

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

At the outset, Greece would like to express its appreciation to the members of the Core Group for having organized last January in The Hague the Informal Consultations on the scope of the envisaged convention as well as for circulating, despite the challenging conditions imposed by Covid-19 pandemic, the third Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes, dated March 20, 2020 (hereinafter “the Draft Convention”).

Following the invitation extended by the Core Group to provide comments on the above Draft Convention, Greece has the honour to submit the following comments on the scope of the Draft Convention and its proposed articles, while reserving itself for further comments and proposals that it may consider appropriate in light of future discussions.

I. Comments on the scope of the Draft Convention

Greece attaches great importance to the fight against impunity for the most serious international crimes. Together with its EU partners, has from the very beginning wholeheartedly supported the establishment of a permanent international criminal Court based on the core principle of complementarity and continues to support the work of the Court and the strengthening of international criminal justice system.

It was in this spirit and with the intention to promote and contribute to the effective implementation of the principle of complementarity that Greece has joined as early as 2013 the MLA Initiative by subscribing to the relevant Joint Statement and, one year after, to the Permanent Declaration.

Both in the Joint Statement and the Permanent Declaration we read that it is first and foremost States’ responsibility to uphold and implement the conventions criminalizing the crime of genocide, crimes against humanity and war crimes and that the conventions covering these international crimes, where they exist, do not address judicial assistance and extradition in modern terms and norms. The aim, therefore, of the Initiative, as reflected in these texts, is “*to address this outdated and insufficient international procedural legal framework*” and cover this gap by opening negotiations on a “*procedural multilateral treaty on mutual legal assistance and extradition*” for crimes of genocide, crimes against humanity and war crimes, which

would incorporate -to the extent possible- the most advanced provisions on MLA and extradition contained in major UN Conventions such as UNTOC and UNCAC and would bolster the capacity of States to effectively investigate and prosecute these crimes on the domestic level.

As it was already indicated last January, Greece shares the views of the vast majority of delegations intervening during the Informal Consultations, that if we want this Initiative to succeed, we should stick to its initial goals as described in the abovementioned texts. We believe, therefore, that the Convention should remain procedural in nature, seeking to establish a modern framework for extradition and mutual legal assistance for the crime of genocide, war crimes and crimes against humanity while leaving the issues of criminalization and establishment of jurisdiction over the above crimes to the responsibility of the States. This, not only because a considerable number of States supporting the initiative have already criminalized these crimes in their domestic legal order, but also in order to attract the largest possible number of ratifications and, more importantly, to avoid duplications, overlaps and possible conflicts either with existing international conventions or with projects such as the elaboration of a convention for the prevention and punishment of crimes against humanity based on the Draft Articles adopted last year by the ILC.

With regard to the latter project, we have read and carefully considered the views of the Core Group on the relation between the Draft Convention and the Draft Articles. We are not, however, in a position to share those views and would like, once again, to join those States that last January highlighted the need for a coordination between the two texts. Since in our view, and as far as crimes against humanity are concerned, there is a significant amount of overlap between the two texts, every effort should be made to harmonize them so that they become mutually complementary and constitute in the future a point of reference for each other.

-In view of the above, it is suggested:

a) To delete articles 4 to 8. Alternatively, these articles could be included in a separate optional Protocol or Part of the Convention, open to interested States.

b) To delete Part VI on Victims, Witnesses and Experts.

-With respect to the crimes to which the Convention should apply, we are of the view that the Convention should remain focused on the three core international crimes mentioned in its title as well as in the 2013 Joint Statement and the 2014 Permanent Declaration, namely the crime of genocide, crimes against humanity and war crimes, as these crimes are defined in the 1998 Rome Statute of the International Criminal Court, with the possibility for the States Parties to agree to apply on an ad hoc basis and subject to the principle of double criminality, broader definitions of these crimes under international and domestic law and to optionally extend (possibly through annexes) the list of such crimes, so that it includes any subsequent amendments to the relevant articles of the 1998 Rome Statute of the International Criminal Court.

