

**RECOMMENDATIONS
FOR A CONVENTION
ON MUTUAL LEGAL
ASSISTANCE**

**AMNESTY
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Amnesty International Publications

First published in 2020 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

© Amnesty International Publications 2020

Index: IOR 51/1651/2020
Original language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

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I. INTRODUCTION

Amnesty International welcomes the initiative by some states to draft a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes ('Draft MLA Convention'). Such a Draft Convention has, by enhancing international cooperation in criminal matters, an enormous potential in the international criminal law field, and may become - for those states willing to fight against impunity for crimes under international law, an effective tool in conducting investigations and prosecutions in fair trials.

The concerns raised and recommendations made to governments in this paper have been drafted for the purposes of an informal consultation on the Draft MLA Convention to be held in The Hague, Netherlands, on 27-29 January 2020, and also for the Diplomatic Conference in Ljubljana, Slovenia, 8-19 June 2020, and often restate past positions of the organization on international criminal law matters.

II. POSITIVE ASPECTS OF THE REVISED TEXT

Amnesty International is glad to see that some substantive amendments to the original text have been incorporated into the current proposal (version, 2 October 2019).¹ The deletion of an odd article permitting states to grant amnesty and pardon for genocide, crimes against humanity and war crimes (former draft article 52); the addition of a 'third alternative' in the *aut dedere aut judicare* provision, which allows states to surrender a person suspected of criminal responsibility to an international criminal court (draft article 7); the inclusion of torture and, to some extent, enforced disappearance as crimes covered by the Draft Convention - through annexes (new draft article 3); and the addition of the right to a fair trial as a human rights safeguard for extradition in draft article 31(1)(d), are all steps in the right direction that deserve full support by states.

III. CONCERNS ARISING FROM THE PROPOSED DRAFT PREAMBLE AND ARTICLES

Amnesty International has some concerns regarding the text of the Draft MLA Convention. However, failure to comment on a provision or part of a provision should not be taken to mean that the organization endorses it.

¹ Amnesty International, "Key Observations and Recommendations, Second Preparatory Conference of States Party to the 'Mutual Legal Assistance Initiative'", 11th-14th March 2019.

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 prohibition of genocide, crimes against humanity, war crimes, torture and enforced disappearance is a peremptory norm 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),² a clause recognizing - *mutatis mutandi* - that the prohibition of genocide, crimes against humanity, war crimes, torture and enforced disappearance is a peremptory norm of general international law (*jus cogens*). Such a view, the peremptory character of the prohibition of certain crimes under international law, has been confirmed by the ILC whilst adopting in 2019, on first reading, the Draft Conclusions on peremptory norms of general international law (*jus cogens*).³

b) Victims' right to justice, truth and reparation

Unfortunately, the Preamble does not make any reference to the right of victims to justice, truth and reparation, as recognized to some extent in the Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED),⁴ the Preamble of the Draft Convention on the Prevention and Punishment of Crimes against Humanity, 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.⁵

Since the Preamble summarizes the aims and purposes of the Draft MLA Convention, it would be advisable to include a new paragraph emphasizing or recalling the right of victims to justice, truth and reparation as a fundamental component in the fight against impunity. The ninth paragraph of the Preamble of the draft Convention on the Prevention and Punishment of Crimes against Humanity contains a clause that could inform the drafters of the MLA Convention (see below).

² 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.

³ 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 V. See Conclusion 23, non-exhaustive list, and its Commentary.

⁴ International Convention for the Protection of All Persons from Enforced Disappearance (signed 20 December 2006; entered into force 23 December 2010), 2716 UNTS 3.

⁵ UNGA Res. 60/147 (16 Dec. 2005), UN Doc. A/RES/60/147.

c) Alleged offenders' right to fair trial

In matters of mutual legal assistance and extradition it is imperative that the right to a fair trial is guaranteed both by the requesting and requested state. Indeed, the right to a fair trial serves both to guarantee due process throughout the extradition or mutual legal assistance request procedure and serves also as a human rights safeguard and bar to extradition if fair trial guarantees cannot be met by the requesting state.

