

MLA Initiative draft convention
France's observations

France would like to thank the Core Group for its draft convention and avails itself of this opportunity to make the following observations:

I. Preamble

- Recital on the duty to investigate

Concerning the following recital – “*Recognizing that States have ~~primary responsibility for the prosecution of a duty to investigate and prosecute the perpetrators of the crime of genocide, crimes against humanity and war crimes, crimes covered by this Convention and that they must take all necessary legislative and administrative measures to that effect,~~*” – France wishes to raise the following observations:

France is **opposed** to the addition of the words “have a duty to investigate and prosecute”, this duty running contrary to the **principle of the opportuneness of prosecution** which governs its criminal procedure. France recalls that it is up to the competent judicial authorities to determine sovereignly, independently and on a case-by-case basis whether it is opportune to conduct investigations and prosecutions. This new wording is moreover contrary to France’s position on the current wording of Article 5 of the Convention, providing for universal jurisdiction.

France therefore requests that the previous version – “*have primary responsibility*” – be retained.

- Recital on the Geneva Conventions

Concerning the following recital – “*Taking note with appreciation of existing provisions under customary international law and multilateral instruments to fight against impunity for the crime of genocide, crimes against humanity and war crimes, including, inter alia, the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, the Geneva Convention relative to the Treatment of Prisoners of War and the additional protocols thereto, The Convention for the Protection of Cultural Property in the Event of Armed Conflict and the additional protocols thereto, and the Rome Statute of the International Criminal Court*” – France wishes to raise the following observation:

France proposes to replace the words “*and the additional protocols thereto*” with “*and their additional protocols*”. The current wording suggests that each Geneva Convention has an additional protocol, which is not the case.

II. General provisions, central authorities and communication

- Article 1 (Purpose)

While France can support the addition of paragraph 2 to Article 1, recalling the rules of international law, the reference to “developing” rules is, as far as it is concerned, an inappropriate provision in an international treaty. While the paragraph appears to refer to the developing ILC initiative, this very wide-ranging wording lacks precision in that it refers to norms which by definition do not yet exist, and to which it is therefore not possible to commit. While referring to the draft Convention on Crimes against Humanity being drawn up by the ILC would appear useful, it would be preferable to do so in the preamble.

France therefore proposes the following wording:

Nothing in this Convention shall be interpreted as limiting or prejudicing in any way ~~existing or developing~~ rules of international law.

- Article 2 (Crimes covered by this Convention)

France recommends considering the introduction of the **notions of “attempt” and “complicity”** to the scope.

While the convention applies to genocide crimes, crimes against humanity and war crimes defined by the Rome Statute, that same treaty provides for the responsibility of a natural person who (Article 25 of the Rome Statute):

- Commits a crime;
- Orders, solicits or induces the commission of a crime which in fact occurs or is attempted;
- Aids, abets or otherwise assists in the commission or attempted commission of a crime;
- Contributes to the commission or attempted commission of a crime.

It seems therefore possible to deduce that the Convention could also apply to cases of complicity and attempts. In order to avoid any ambiguity in this respect, such a precision should be made explicitly in the Convention.

France proposes to add a new paragraph immediately after the first, worded as follows:

“Ibis. For the purposes of this Convention, a natural person shall be criminally responsible if that person:

- *Commits a crime;*

- *Orders, solicits or induces the commission of a crime which in fact occurs or is attempted;*
- *Aids, abets or otherwise assists in the commission or attempted commission of a crime;*
- *Contributes to the commission or attempted commission of a crime.”*

Moreover, Article 2 does not, in its current version, incorporate Article 8(2)(b)(xx) of the Rome Statute which, for the purposes of the Statute, includes in the definition of war crimes “Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex [to the Statute], by an amendment in accordance with the relevant provisions set forth in articles 121 and 123”.

France is in favour of including this Article 8(2)(b)(xx) of the Rome Statute within Article 2 of the Convention. The approach chosen during the recent negotiations aims to exactly reproduce the definitions of crimes against humanity, war crimes and genocide as they appear in the Rome Statute, and Article 2(5) as worded (definition of war crimes) is an exact reproduction of Article 8 of the Rome Statute, apart from this mention of weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.

It therefore appears coherent to make this addition, while making necessary adaptations.

A new Article 2(5)(b)(xx) could be inserted, worded as follows:

“(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Convention”.