Finally, regarding Part V of the Draft Convention on the transfer of sentenced persons, we wonder whether it might be preferable to make that Part optional for the interested States either by means of an express provision to this end or by inserting it into a separate Optional Protocol to the Convention. In this regard, we would like to note that, besides the existing network of bilateral and regional agreements on this issue, almost two-thirds of the States currently supporting the Initiative are already Parties to the 1983 CoE Convention on the Transfer of Sentenced Persons, which is, under certain conditions, open also to States not members of the Council of Europe.

II. Comments on the Preamble and specific articles of the Draft Convention

Preamble

It is suggested to readjust and rephrase the Preamble as follows:

“The States Parties to this Convention,

Mindful that during the 20th century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recalling that 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,

Emphasizing that fighting impunity for these crimes is essential for peace, stability and the rule of law, in the States concerned,

Recognizing that States have the primary responsibility to investigate and prosecute the crime of genocide, crimes against humanity and war crimes,

Observing that prosecuting these crimes often involves suspects, witnesses, evidence or assets located outside the territory of the State that is conducting the investigation or prosecution,

Acknowledging that their effective prosecution at the national level must be ensured by enhancing international cooperation,

Recognizing that international cooperation in criminal matters in accordance with international obligations and domestic law is a cornerstone of continued efforts by States to fight against impunity, and encouraging the continuation and reinforcement of such activities at all levels,

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

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 Treatment of Prisoners of War, the Geneva Convention relative to the Protection of Civilian Persons in Time 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,

Determined to investigate and prosecute in a more effective manner the crimes covered by this Convention and recognizing the need to strengthen the legal framework for international cooperation to this end,

Have agreed as follows:”

Part I – General Provisions

Without prejudice to the comments made under I above on the scope of the Convention, the following comments are made on the current articles of this Part:

Article 3

Paragraph 2, second sentence (Unless expressly provided ...thereto): Given the optional character of the annexes, we believe that this sentence creates confusion and we suggest its deletion.

Article 5

Paragraph 1, subparagraph (b): It is suggested to replace the words “a foreign national” by the words “*a stateless person*” (see also Draft Articles on Crimes against Humanity, Draft Article 7 par. 1(b)).

Article 6

Paragraph 1:

-For the sake of consistency with the wording of Article 5, it is suggested to replace the phrase “in whose territory” with the phrase “*in the territory under whose jurisdiction*” (see also Draft Articles on Crimes against Humanity, Draft Article 9 par. 1).

-It is also suggested to replace the phrase “any criminal or extradition proceedings” with the phrase “*any criminal, extradition or surrender proceedings*” (see also Draft Articles on Crimes against Humanity, Draft Article 9 par. 1).

Article 7:

Paragraph 2: It is suggested to replace the word “ordinary” with the word “*other*”.

Articles 9 to 11:

-We believe that these articles are better fitted in Part III of the Draft Convention on mutual legal assistance. It is noted in this respect that article 18 of the UNTOC after which these articles are modelled deals exclusively with mutual legal assistance. It is therefore suggested to remove them in Part III.

-We also wonder whether it might be more accurate to replace the current title of article 10 with the following: “*Limitations on use of information and evidence*”.

Article 12: This article is also modelled after article 18 par. 28 of UNTOC which, as mentioned above, refers to mutual legal assistance and which seems to have been inspired by article 20 of the UN Model Treaty on Mutual Assistance in Criminal Matters. We believe that this article cannot adequately address the issue of costs relating to the other forms of cooperation in criminal matters contemplated in the Draft Convention, namely extradition and transfer of sentenced persons. In this respect, we draw the attention to article 17¹ of the UN Model Treaty on Extradition which regulates in a different way the issue of costs as well as to article 17 par. 5 of the Coe Convention on the Transfer of sentenced persons².

It is, therefore, suggested to remove this article in Part III and to insert separate provisions on costs in Parts IV and V modelled, possibly, after the abovementioned instruments.

