

**Convention on International Cooperation in the Investigation and
Prosecution of the Crime of Genocide, Crimes against Humanity and
War Crimes
(version 20/03/2020)**

Explanatory note to the Draft Convention

This revised text of the Draft Convention incorporates a number of new provisions and changes to existing ones. These changes follow the debate that took place at the informal consultations (held in The Hague from 27-29 January 2020), as well as written comments received by the Core Group, including the written proposal of Switzerland which was disseminated during the informal consultations, the “Joint NGO letter to the Core Group and Co-Sponsoring States of the initiative” of 20 January 2020, and Amnesty International’s “Recommendations for a Convention on Mutual Legal Assistance” of 16 January 2020.

The revised text of the Draft Convention incorporates inter alia:

- the possibility for the optional expansion of the scope of the Convention to international crimes not defined in the Convention, on the basis of dual criminality (article 3, paragraph 3),
- more detailed, as well as new provisions on mutual legal assistance (Part III), and
- new provisions on human rights safeguards in general and victims’ rights in particular.

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DRAFT CORE GROUP

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

Preamble

The States Parties to this Convention,

Recalling that the crimes covered by this Convention are among the most serious crimes of concern to the international community as a whole,

Met opmerkingen [MIG1]: We prefer that the crimes are explicitly named in the Preamble already: the crime of genocide, crimes against humanity and war crimes

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

Stressing that States have a duty to investigate and prosecute the crimes covered by this Convention and that they must take all necessary legislative and administrative measures to that effect,

Met opmerkingen [MIG2]: We prefer: a primary responsibility

Affirming their willingness to foster conditions allowing States to assume fully that primary responsibility,

Considering the rights of victims, witnesses and others in relation to the crimes covered by this Convention, as well as the right of alleged offenders to fair treatment,

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 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,

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,

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

Have agreed as follows:

PART I GENERAL PROVISIONS

Article 1. Purpose

~~1. 1.~~ The purpose of this Convention is to facilitate international cooperation in criminal matters between States Parties with a view to strengthening the fight against impunity for the crime of genocide, crimes against humanity and war crimes.

2. The provisions of this Convention shall not affect any obligations under any other treaty, bilateral or multilateral, that governs or will govern in whole or in part, international cooperation in judicial matters in a more favorable way.

2. Nothing in this Convention shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.
3. For the purpose of this Convention, the crimes covered by this Convention shall not be considered political crimes.

Article 2. Crimes covered by this Convention

1. The crimes covered by this Convention are the crime of genocide, crimes against humanity and war crimes.
2. For the purpose of this Convention, "crime of genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
3. For the purpose of this Convention, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;

Met opmerkingen [MIG3]: Switzerland suggests that the Convention should be a pure MLA Convention focused on the **cooperation** between States. Therefore, we suggest another approach, in particular in the first part, and refer to our Swiss draft (also sent out to Supporting States by the Core Group on 20/03/20) in general.

Met opmerkingen [MIG4]: Due to the importance of this paragraph, we suggest to put it more prominently in art.1.

Met opmerkingen [5]: [Based on inter alia Genocide Convention Article 7]

Met opmerkingen [MIG6]: We propose to delete the definitions of crimes covered by the Convention. They are and should be defined in other instruments of international law. This new instrument should complement existing (and evolving) treaties containing crime definitions and thus focus exclusively on effective international cooperation (MLA, extradition and prisoner transfer) in the field of international core crimes.

Cf. to the Swiss draft to see the approach we suggest.

Met opmerkingen [7]: [Based on inter alia Rome Statute Article 5]

Met opmerkingen [8]: [Rome Statute Article 6]

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime covered by this Convention;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

4. For the purpose of paragraph 3:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 3 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

Met opmerkingen [9]: [Rome Statute Article 7, paragraph 1]

- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 3, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "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.