To that end, drafters may find inspiration, for example, in the ninth paragraph of the Preamble of the Draft Convention on the Prevention and Punishment of Crimes against Humanity, which provides: 'Considering the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment'.

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

Amnesty International agrees in general with the approach taken by drafters of incorporating the definitions in articles 6, 7 and 8 of the Rome Statute 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.

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

Following the Rome Statute, article 2(4)(i) of the Draft MLA Convention 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 expression 'with the intention of removing them from the protection of the law for a prolonged period of time', which is absent in the definition contained in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CPED), should be taken out.

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 necessary result or, at most, a purely objective element of the crime. 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'.

4. ON THE UNNECESSARY RESTRICTION ON 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. And there is no reason for drafters to relieve armed non-state actors from the provisions of the Draft MLA Convention when they are suspected of criminal responsibility for a disappearance.

5. ON THE RESTRICTIVE GEOGRAPHICAL SCOPE OF SOME PROVISIONS

Draft article 29(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 the 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 under the State Party's jurisdiction' – e.g., in an occupied territory, etc.

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 limitation. For example, draft article 5(1)(a) and 5(2) provide for the expression 'in any territory under its jurisdiction' and draft article 7 'in the territory under whose jurisdiction', thus not restricting the scope of the obligations just to the territory of the state concerned.

Amnesty International recommends replacing the restrictive expression ‘in the territory’ by ‘in any place under the State Party’s jurisdiction’ or a similar one reflecting the idea.

6. ON THE GENERAL GROUNDS FOR REFUSAL (DRAFT ARTICLE 20)

Improper grounds for refusal of assistance are one of the main problems with the current legal framework around mutual legal assistance. 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.

Draft article 20(1)(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;

Amnesty International considers that drafters should entirely remove draft article 20(1)(b) from the Draft MLA Convention. 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 that each state has a duty to investigate and prosecute. In addition, many states do not even include grounds for refusal listed in the article in their national law or in bilateral treaties and it is not found in many multilateral treaties, including treaties with regard to crimes under international law, such as the Geneva Conventions, Protocol I, CAT, etc.

7. ON HUMAN RIGHTS SAFEGUARDS AS GROUNDS FOR REFUSAL (DRAFT ARTICLE 20)

The human rights safeguards provided in the Draft MLA Convention are welcome. However, their inclusion as grounds for refusal of mutual legal assistance in the same provision as grounds for refusal not based on human rights safeguards is problematic.

Drafters should separate draft article 20, paragraphs 1(d) and 1(e), into a new draft article providing that ‘mutual legal assistance *shall* be refused if...’ – instead of ‘mutual legal assistance *may* be refused if...’.

Notwithstanding the concerns raised above related to improper grounds for refusal, draft article 20 provides that requests for mutual legal assistance *may* be refused in relation to draft article 20(1)(a), (b), and (c), which demonstrates that states have discretion to refuse certain requests. However, refusals based on human rights safeguards are based on mandatory obligations on states which must be distinguished by the imperative ‘shall’ (as correctly provided in draft article 31(1), which provides for several grounds for refusal of requests for extradition).

Amnesty International recommends the addition of a new draft article which recognizes the imperative obligation on states to refuse requests for mutual legal assistance based on human rights safeguards.

8. ON (POTENTIAL) DISCRIMINATORY PROSECUTION, PUNISHMENT OR OTHER TREATMENT AS A GROUND FOR REFUSING EXTRADITION (DRAFT ARTICLE 31)

If compared with former draft article 33(1)(a) new draft article 31(1)(a) improves the grounds under which an extradition request *shall* be refused.

Article 31. Grounds for refusal

1. Extradition shall be refused if:

(a) 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 **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 (emphasis added)

The current draft has removed 'political opinions' as one of the explicit grounds for refusing extradition and there is no cogent reason for this change, which should be reversed. However, the addition of the expression 'or other grounds that are universally recognized as impermissible under international law', which was absent in the original text, strengthens the human rights safeguards of the Draft Convention.⁶

However, a more comprehensive list of human rights safeguards may be found in draft article 13(11) of the Draft Convention on the Prevention and Punishment of Crimes against Humanity, which provides:

Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State 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 gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions 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.