Part II – Central authorities and communication

Articles 13 and 14: Both articles are to a great extent modelled after article 18 par. 13 of UNTOC dealing with mutual legal assistance. Since the Draft Convention envisages not only mutual legal assistance but also extradition and transfer of sentenced persons, issues that in some States are being dealt with by different authorities, the Draft Convention should provide for the possibility for States Parties to designate distinct central authorities and, possibly, points of contact.

Article 14

Paragraph 1: It is suggested to replace the words “the communication” by the words “*any communication*” (see Article 18 par. 13 UNTOC).

Paragraph 2: It is suggested to replace the phrase “that the requests and communications shall be addressed” with the phrase “*that such requests and communications be addressed*”.

Article 15: As already pointed out by some delegations during the Informal Consultations last January, this provision needs to be further clarified in order to become workable. As it currently stands, the provision needs, in our view, to be complemented with a mechanism allowing States Parties to identify in advance, through the depositary, commonly accepted language or languages. Alternatively, the possibility to revert to the provision contained in Article 14 of the Preliminary Draft Treaty with some adjustments could also be examined.

¹ “Article 17
Costs

1. The requested State shall meet the cost of any proceedings in its jurisdiction arising out of a request for extradition.

2. The requested State shall also bear the costs incurred in its territory in connection with the seizure and handing over of property, or the arrest and detention of the person whose extradition is sought.

3. The requesting State shall bear the costs incurred in conveying the person from the territory of the requested State, including transit costs”.

² “5. Any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State”.

Part III – Mutual legal assistance

Article 16

Paragraph 2: It is suggested to delete the phrase “in accordance with article 8 paragraph 1”.

Article 17: It is suggested to delete subparagraph (l).

Article 21

Paragraph 1

Subparagraph a: It is suggested to replace “sex” with “gender” and “political opinion” with “*political opinions*”.

Subparagraph b: It is suggested to replace the words “sufficient guarantees” with the words “*credible and effective guarantees*” which are included in article 35 paragraph 1, subparagraph b.

Article 22

Paragraph 2: Given the content of article 18 paragraph 2, subparagraph h), it is suggested to delete the word “preferably” as well as the comma before it.

Paragraph 5: It is suggested to replace the phrase “the central authority of the requested State Party” with the phrase “*the requested State Party*”.

Article 26

Title: It is suggested to add the word “Party” at the end.

Article 27

It is suggested to add a new paragraph 9 as follows:

“Any State Party may, at any time, by means of a declaration addressed to the Depositary, declare that it will not avail itself of the possibility provided in paragraph 8 above of also applying the provisions of this article to hearings by video conference involving the accused person or the suspect” (see article 9 par. 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ECMA)).

Article 29

Paragraph 1, subparagraphs a and b: In our view the phrase “into criminal offences” should be replaced with the phrase “*into crimes covered by this Convention*”.

Article 30

-This article reproduces article 17 par. 1, 2 and 3 of the Second Additional Protocol to ECMA which, however, contains 6 paragraphs. This combined with the fact that there has been a change in the numbering of paragraphs creates confusion as to the substance of the article while the references to specific paragraphs are not correct.

We believe, therefore, that this article needs to be redrafted with the necessary adjustments, taking into account the nature of the Draft Convention which covers only specific crimes. In this respect, the following problematic points are highlighted (in an indicative way):

Paragraph 1: The phrase “in a criminal offence to which extradition may apply”.

Paragraph 4 (chapeau): The phrase “offences listed in paragraph 6”.

Paragraph 4, subparagraph a: The phrase “designated under paragraph 4”.

Paragraph 5: The phrase “the notification referred to in a or the request referred to in b”.

Paragraph 6 (chapeau): The phrase “The observation referred to in paragraphs 1 and 2”.

Paragraph 6, subparagraph b: The phrase “Except in the situations provided for in paragraph 2”.