Moreover, Articles (xx) et seq. as currently numbered would therefore be renumbered consequently.

- Article 3 (Optional extension of the scope of this Convention)

France wishes to raise the following observations concerning Article 3(3):

- While the term “*underlying conduct*”, for which France requested clarification in its previous observations, has been replaced appropriately by the term “*an act or*

omission”, France would like the latter term to be replaced with “a **positive** act or an omission”, which would differentiate between malfeasance and non-feasance offences. To determine **malfeasance offences**, evidence of a **positive act** is required, whereas **non-feasance offences** sanction failure to comply with an obligation.

- France would like the word “and” to be deleted from the end of the second point.

France therefore proposes the following wording:

*“3. Without prejudice to Article 2 and paragraphs 1 and 2 of this Article, States Parties may, on an ad hoc basis, agree to apply this Convention to any request that refers to a **positive** act or an omission that qualifies as:*

- *A crime of genocide, crime against humanity, war crime, crime of aggression, torture or enforced disappearance as defined in international law;*
- *A crime of genocide, crime against humanity, war crime, crime of aggression, torture or enforced disappearance in the law of the requesting State Party; ~~and~~*
- *An extraditable offence under the law of the requested State Party.”*

- Article 5 (Jurisdiction)

France again reiterates its **firm opposition to the current wording of Article 5(2)**, which requires States Parties to establish their jurisdiction where the alleged perpetrator of a crime covered by the Convention is located in their territory.

Firstly, it should be recalled that the Rome Statute sets down no rule in this respect, leaving States free to determine criteria of jurisdiction. It is also important to note that universal competence based on presence in territory raises very major practical difficulties.

In order to maintain a degree of latitude for States which, like France, have chosen the criterion of usual residence for the competence of courts to try crimes of genocide, crimes against humanity and war crimes covered by the Rome Statute (see Article 689-11 of the French Code of Criminal Procedure¹), France proposes that Article 5(2) should be worded so as to allow States to choose between the criteria of presence in territory and of usual residence.

¹ “Art. 689-11. – With the exception of cases provided for in Subtitle 1 of Title 1 of Book 4 for the application of the International Criminal court statute, opened for signature at Rome on 18 July 1998, any person may be prosecuted and tried by French courts, **if said person is usually resident in the territory of the Republic and is suspected of having committed abroad one of the following offences:**

“1° The crime of genocide, defined in Chapter 1 of Subtitle 1 of Title 1 of Book II of the Penal Code;

2° Other crimes against humanity defined in Chapter II of the same Subtitle 1, if the offences are punished by the legislation of the State where they were committed or if that State or the State of which the suspect bears the nationality is a party to the abovementioned Convention;

Moreover, France would like to underline that the current proposal **goes beyond other international conventions**, as Articles 42(3) of the Merida Convention (UNCAC) and 15(3) of the Palermo Convention (UNTOC) do not provide so widely for such a criterion of jurisdiction. With regard to persons situated in the territory of States Parties, this jurisdiction should apply only where the requested State does not extradite the suspect **on the sole grounds that he or she is one of its nationals**.

The French authorities see no reason to justify universal jurisdiction such as that proposed, and highlight moreover the major operational difficulties linked to this type of jurisdiction (great difficulty of investigations, collecting evidence, and achieving convictions by trial jurisdictions).

France, which would ideally like to see this clause deleted, considers that a wording making the criterion of jurisdiction based on the mere presence of a suspect in its territory optional would be a **perfectly acceptable compromise**.

France therefore reiterates the following proposed wording:

*Article 5.2: “Each State Party **may** likewise take...”.*

France also proposes the following alternative solution, which would also be an acceptable compromise:

*Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such crimes in cases where the alleged offender **usually resides in any territory under its jurisdiction** and it does not extradite him or her to any of the States mentioned in paragraph 1...*

- Article 6 (Preliminary inquiry)

3° War crimes and war misdemeanours defined in Articles 461-1 to 461-31 of the same Code, if the offences are punished by the legislation of the State where they were committed or if that State or the State of which the suspect bears the nationality is a party to the abovementioned Convention.

