee would suggest that additional consideration be given to ensure that there are sufficient protections to allow for (1) challenging the seizure or freeze of assets; (2) releasing assets in certain circumstances, such as to allow for basic living expenses and/or the payment of attorney’s fees; (3) allowing for innocent third parties to protect their claims to the assets in question; and (4) preserving assets such that they are available to be returned to the owner should it be shown that they are not subject to seizure. Further, in view of the risk that transferred assets may be difficult to recover, the transfer of assets should occur after the completion of all proceedings.

Article 24. Temporary transfer of detainees

As regards the transfer of detainees in this provision, the Committee would recommend amending Article 24(2)(d) to provide that detainees “shall receive full credit” for service of their sentence in the State Party from which they were transferred, to ensure that no arguments may be made that a detainee should receive anything less than 1:1 credit.

In addition, the Committee would urge the drafters to provide basic protections for the rights of detainees, such as stating that, absent the need for protective custody or other special procedures, detention in the requesting State be in the same or similar conditions as in the original State, and ensuring that detainees have access to legal counsel.

Article 26. Appearance of persons in the requesting State

The Committee recommends that this provision be amended to ensure that States provide necessary visas or other travel documents for persons that need to appear in a requesting State, to ensure that individuals are admitted without detention or unwarranted delays.

²³ See, e.g., UN Office on Drugs and Crime, Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime, United Nations (September 2012) available at <https://www.un.org/ruleoflaw/files/Confiscation_Manual_Ebook_E.pdf>.

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Article 35. Grounds for refusal

As with Article 21, the War Crimes Committee strongly recommends the inclusion of additional grounds upon which cooperation shall be refused under this article, here in the context of requests for extradition. Although this article refers to the refusal of extradition requests made for the purpose of prosecuting or punishing someone on the basis of race, sex, religion, nationality, ethnic origin, political opinion, or other grounds universally recognized as impermissible, it omits reference to requests made for the purpose of prosecuting on the basis of gender and sexual orientation. This is equally, if not more important, in the context of requests for extradition as requests for mutual legal assistance.

In addition, the Committee recommends that any extradition be completed through a judicial process with the assistance of legal counsel.

Article 44. Simplified procedures

While appreciating the need to expedite extradition procedures and simplify relevant evidentiary requirements, the Committee recommends that such expeditiousness and simplification is not inconsistent with the legal rights of relevant parties, including the accused, witnesses, and victims.

Article 45. Transit

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 by reasons of his or her race, sex, religion, nationality, ethnic origin or other grounds universally recognized as impermissible under international law. As with Articles 21 and 35, the War Crimes Committee wishes to express concern about the omission of reference to gender and sexual orientation in this article. In view of persistent and ongoing threats to the safety and well-being of LGBTQ persons as well as widespread sexual and gender based violence, we recommend ensuring that extradited persons face guarantees as to their safety on the basis of sex, gender, and sexual orientation.

Article 46. Scope

As regards Article 46(1), which enables a person sentenced in a State Party to be transferred to another State Party, the Committee recommends that, to avoid potential for abuse, the drafters clarify the circumstances under which such transfer could occur (i.e., where a sentenced person themselves makes a request for transfer, rather than where any individual makes such a request).

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Article 59. Protection of victims, witnesses and experts

The Committee recognizes that paragraph 1 of Article 59 (Protection of victims, witnesses and experts) is derived from the ILC Draft Articles on Crimes Against Humanity.²⁴ However, the term “complainants” has not been transposed. The Committee expresses concern that this omission appears to remove from the scope of protection persons who are affected by the atrocity crime but who may nevertheless not be classified as a “victim” (e.g. witnesses, their families and members of their communities, human rights defenders, investigators, lawyers, health care professionals, monitoring bodies and other individuals or institution assisting victims). In keeping with the notion that greater emphasis should be granted to victims and those who share in their struggles and in order to be streamlined with the Draft Articles, it may be appropriate to augment the article to include protection towards all individuals who may legitimately require redress,²⁵ as well as third parties who provide information, support or protection to victims. Such a provision would provide national authorities with the legal authority to resource the investigation of atrocity crimes and promote participation for the purpose of achieving justice.

To this same end, the drafters may also consider whether this article should include protections for journalists, who are frequently persecuted and even prosecuted for their coverage of war crimes and other atrocities, and who are often the ones able to uncover evidence, locate victims, and provide a narrative of what has occurred. Such protections might also recognize journalists’ privilege to not reveal their sources if requested to provide information, evidence, or testimony.

Finally, if it appears a witness could themselves be subject to prosecution, he or she should be entitled to legal counsel, including during interviews and investigations.

Article 60. Victims’ rights

The Committee applauds the inclusion of a definition of “victim” in the Draft Convention, so as not to leave the application of the relevant protections entirely to the discretion of State Parties.²⁶ It further supports the use of the definition set forth in Rule 85 of the ICC’s Rules of Procedure and Evidence, to promote consistency in terminology across national and international jurisdictions. The Committee, however, concurs with the recommendation that the Draft Convention should make clear that its definition of “victim” is “without prejudice to any broader definition provided for in international or national law,” in addition to the recognition that a person

²⁴ Article 12(1)(b) ILC Draft Articles on Crimes against Humanity, *supra* n. 4.