-Furthermore, there might be a need to add a paragraph similar to paragraph 4 of Article 17 of the Second Additional Protocol to ECMA regarding the designation by the States Parties of competent authorities to which paragraph 4, subparagraph a of the current article refers (see also article 33 par. 4 of the Swiss Draft Convention).

Article 31

-For reasons of consistency, it is suggested to add the word “State” before the words “Party”/ “Parties”.

Paragraph 1: It is suggested to replace the phrase “into crime” with the phrase “*into crimes covered by this Convention*”.

-There might also be a need to add a new paragraph 4 modelled after paragraph 4 of Article 19 of the Second Additional Protocol to ECMA concerning the designation by the State Parties of the competent authorities (see also article 34 par. 4 of the Swiss Draft Convention).

Part IV – Extradition

See comments on article 12 above (Costs).

Article 35

Paragraph 1

Subparagraph a: It is suggested to replace “sex” with “*gender*” and “political opinion” with “*political opinions*”.

Subparagraph c: It is suggested to replace the phrase “to be extradited” with the phrase “*whose extradition is sought*”.

Subparagraph e: It is suggested to further streamline the wording of this subparagraph with the wording of Article 4 par. 3 of the Inter-american Convention on Extradition, as follows:

“(e) The person sought **has been tried or sentenced or is to be tried before an extraordinary or ad hoc tribunal of the requesting State Party**”.

Paragraph 2:

-With regard to the phrase “or postponing its execution pursuant to article 41, paragraph 2”, we wonder whether it would be more appropriate in the context of extradition to refer to postponement of surrender rather than to postponement of the execution of the request.

It is suggested, therefore, to delete the above phrase and to regulate the possibility of postponing surrender into a separate article (see article 12 of the UN Model Treaty on Extradition).

-It is suggested to replace the phrase “the central authority of the requested State Party” with the phrase “*the requested State Party*”.

Article 36

Title: It is suggested to replace the word “Principle” with the word “*Rule*”.

-Paragraphs 1 and 2 of this article are modelled after article 101 of the Rome Statute of the ICC, while paragraph 3 is modelled after article 14 paragraph 1(b) of the European Convention on Extradition.

We believe that it is more appropriate in the current context to redraft this article using the wording of article 14 of the UN Model Treaty on Extradition. In this case, article 37 on re-extradition to a third State could be deleted, since re-extradition is being already covered by par. 1 of article 14 of the UN Model Treaty on Extradition.

Article 37: See above.

Article 38: Given the last sentence of this article (“The requesting State Party shall be informed of the result of its request”), it is suggested to add the phrase “*at the request of the State Party seeking extradition*” after the word “shall” in the second sentence of this article (see also article 16 par. 10 of UNTOC).

Article 40: It is suggested to further streamline the wording of this article with the wording of article 16 par. 12 of UNTOC by adding after the word “permits” the phrase “*and in conformity with the requirements of such law*”.

Article 41 paragraph 2: It is suggested to replace this paragraph with the following:

“2. *If the requested State Party refuses the whole or any part of the request for extradition ~~or in the event of postponement of the request, the reasons for refusal or postponement~~ shall be notified to the requesting State Party*”. See also above, comments on article 35 par. 2.

Article 43

Paragraph 1: It is suggested to add the words “so warrant and” after the word “circumstances”.

Paragraph 4: We believe that the period of sixty days should be replaced by a period of forty days. See both the UN Model Treaty on Extradition (art. 9 par. 4) and the European Convention on Extradition (art. 16 par. 4).

Paragraph 5: It is suggested to replace the phrase «and his or her subsequent extradition of the person sought” with either the phrase “*and extradition of the person sought*” or the phrase “*and institution of proceedings with a view to extraditing the person sought*” (see art. 9 παρ. 5 of the UN Model Treaty on Extradition).

Article 44: It is suggested to add after the word “shall” the phrase “*subject to their domestic law*” which is included in article 16 παρ. 8 of UNTOC after which this article is modelled.