Prosecution may only be carried out at the request of the public prosecutor and if no international or national jurisdiction requests the surrender or extradition of the person. To this end, the public prosecutor verifies that no prosecution has been undertaken by the International Criminal Court and that no other international jurisdiction competent to try the person has requested his or her surrender, and that no other State has requested his or her extradition. Where, pursuant to Article 40-3 of this Code, the prosecutor general is seised of an appeal against a decision to close the case without further action made by the public prosecutor, he or she hears the person if said person so requests. If the prosecutor general deems the appeal unfounded, he informs the person concerned in a reasoned written decision.”

France recalls that the current wording of Article 6 should be improved to avoid any risk of undermining the principle of the presumption of innocence, particularly insofar as it makes a principle of incarcerating persons simply suspected.

France therefore reiterates the following alternative wording:

*Article 6. ~~Preliminary inquiry~~ **Investigation***

*“1. Upon being satisfied, after an examination of information available to it **and after carrying out the necessary investigations**, that the circumstances so warrant, any State Party in whose territory a person ~~alleged to have~~ **against whom there is sufficient evidence that he or she** committed ~~any crime as defined~~ **an offence referred to** 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 present ~~shall take him or her into custody~~ **may request a judicial decision of placement in custody of this person** or ~~take other legal measures to ensure~~ his or her presence.”*

*“2. Such State Party shall immediately ~~make a preliminary inquiry~~ **carry out judicial investigations** into the facts.”*

Met opmerkingen [DC1]: In our French comments, we propose to replace the word “assure” by “garantir” but this distinction has no relevance in English

- Article 7 (Aut dedere, aut iudicare)

This provision would enshrine strict application of the adage “aut dedere, aut iudicare” (either surrender or prosecute) between the States Parties and would undermine the principle of the opportuneness of prosecution in situations where the suspect is discovered in the national territory and is not the subject of extradition to another State Party.

Without prejudice to clarifications which may be made to justify the presence of such a clause, France considers that the wording of paragraph 1 should be closer to that of existing conventions (Palermo, Merida, European Convention on Extradition).

Such a wording would require States Parties only to submit the case to the competent authorities for the purpose of prosecution, **without establishing an obligation to prosecute**. The conditions governing extraterritorial jurisdiction in internal law should therefore continue to be examined by the competent authorities for the purpose of prosecution. Moreover, this obligation would apply only **if the alleged offender, discovered in the national territory, has been the subject of a refusal to extradite on the sole grounds that he or she is a national of the requested State**. Sufficient latitude would remain for the implementation of the current safeguards of universal jurisdiction.

The addition in the latest version of “or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized” does not appear legitimate in an “aut dedere, aut iudicare” article.

France therefore reiterates the following alternative wording:

*“1. The State Party in the territory ~~under whose jurisdiction of which~~ a person alleged to have committed any crime ~~as defined~~ **referred to** in article 2, paragraphs 2 to 6, ~~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 **4**, if it does not extradite him or her **on the sole grounds that he or she is one of its nationals**, 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 11 (Spontaneous exchange of information)

Given the overly vague nature of the principles set down and the referral to the application of national laws, we would like the expression “subject to domestic law” to be replaced by “without prejudice to domestic law”.

- Article 14 (Channel of communication and single points of contact)

Just as Article 13(4) provides that States shall communicate the list of their central authorities, it would be useful operationally for Article 14 to provide that they shall also communicate the list of their designated points of contact.

On electronic means, it should be clarified that this should be done by secure means that guarantee the authenticity and integrity of requests, and guarantees their source (even if this point is partially covered in Article 17).

III. Mutual legal assistance

- Article 17 (Purpose of the request)

Concerning the amendments made to Article 17 of the Convention, refer to our observations on Article 59.

- Article 18 (Request and supporting documents)

France reiterates its **opposition to the possibility of requests made only orally**, which is too vague and provides no traceability, and therefore considers that the alternative wording below, used in many conventions on mutual assistance in criminal matters is more appropriate.

France therefore proposes the following wording:

*In urgent circumstances, where agreed by the States Parties, requests may be made **by any means leaving a written record** orally but shall be confirmed in writing forthwith.*

- Article 21 (Grounds for refusal)

The new wording in Article 21 adds a paragraph 2(d) worded as follows: “*The request has been issued on behalf of an extraordinary or ad hoc tribunal of the requesting State Party*”. This grounds for refusal is usually mandatory in extradition conventions. France would therefore ideally like it to be moved to paragraph 1.