Met opmerkingen [10]: [Rome Statute Article 7, paragraph 2]

5. For the purpose of this Convention, "war crimes" means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to

the protection given to civilians or civilian objects under the international law of armed conflict;

- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his or her arms or having no longer means of defense, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

- (xvi) Pillaging a town or place, even when taken by assault;
 - (xvii) Employing poison or poisoned weapons;
 - (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - (xx) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in paragraph 4 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxiv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxv) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

- (d) Paragraph 5 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in paragraph 4 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor

carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 5(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Met opmerkingen [11]: [Rome Statute Article 8]

Article 3. Dual Criminality

Met opmerkingen [MIG12]: Instead of defining the crimes, we suggest adding the principle of Dual Criminality.

1. Any State Party may, by a declaration addressed to the Depository, when signing this Convention or depositing its instrument of ratification, declare to what extent the execution of requests is dependent on one or more of the following conditions:

(a) that the offence motivating the request is punishable under both, the law of the requesting State Party and the requested State Party;

(b) that the offence motivating the request is an extraditable offence in the requested State Party;

(c) that the offence motivating the request is punishable as a crime within the scope of this Convention in the requested State Party.

2. Where a State Party makes a declaration in accordance with paragraph 1 of this article, any other State Party may apply reciprocity.

Article 4. Statute of limitations

International judicial cooperation in criminal matters shall not be refused on the ground that the prosecution or the punishment at the origin of the request would be statute-barred according to the law of the requested State Party.

Article 3. Optional extension of the scope of this Convention

1. Each State Party may, at the time of ratification, acceptance or approval of or accession to this Convention, or at any later time, notify the depository that it shall apply this Convention to the international crime or crimes listed in any of the annexes to this Convention in relation to other States Parties which have declared to apply the Convention to the same crime.

Met opmerkingen [MIG13]: We would propose a more balanced formulation along the lines of the one contained in the Swiss version:

States Parties may, on an ad hoc basis, agree to apply this Convention to any request that refers to an act that qualifies in the requesting State Party as a crime of aggression, torture or enforced disappearance, as defined in international law.

2. The annexes to this Convention shall form an integral part thereof for the State Party that has notified the depositary that it shall apply this Convention to the international crime or crimes listed in any of the annexes to this Convention, in accordance with paragraph 1. Unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto.
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 an act or 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.

Met opmerkingen [14]: [Stockholm Convention on Persistent Organic Pollutants Article 22, paragraph 1]

Article 4. Criminalization

1. Each State Party shall take the necessary measures to ensure that the crimes as defined in article 2, paragraphs 2 to 5, as well as any other international crime it applies this Convention to in accordance with article 3, paragraph 1, constitute offences under its criminal law.
2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

Met opmerkingen [MIG15]: We are of the opinion that in the process named "MLA Initiative", we should develop a convention on MLA (in the large sense). The proposed instrument should thus be limited to aspects of international cooperation in criminal matters. It should therefore not contain provisions of substantive criminal law. In that sense, we are of the opinion that the criminalization article should not be contained in the Convention. Criminalization, rules on jurisdiction etc. should (continue to) be dealt with in substantive conventions (such as the Genocide Convention, Geneva Conventions etc.).

Met opmerkingen [16]: [Based on United Nations Convention against Torture (UNCAT) Article 4]

Article 5. Jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes as defined in article 2, paragraphs 2 to 5, as well as any crime it has declared applicable under article 3, paragraph 1, in the following cases:
 - (a) When the crimes are committed in any territory under its jurisdiction or on board a vessel or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State or, if that State considers it appropriate, a foreign national who is habitually resident in that State's territory;
 - (c) When the victim is a national of that State if that State considers it appropriate.
2. 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 is present in any territory under its jurisdiction and it does not extradite him or her to any of the States mentioned in paragraph 1, or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized.

Met opmerkingen [MIG17]: In the sense of the commentary just above, we are of the opinion that also the article on jurisdiction should not be contained in the Convention.