Amnesty International recommends the amendment of draft article 31(1)(a) so as to incorporate the widest list of grounds of discrimination prohibited under international law.

9. ON THE DEATH PENALTY

Amnesty International welcomes the provision whereby any extradition request made

⁶ Former draft article 33(1)(a) reads: 'Article 33. Grounds for refusal Extradition shall be refused if: (a) 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 sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons'.

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 31(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 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 and degrading punishment.

Consequently, the organization recommends the deletion of the expression ‘or, if imposed, will not be carried out’. 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 total abolition of the death penalty in the requested state. In any event, the text of Article 31 needs to be strengthened as follows so as to ensure that such assurances can be relied upon, including by being actually implementable by the competent authorities of the requesting state:

Article 31. Grounds for refusal

1. Extradition shall be refused if:

(b) The request is made with regard to an offence punishable by the death penalty under the law of the requesting State Party, unless the requesting State Party gives credible and effective guarantees that the death penalty will not be imposed.

It goes without saying that this recommendation is also applicable to draft article 20(1)(e), on grounds for refusal of mutual legal assistance.

10. ON VICTIMS

Amnesty International has previously called on states to expand and strengthen Part VI of the Draft MLA Convention (‘Victims, Witnesses and Experts’) to ensure victims’ rights are embedded throughout the text where necessary.⁷ 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 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 access truth, justice and reparation.

a) On the lack of definition of victim (draft articles 53 and 54)

Draft articles 53 and 54 have improved former draft articles 56 and 57 by including some language related to victims and other persons’ rights. However, the Draft MLA Convention

⁷ Amnesty International, “Key Observations and Recommendations, Second Preparatory Conference of States Party to the ‘Mutual Legal Assistance Initiative’”, *supra*, note 1, pp.8-10.

still lacks a definition of victim.

Amnesty International recommends that drafters provide for a definition of victim and avoid leaving that definition to states' domestic legislation. Drafters may find inspiration in, for example, article 24(1) of CPED,⁸ Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court⁹ and article 2(1) of the Convention on Cluster Munitions.¹⁰

b) On the right to complain

Part VI, possibly in a separate article or in article 53, should provide that each state shall take the necessary measures to ensure that any person who alleges that acts constituting crimes under the Draft MLA Convention have been or are being committed has the right to complain to the competent authorities. Drafters should also provide for the obligation of states parties to examine the complaints lodged by victims or their representatives, in order to determine whether there is reasonable ground to believe that acts constituting crimes in the Draft Convention have been or are being committed.

c) On the right to be informed

Part VI should expressly provide that states parties must inform victims of the progress and results of the examination of the complaint and any subsequent investigation - in order to ensure that states fulfil their obligations to investigate and prosecute in fair trials and that victims have access to effective remedies.

d) On access to assistance for victims

All victims of crimes under international law have a right to full, effective and prompt reparation to address the harm they have suffered. Therefore, the current text – which only provides for compensation and restitution, should be amended, so as to ensure that it is consistent with states' obligations under international law. Draft article 54(1) should be significantly amended to enshrine the right of victims to all forms of reparation - restitution; compensation; rehabilitation; satisfaction and guarantees of non- repetition.

⁸ CPED, article 24(1) 'For 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'.

⁹ Rules of Procedure and Evidence, 'Rule 85. Definition of victims. For the purposes of the Statute and the Rules of Procedure and Evidence:(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

¹⁰ Convention on Cluster Munitions (adopted 30 May 2008. Entered into force: 1 Aug. 2010), 2688 UNTS 39. '1. "Cluster munition victims" means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities'.

e) On legal representation

Draft article 54 should clarify that whenever the interests of victims may be affected, they should be provided with the right to legal representation.

11. ON THE SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION (DRAFT ARTICLE 60)

Unlike the standard form final clause,¹¹ draft article 60 provides that the MLA Convention shall only be open to signature, ratification, etc., to UN Member states.

The Rome Statute of the International Criminal Court,¹² the Convention on the Prevention and Punishment of the Crime of Genocide,¹³ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁴ the Geneva Conventions of 12 August 1949 and their Protocols do not impose such a membership as a condition to become party to the treaty, and are basically open to all states. Moreover, such a membership should not be a condition when the Draft MLA Convention is not being drafted under the auspices of the UN.