Moreover, France would like the words “*of an extraordinary or ad hoc tribunal*” to be replaced by “*of a special tribunal*”. The reference to an “ad hoc tribunal” does not appear sufficiently precise and could be interpreted as a reference to hybrid jurisdictions such as the specialist chambers for Kosovo or Cambodia, for example.

- Article 22 (Execution of the request)

Concerning the presence of officials from the requesting State Party, the French delegation requests the introduction of a clause providing for the possibility to issue a reservation on this point, notably so that it may be stated that mere passive assistance can be envisaged.

- Article 23 (Confiscation)

France is satisfied with the addition of paragraph 4, which introduces a mechanism to distribute confiscated property as a priority to victims or for the purpose of restitution.

France does however request clarification that requests for freezing or seizure should be made by the requesting State, in the event such property is identified.

France proposes moreover that the **possibility be added for States Parties to conclude agreements for disposal of property, drawing for example on Article 57(5) of the Merida Convention** (to cite: “*Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.*”)

- Article 26 (Appearances of persons in the requesting State)

France is in favour of introducing this new article.

It considers that it could be useful to supplement it with three other paragraphs worded as follows, corresponding to Articles 8 and 9 of the European Convention on Mutual Assistance in Criminal Matters, so as to best govern appearances:

4. A witness or expert who has failed to answer a summons to appear, service of which was requested, shall not, even if this summons contains obligations, be subject to any punishment or measure of constraint, unless he or she later voluntarily enters the territory of the Requesting State Party and is there again duly summoned.

5. Where a State Party makes an assistance request concerning a witness who requires protection, the competent authorities of the Requesting State Party and those of the Requested State Party may agree on measures to protect the person concerned.

6. The allowances payable and the travelling and subsistence expenses refundable to the witness or expert by the Requesting State Party shall be calculated from the place of residence of the witness or expert and cannot be lower than the rates provided for by the existing texts in the territory of the State Party where the hearing is to take place.

- Article 27 (Hearing by video conference)

France is in favour of introducing the new paragraphs 3 to 8.

However, an additional paragraph could be added between paragraphs 6 and 7 to govern the costs of video conferencing.

France therefore proposes the following wording, building on Article 10 of the Convention of 19 May 2000 applicable to EU Member States:

“The cost of establishing the video link, costs related to the servicing of the video link in the Requested Party, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Party shall be refunded by the Requesting Party to the Requested Party, unless the latter waives the refunding of all or some of these expenses.”

- Article 29 (Joint investigation teams)

France is in favour of this new provision, which takes up the content of Article 20 of the second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

However, the French wording diverges from that of said Article 20 and France proposes the following changes:

- In paragraph 1 a), the words “*et exigeantes*” could be replaced with “*et impliquant la mobilisation d’importants moyens*”.
- In paragraph 3 (et seq.), the word “*chef*” could be replaced with “*responsable*”.
- In paragraph 5, the words “*ont le droit*” could be replaced with “*sont habilités*”.

- In paragraph 10 b), the words “*sont devenues disponibles*” could be replaced with “**ont été obtenues**”.
- In paragraph 10 c), the words “*une menace immédiate et grave*” could be replaced with “**un danger immédiat et sérieux**”.

- Article 30 (Cross-border observations)

France is in favour of this new provision, which takes up the content of Article 17 of the second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

However, the French wording diverges from that of said Article 17 and France proposes the following changes:

- In paragraph 1, the word “*policiers*” should be replaced with “**agents**” and the word “*fortes*” should be replaced with “**sérieuses**”.
- In paragraphs 1 and 4, the word “*assistance*” could be replaced with “**entraide**”.
- In paragraph 6 a), the word “*responsables*” could be replaced with “**compétentes**”.
- In paragraph 6 f), the words “*intercepter et interroger*” could be replaced with “**interpeller**”.

Moreover, it could be useful to add a paragraph to designate competent authorities pursuant to paragraph 4.

- Article 31 (Covert investigations)

France is in favour of introducing such a provision. It does however propose adding a fourth paragraph, enabling States Parties to designate the competent authority for the purposes of paragraph 2 of this Article.

III. Specificities of the extradition procedure

- Article 33 (Scope)

The French authorities consider that the term of Article 33(2)b) is more relevant to grounds for refusal than to scope, and therefore asks for it to be moved to Article 35.