Met opmerkingen [18]: [UNCAT Article 5 and International Convention for the Protection of All Persons from Enforced Disappearance Article 9]

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with domestic law.

Met opmerkingen [19]: [UNCAT Article 5]

Article 6. Preliminary inquiry

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any crime as defined in article 2, paragraphs 2 to 5, or any other international crime it applies this Convention to in accordance with article 3, paragraph 1, is present shall take him or her into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State Party but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State Party shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States Parties referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State Party which makes the preliminary inquiry contemplated in paragraph 2 shall promptly report its findings to the said States Parties and shall indicate whether it intends to exercise jurisdiction.

Met opmerkingen [MIG20]: The suggested preliminary inquiry article makes sense if a State is itself leading an investigation, not when it contributes to one via MLA. It should thus not be contained in this Convention.

Met opmerkingen [21]: [UNCAT Article 6]

Article 7. Aut dedere, aut iudicare

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any crime as defined in article 2, paragraphs 2 to 5, or any other international crime it applies this Convention to in accordance with article 3, paragraph 1, is found shall in the cases contemplated in article 5, if it does not extradite him or her, submit the case to its competent authorities for the purpose of prosecution or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the crimes covered by this Convention shall be guaranteed fair treatment at all stages of the proceedings.

Met opmerkingen [MIG22]: Also aut dedere aut iudicare belongs into substantive conventions.

Met opmerkingen [23]: [UNCAT Article 7]

Article 8. Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the crimes as defined in article 2, paragraphs 2 to 5, as well as any other international crime it applies this Convention to in accordance with article 3, paragraph 1.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the crimes.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Met opmerkingen [MIG24]: This article should be included in the specific MLA part as legal persons cannot be the subject of extradition or prisoner transfer.

Met opmerkingen [25]: [United Nations Convention against Corruption (UNCAC) Article 26 and Article 10 UNTOC, paragraph 1]

Met opmerkingen [26]: [UNCAC Article 26 and UNTOC, Article 10, paragraph 2]

Met opmerkingen [27]: [UNCAC Article 26 and UNTOC, Article 10, paragraph 3]

Met opmerkingen [28]: [UNCAC Article 26 and UNTOC, Article 10, paragraph 4]

Article 9. Confidentiality

The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

Met opmerkingen [29]: [United Nations Convention against Transnational Organized Crime (UNTOC) Article 18, paragraph 20]

Article 10. Protection of information and evidence

1. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party.
2. Where the requested State Party has imposed special conditions on the use of the provided information or evidence as referred to in paragraph 1, the requesting State Party shall upon request from the requested State Party provide information on the use that has been made of the information or evidence.
3. Notwithstanding paragraph 1, the requesting State Party may disclose in its proceedings information or evidence that is exculpatory to an accused person. In such case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.
4. Where, following disclosure to the requesting State Party, the requested State Party becomes aware of circumstances that may cause it to seek an additional condition in a particular case, the

Met opmerkingen [MIG30]: We would suggest to divide this article into two separate articles, one including paragraphs 1-3 and entitled: Principle of speciality and a second one including paragraphs 4-7 and entitled: Use of information and evidence.

Cf. Swiss draft.

Met opmerkingen [31]: [UNTOC, Article 18, paragraph 19]

Met opmerkingen [32]: [UNTOC, Article 18, paragraph 19]

central authority of the requested State Party may consult with the central authority of the requesting State Party to determine the extent to which the evidence and information can be protected.

5. The requested State Party shall be obliged to ensure the accuracy of the information to be transmitted. If it appears that incorrect information has been transmitted or if it appears that information should not have been transmitted, the requesting State Party shall immediately be notified to this effect. The requested State Party shall be obliged to correct or delete the information without delay.
6. Upon request, the person concerned shall be informed about any transmitted personal data relating to him or her and about the purpose of its intended use. However, this information may be withheld or postponed in order to avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences.
7. If the domestic law of the requested State Party envisages special time limits regarding the deletion of transmitted personal data, the requested State Party shall notify the requesting State Party to this effect. Irrespective of such time limits, the transmitted personal data shall be deleted in accordance with the domestic law of the requesting State Party as soon as they are no longer required for the purpose for which they have been transmitted.