Article 45, paragraph 5: In order to streamline the wording of this paragraph with the wording of articles 21 paragraph 1(a) and 35 paragraph 1(a) (see comments above), it is suggested to replace “sex” with “*gender*” and to add the words “*political opinions*” after the words “ethnic origin”.

Part V – Transfer of sentenced persons

-See comments on the scope of the Draft Convention under I as well as comments on article 12 (Costs).

-The words “offence/offences” and “crime/crimes” are used interchangeably in this Part. It is suggested to use only the words “crime/crimes”.

-No provisions on transit are contained in this Part (see CoE Convention on the transfer of sentenced persons, art. 16).

Article 46

Paragraph 2, subparagraph a: It is suggested to replace the phrase “and from which the sentenced person would be transferred of has been transferred” with the phrase “*on the person who may be, or has been, transferred*” (see article 1(c) of the CoE Convention of the transfer of sentenced Persons).

Paragraph 2, subparagraph c:

-It is suggested to replace the phrase “for the commission of a criminal offence” with the phrase “*for the commission of a crime covered by this Convention*”.

Article 47

Paragraph 3:

Subparagraph a: It is suggested to delete the phrase “or a permanent resident of the administering State Party” and add a new paragraph 4 reading as follows: “*Any State may, at any time, by a declaration addressed to the Depositary, define, as far as it is concerned, the term "national" for the purposes of this Part of the Convention*” (see Article 3 par. 4 of the CoE Convention on the transfer of sentenced persons). We believe that this solution allows for greater flexibility. Current paragraph 4 should become paragraph 5.

-Given the provisions of Article 49 paragraph 3 (b) of the Draft Convention, it is suggested to add a new subparagraph e reading as follows:

“if the acts or omissions on account of which the sentence has been imposed constitute a crime covered by this Convention according to the law of the administering State or would constitute such a crime if committed on its territory” (see also art. 3 par. 1(e) of the CoE Convention on the transfer of sentenced persons). Current subparagraph e should become subparagraph f.

Paragraph 4: It is suggested to delete the word “necessary”.

Article 49

Paragraph 3:

Subparagraph a: It is suggested to delete the phrase “or a permanent resident”.

Subparagraph b: It is suggested to amend it as follows:

*“A copy of the relevant law of the administering State Party which provides that the acts or omissions on account of which the sentence has been imposed in the sentencing State Party constitute a ~~criminal offence~~ **crime covered by this Convention** according to the law of the administering State Party, or would constitute **such a crime** ~~a criminal offence~~ if committed on its territory”.*

Subparagraph c: It is suggested to replace it with the following:

“(c) a statement containing the information mentioned in Article 53 par. 2” (see art. 6 par. 1(c) of the CoE Convention on the transfer of sentenced persons).

Paragraph 4: It is suggested to delete this paragraph since its provisions are similar to those of article 53 paragraph 2 and renumber current paragraph 5 as paragraph 4.

Paragraph 5, subparagraph. c: It is suggested to replace the phrase “as referred to in Article 50” with the phrase “*as referred to in Article 47 paragraph 3, subparagraph d*” (see art. 6 par. 2 (c) of the CoE Convention on the transfer of sentenced persons).

Article 50

Paragraph 2: The phrase “conditions set out in paragraph 2” should become “*conditions set out in paragraph 1 above*”.

Article 51

Paragraph 2: In order to streamline the wording of this paragraph with the wording of Article 2 par. 2 of the Additional Protocol to the CoE Convention on the transfer of sentenced persons, it is suggested to amend it as follows:

*“At the request of the sentencing State Party, the administering State Party may, before receiving the documents supporting the request, or ~~pending prior~~ **prior** to the decision on ~~this~~ **that** request, ~~have~~ **arrest** the sentenced person ~~arrested~~ or take any other ~~steps such as~~ **measure** to ensure that ~~he~~ **the sentenced person** remains on its territory pending a decision ~~regarding on~~ the request. ~~Any such request~~ **Requests on provisional measures** shall be accompanied by the information mentioned in article*

~~49 48, paragraph 3. Arrest of the sentenced person under this heading shall not lead to an aggravation of his or her penal situation~~ **The penal position of the sentenced person shall not be aggravated as a result of any period spent in custody by reasons of this paragraph**”.