Moreover, the French authorities note that the draft Convention should be supplemented with a specific clause governing extradition requests for the purposes of enforcing a sentence of imprisonment.

France proposes adding a point to Article 33(2) as follows:

“If extradition is requested for the enforcement of a sentence of deprivation of liberty awarded by competent judicial authority of the Requesting Party, the duration of the

penalty remaining to be served must amount to at least a year [at the date of the request].”

- Article 35 (Grounds for refusal)

France considers that humanitarian grounds for refusal should be introduced, and proposes supplementing Article 35 with a new paragraph worded as follows:

“f. Extradition may be refused on humanitarian grounds, where surrender of the person sought is likely to have consequences of exceptional gravity for him or her, particularly by reason of his or her age or state of health.”

The notion of “underlying facts” in paragraph 1 c) has not been changed and remains too imprecise in France’s view. France therefore asks for this notion to be clarified or deleted.

- Article 36 (Principle of speciality)

France welcomes the introduction of this new article.

However, it considers that the wording could be improved, making it closer to that of Article 14 of the European Convention on Extradition.

France proposes the following changes:

- The word “*punished*” could be replaced with the word “*sentenced*”.
- The proposed **paragraph 2** could be supplemented as follows: *and a legal record of the depositions of the extradited person. The consent of the requested Party may only be given where the facts described in the extension request are extraditable, in accordance with the terms of this Convention.*
- Two other paragraphs could be added, as follows:
 - 4. However, the Requesting Party may take measures necessary to remove the person from its territory or for the interruption of the limitation period, in accordance with its legislation, including proceedings by default.*
 - 5. Where the legal description of the offence for which a person has been extradited is amended, this person may be prosecuted or tried only if the newly described offence concerns the same facts for which the extradition was granted and is extraditable in accordance with this Convention.*

- Article 43 (Provisional arrest)

France requests the same clarifications concerning the expression “underlying facts” in paragraph 2.

- Article 45 (Transit)

France would like to draw the attention of the Core Group to what is probably an omission: the grounds for refusal linked to “*political opinion*” **has not been reintroduced here along with** the added words “*other grounds that are universally recognized as impermissible under international law*” (but has been in the other paragraphs on grounds for refusal).

IV. Transfers

- Article 46 (Scope)

The draft Convention states that sentence means a “final judicial decision imposing, as a penalty for the commission of a criminal offence, imprisonment or a term of parole, probation, or other form of supervision without imprisonment.”

France notes that this wording **does not match the usual conception of sentences or terms of enforcement of sentences concerned by transfers**. That would involve moreover a very wide-ranging mutual recognition of judicial decisions.

France **cannot accept this wording** and therefore requests sentences of parole, probation, or other form of supervision without imprisonment **be withdrawn from the scope** of transfers.

As a compromise, it could accept an explicit possibility for reservations or declarations enabling signatory States to declare that they will apply this term only for sentences involving deprivation of liberty.

V. Victims, witnesses and experts

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

France would like to observe that the wording of Article 59 goes beyond that of Articles 24 and 25 of the Palermo Convention it is based on, notably due to the deletion of the words “**within its means**”. France, however, considers that the wording of the Palermo Convention is fully satisfactory. It highlights that protection of victims and witnesses is covered by complex national arrangements specific to each State.

France therefore asks for Article 59 to be split into two articles, faithfully using the wording of Articles 24 and 25 of the Palermo Convention as reproduced below:

Article 24

Protection of witnesses

1. Each State Party shall take appropriate measures **within its means** to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, *inter alia*, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

Article 25

Assistance to and protection of victims

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

- Article 60 (Victims' rights)

France wonders about the exclusion of legal persons from the definition of the term "victim" in paragraph 1. The Rome Statute does not make such a limitation to natural persons.

In paragraph 2, France wonders about the addition of the words "*committed through acts attributable to the State under international law*" and would like the Core Group to explain what such a clause involves.

Concerning the addition of “*guarantees of non-repetition*”, while this notion is one of the four rights granted to victims in transitional justice, the principle will raise insurmountable problems in practice. France is therefore in favour of a return to the previous wording: “**Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.**”

IV. Final Provisions

- Article 61 (Relation with other agreements)

France would like to thank the Core Group for replacing the words “*objet traité*” with the word “*sujet*” in the French version. However, the word “*traité*” does need to be retained after the word “*sujet*” for the sentence to keep its meaning.