²⁵ See Council of the European Union, Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - 2019 Revision of the Guidelines (16 September 2019), available at <<https://www.consilium.europa.eu/media/40644/guidelines-st12107-en19.pdf>> 29.

²⁶ See also War Crimes Committee of the International Bar Association, *supra* n. 5.

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can be a victim in the absence of a formal complaint to a competent authority or regardless of whether the perpetrator of the crime is identified, apprehended, prosecuted, or convicted.²⁷

Additional general recommendations

- ***Use of defined terms***

In addition to the above recommendations on specific provisions, the Committee respectfully recommends that the MLA Initiative consider using a set of key defined terms for use throughout the Convention, to set out and clarify with specificity the meaning of fundamental concepts such as “the request,” as well as “the requesting State Party” and “the requested State Party.” This is particularly important in relation to, for example, the provision regarding State Parties keeping confidential the fact and substance of a “request” (at Article 9), which would only be enforceable if such request is defined and the term is used consistently throughout the draft. This would strengthen the enforceability and clarity of the draft in a number of places.

Similarly, and where appropriate, definitions relating to asset seizures and forfeitures should mirror those used in other international and bilateral treaties and conventions, as well as definitions relating to requests for information from financial institutions.

- ***Use of commentary to support the provisions***

The Draft Convention may also benefit from the inclusion of commentary to support the individual articles. This may serve to both clarify the purpose and intention of certain provisions, and to increase the likelihood of approval and ratification. In a number of instances, for example, the Draft Convention draws inspiration from existing treaty law,²⁸ and in some cases exact phrases have been directly transposed from previously concluded treaties. Highlighting the origins of various provisions may assist in reinforcing the notion that many of the Draft Convention’s articles weave together concepts which have already been agreed upon within the international community, reducing the need for protracted debate and requests for clarification.²⁹

- ***Ensuring an inclusive and comprehensive process***

In addition, the Committee notes that concerns have been raised as to the inclusiveness of the process leading to the current Draft Convention. As of early 2019, for example, the Draft Convention had not been made publicly available, and for much of the drafting process, there

²⁷ ‘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’ *supra* n. 9.

²⁸ This includes, for example, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention against Transnational Organized Crime, the Convention for the Protection of All Persons from Enforced Disappearance, and the Rome Statute.

²⁹ The Committee recognizes that this was a deliberate choice. *See, e.g.*, MLA Initiative, ‘Towards a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (Explanatory Note), available at <<https://www.gov.si/assets/ministrstva/MZZ/projekti/MLA-pobuda/MLA-Initiative-Explanatory-note-English.pdf>> 3.

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appeared to have been no formal mechanism for input from civil society or States that were not “supporting States.”³⁰ The Committee therefore appreciates the current opportunity to provide input on the Draft, and urges the MLA Initiative to continue to broaden the available avenues for feedback, recommendations, and discussion, so that the resulting Convention will be as comprehensive as possible. Seeking submissions from a wide audience of representative states will also assist in maximizing the Draft Convention’s chances of approval and ratification. In this regard, the Committee appreciates that the MLA Initiative is in close contact with the UN and members of the ILC, as such a dialogue should help to ensure that the MLA Convention and the Draft Articles on Crimes Against Humanity form coherent and consistent contributions to the international legal framework.

To this same end, we would urge those considering the Draft Convention to not permit its progress to block the advancement of the ILC Draft Articles on Crimes Against Humanity, which is now before the General Assembly. Both initiatives have the potential to be mutually compatible and reinforcing, and progress should continue to be made on both fronts without delay.

³⁰ See, e.g., Madaline 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/>>.

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Concluding Thoughts

It is clear that a modern, multilateral treaty comprehensively covering mutual legal assistance and extradition in connection with atrocity crimes is urgently needed. In today's political climate, there are a number of factors inhibiting the successful prosecution and punishment of atrocity crimes, but in many cases, efforts to pursue these crimes grind to a halt because of the legal and logistical barriers to transnational cooperation.

The MLA Initiative's Draft Convention aims to address important gaps in the international legal framework, and does so in a number of places by drawing together existing obligations under international law. The War Crimes Committee commends the work of the MLA Initiative on its important work to date, and urges States, academics, and civil society alike to engage in the process of making recommendations and submissions to continue to enhance and strengthen the Draft Convention, so that it may be adopted and implemented without delay.

We reiterate our call for the MLA Initiative to grapple with opportunities to integrate cooperation with international courts, mechanisms and tribunals alongside transnational cooperation, and to place victims' rights and needs at the centre of any discussion on the prosecution and punishment of atrocity crimes. We welcome the opportunity to discuss these issues in more detail and to engage further with the Draft Convention. For future correspondence and inquiry, please do not hesitate to contact the Committee's Special Rapporteur, Shannon Raj Singh, at shannonr@guernica37.com.

Kind regards,

A handwritten signature in black ink, appearing to read "Shannon Raj Singh".

Shannon Raj Singh

*Special Rapporteur
IBA War Crimes Committee Officer*

A handwritten signature in black ink, appearing to read "Kakoly Pandé".

Kakoly Pandé

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