Paragraph 3: For the same reasons, it is suggested to adjust the wording of this paragraph as follows:

“The consent of the sentenced person shall not be required to the transfer of the execution of the sentence”.

Article 53

Paragraph 4: It is suggested to add after the phrase «by way of a declaration» the phrase *“addressed to the Depositary”*.

Part VI – Victims, witnesses and experts

See above comments on the scope of the Draft Convention under I.

Part VIII – Final Provisions

Greece would like to reiterate the view expressed during the Informal Consultations last January that the final provisions as well as the issue of reservations should be ultimately decided once we have a clear idea about the scope of the Convention and the content of its substantive provisions. Having said that, we would like at this stage to make the following comments on the articles proposed in this Part:

Article 61

-It is suggested to replace the phrase “an agreement or treaty” with the phrase *“other agreements”* which was included in the previous draft Convention.

-We believe that the phrase “if that facilitates their cooperation” creates legal uncertainty and we suggest its deletion.

Article 62

During the Informal Consultations last January, we shared the doubts expressed by some delegations about the need and the added value of establishing a Conference of States Parties in the context of the envisaged Convention as well as the concerns about the financial burden that would imply for States Parties.

Although substantially changed, this article still provides for the convening of a Conference of States Parties at the proposal of at least one third of the States Parties without, however, describing the functions thereof. Moreover, it is not clear to us how the Conference would be convened in accordance with article 64 to discuss proposals for amendments to the Convention (see below comments on article 64).

Article 63

Paragraph 3: In our view it is necessary to complement this paragraph with the following sentence: “*The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation*” (see article 35 par. 3 of UNTOC).

Paragraph 4: The phrase “in accordance with article 63, paragraph 3” should be replaced with the phrase “*in accordance with paragraph 3 of this article*”.

Article 64

In our view, this article does not contain clear rules about the convening of a Conference of States Parties in order to discuss amendments to the Convention. In particular, it is not clear to us how the host of the meeting who is supposed to circulate the proposal for amendment in accordance with paragraph 2 would be designated. We wonder, therefore, whether it might be more appropriate to revert to the procedure for amendments contained in the Preliminary Draft Convention (see article 63 thereof) with some adjustments.

Paragraph 5: Since there is no longer paragraph 6, the phrase “Without prejudice to paragraph 6” should be deleted.

Article 65

Paragraph 1: See above comments on the scope of the Convention and the content of Annexes thereto.

Paragraph 2: See above comments about article 64.

Article 67

Paragraphs 1 and 2: Given the nature of the envisaged Convention, we believe that it is more appropriate to raise the number of ratifications required for its entry into force to at least 15. In this respect, we would like to remind article 38 of the UNTOC which requires 40 ratifications for the entry into force of the Convention.

Paragraph 4: We believe that the phrase “in accordance with paragraph 1 of this article” should become “*in accordance with paragraph 1 or 2 of this article*”.

Paragraph 5: It is suggested to replace the phrase “that this date is no later than the entry into force of the Convention” with the phrase “*that this date is no later than the date of entry into force of the Convention for that State Party*”.

Article 68: We wonder whether the nature of the envisaged Convention allows for its provisional application given the legal problems that might arise especially in cases of termination of the provisional application. Moreover, it is noted that neither UNTOC nor UNCAC contain provisions on their provisional application.

Άρθρο 69: See above general comments on this Part. We also wonder whether an express prohibition of reservations is appropriate for the envisaged Convention. In this respect, we would like to note that UNTOC and UNCAC do not contain any provision on reservations, while the European Conventions on Extradition and Mutual Assistance in Criminal Matters expressly permit them (articles 26 and 23 respectively).