Article 11. Spontaneous exchange of information

1. Without prejudice to domestic law, a State Party may, without prior request, transmit information relating to the crimes covered by this Convention to another State Party where they believe that such information could assist the latter State Party in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party in accordance with this Convention. Without prejudice to more favorable conditions in other legal instruments, the spontaneous exchange of information shall take place through the central authorities designated by the States Parties.
2. The transmission of information pursuant to paragraph 1 shall be without prejudice to inquiries and criminal proceedings in the providing State Party.
3. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use.
4. Notwithstanding paragraph 3, the receiving State Party may disclose in its proceedings information that is exculpatory to an accused person. In such case, the receiving State Party shall notify the providing State Party prior to the disclosure and, if so requested, consult with the providing State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the providing State Party of the disclosure without delay.

Met opmerkingen [MIG33]: We are of the opinion that spontaneous exchange of information is a measure of MLA and as such, it should be transferred to the MLA part

Met opmerkingen [34]: [Based on UNTOC Article 18, paragraph 4]

Met opmerkingen [35]: [Based on UNTOC Article 18, paragraph 5]

Met opmerkingen [36]: [Based on UNTOC Article 18, paragraph 5]

Met opmerkingen [37]: [Based on UNTOC Article 18, paragraph 5]

Article 8. Data protection

1. Personal data transmitted based on this Convention shall only be used for the purposes for which the data were transmitted and subject to such conditions as the transmitting State determines. Subject to the exceptions according to articles 6 and 7, use of the data for other purposes requires the prior consent of the State Party transmitting the data.
2. The following provisions shall apply to the transmission and use of personal data transmitted for the purpose of a request for assistance under this Convention:
 - (a) only data that relates to the request shall be transmitted to the competent authority of the requesting State Party;
 - (b) upon request, the States Party which has received the data shall inform the transmitting State Party of the use made of the data and the results achieved therefrom;
 - (c) if it appears to the transmitting State Party that incorrect data have been transmitted or that data have been transmitted that should not have been, the transmitting State Party shall notify without delay the State Party that has received the data; the latter shall without delay rectify any errors or destroy the data;
 - (d) the States Parties shall keep records in a readily retrievable form concerning the transmission and receipt of data;
 - (e) onward transfers of personal data shall only be permitted in compliance with the national legislation and with the prior consent of the transmitting State Party;
 - (f) transmitted data that are no longer used for the purposes permitted pursuant to the Convention shall be destroyed without delay, or other measures permitted pursuant to domestic law shall be taken which serve the right of the affected person in the same way.
3. The States Parties shall protect personal data against accidental loss, accidental or unauthorized destruction or modification, unauthorized access, use or disclosure or other misuse.
4. The States Parties shall guarantee the legitimate rights of the person affected by the transmission of the data under this Convention with regard to information and access to data concerning him or her, correction or deletion of such data or restriction of their processing in appropriate cases, and effective judicial remedy, upon request of the person concerned, in relation to the transmission or use of the information.

Met opmerkingen [MIG38]: We are of the opinion that a data protection clause, meeting the current standards applicable in that field, is necessary in a modern treaty on MLA.

Each State Party may wholly or partly restrict the rights of the person concerned with regard to information and access to data, including information with regard to any refusal of rectification or erasure of personal data or restriction of processing, if this constitutes a necessary and proportionate measure in order to take into account legitimate interests so as to safeguard public and national security, protect rights and freedoms of others, avoid obstructing legal inquiries, investigations or proceedings, or avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of sentences.