Amnesty International recommends that draft article 60 is amended so as to allow all states to become parties to the MLA Convention.

12. ON RESERVATIONS (DRAFT ARTICLE 63)

Draft article 63 (Reservations) provides:

1. No reservations may be made to this Convention other than those expressly provided for in this Convention.
2. Any State Party that has made a reservation in accordance with article 57, paragraph 3, may at any time withdraw that reservation by notification to the depositary.

Amnesty International supports the general prohibition of reservations, aside the one on draft article 57(3) on the compulsory jurisdiction of the International Court of Justice. The organization is of the view that a general ban on reservations ensures that all states parties are subject to the same obligations and that these obligations are readily known to all states and to the general public.

As a leading scholar observed, reservations ‘may impair the integrity of multilateral

¹¹ R. Clark, in O. Triffterer (ed), *Commentary to the Rome Statute* (2008), article 125, margin No.1.

¹² Article 125, *Rome Statute of the International Criminal Court* (signed 17 July 1998; entered into force 1 July 2002), 2187 UNTS 3.

¹³ Article IX, *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948. Entry into force: 12 January 1951), 78 UNTS 277.

¹⁴ Article 25, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (signed 10 December 1984; entered into force 26 June 1987), 1465 UNTS 85.

treaties’,¹⁵ and ‘[t]o be workable, this regime should always rely on the possibility that there is an international body to monitor and assess the admissibility of reservations, and rule on the matter.’¹⁶ Likewise, reservations could lead to an unwieldy system in which a national prosecutor or court would have to review reservations of all relevant states to determine the extent of the obligations on cooperation each of those states had accepted.

III. RECOMMENDATIONS

Amnesty International makes the following recommendations to states participating in the informal consultations on the draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes, to be held in The Hague on 27-29 January 2020, namely:

- The Preamble should recall that the prohibition of genocide, crimes against humanity, war crimes, torture and enforced disappearance is a peremptory norm of general international law (*jus cogens*);
- The Preamble should incorporate a new paragraph emphasizing or recalling the right of victims to justice, truth and reparation as a fundamental component in the fight against impunity;
- The Preamble should also recognize the right of alleged offenders to a fair trial and the full protection of his or her rights under national and international law;
- Whenever international treaties or customary international law contain broader definitions of crimes than those in the Rome Statute, those definitions should be preferred and incorporated into the Draft MLA Convention;
- The definition 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’;
- Annex F 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’;
- The restrictive expression ‘in the territory’ in draft article 29 should be replaced by ‘in any place under the State Party’s jurisdiction’.
- Drafters should entirely remove draft Article 20(1)(b), which provides for a vague and subjective set of grounds for refusal of mutual legal assistance

¹⁵ A. Cassese, *International Law* (2nd edn., Oxford University Press, 2005), at 174.

¹⁶ *Ibid.*

(‘sovereignty, security, *ordre public* or other essential interests’);

- A new draft article recognizing the imperative obligation on states to refuse requests for mutual legal assistance based on human rights safeguards should be added;
- Draft article 31(1)(a) should incorporate the widest list of grounds of discrimination prohibited under international law;
- The expression ‘or, if imposed, will not be carried out’ in draft article 31(1)(b) should be deleted;
- The Draft MLA Convention should provide for a definition of victim and avoid leaving the definition to states’ domestic legislation;
- Drafters should provide that states parties shall ensure that any person who alleges that acts constituting crimes in the Draft MLA Convention have been or are being committed has the right to complain to the competent authorities, as well as an obligation on states parties to examine the complaints lodged by victims or their representatives;
- Draft article 54(1) should be significantly amended to enshrine the right of victims to all forms of reparation - restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition;
- Draft article 54 should clarify that, whenever the interests of victims may be affected, they should be provided with the right to legal representation;
- Draft article 60 should be amended so as to allow all states – and not only UN Member states, to become parties to the MLA Convention;
- No reservations shall be made to the Draft MLA Convention, bar the one permitted in draft article 57(3).

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