Article 12. Costs

The ordinary costs of executing a request pursuant to this Convention shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Met opmerkingen [39]: [UNTOC Article 18, paragraph 28]

PART II REQUEST

Article 10. Request for cooperation

A request for cooperation shall be made in writing under conditions allowing States Parties to establish authenticity.

Article 11. Additional information

If the requested State Party considers that the information provided in support of a request for cooperation is not sufficient to enable the request to be dealt with, it may request that additional information be furnished within such reasonable time as it specifies.

Article 12. Common grounds for refusal

1. Cooperation shall be refused if:

- (a) the requested State Party has substantial grounds to believe that the person concerned by the request would be subjected, in the other State Party, to torture or other cruel, inhuman or degrading treatment or punishment, a flagrant violation of the right to a fair trial or other serious violations of human rights as guaranteed by the international instruments for the protection of human rights such as the International Covenant on Civil and Political Rights of 16 December 1966;
- (b) the requested State Party has grounds for believing that the proceedings in the requesting State Party are being conducted with the purpose of prosecuting or punishing a person on account of that person's political beliefs, its belonging to a certain social group or for reasons of 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;
- (c) 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 sufficient guarantees that the death penalty sentence will not be sought, imposed or, if imposed, will not be carried out.
- (d) The person sought is to be tried before an extraordinary or ad hoc tribunal of the requesting State Party.

Met opmerkingen [MIG40]: We would suggest to include a part about the request that contains the general articles applicable to all the requests based on parts III, IV, and V.

Cf. Swiss draft.

Met opmerkingen [41]: [Inter-American Convention on Extradition Article 4]

2. Cooperation may be refused if:
 - (a) the request is not made in conformity with the provisions of this Convention;
 - (b) the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
 - (c) the request concerns facts on the basis of which the prosecuted person has been finally acquitted, pardoned or convicted in the requested State Party for an essentially similar offence, provided the penalty imposed is currently being carried out or has already been carried out.
3. States Parties may not refuse a request for cooperation on the sole ground that the crime is also considered to involve fiscal matters, on the ground of bank secrecy, nor on the ground that it was committed by a person holding an official position.
4. Reasons shall be given for any refusal of cooperation.
5. Before refusing a request, States Parties shall consider whether assistance can be given on such terms and conditions as they deem necessary. If so, those terms and conditions shall be complied with by the requesting State Party.

Article 13. Execution of the request

1. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.
2. The requested State Party shall execute the request as soon as possible and shall aim at complying with any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request.
3. The execution of the request may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding. Reasons shall be given for any postponement.

Article 14. Legal basis

If a State Party that makes cooperation conditional on the existence of a treaty receives a request for cooperation from another State Party with which it has no treaty, it shall consider this Convention the legal basis for cooperation in respect of any crime covered by this Convention.

PART II CENTRAL AUTHORITIES AND COMMUNICATION

Article 13. Central authority

1. Each State Party shall designate a central authority at the time of ratification, acceptance, approval or accession to this Convention. The central authority shall be responsible for sending and receiving requests made in accordance with the provisions of this Convention.
2. Where a State Party has a special region or territory with a separate system, it may designate a distinct central authority that shall have the same function for that region or territory.
3. At the request of one or more States Parties, consultations may be held among central authorities on matters related to the application of this Convention.
4. The depositary shall be notified of the designated central authority of each State Party at the time it deposits its instrument of ratification, acceptance, approval or accession to this Convention. A list of designated central authorities shall be shared and updated annually.

Met opmerkingen [42]: [UNTOC Article 18, paragraph 13]

Met opmerkingen [43]: [Based on UNTOC Article 18, paragraph 13]

Article 14. Channel of communication and single points of contact

- ~~1.~~ ~~1—~~Requests made in accordance with this Convention and the communication related thereto shall be addressed to the central authorities designated by the States Parties.
- ~~2.~~ Where State Parties in bilateral or multilateral instruments have agreed upon more favorable forms of transmission of requests, the more favorable rules shall take precedence over this Convention.
- ~~1.~~ ~~2—~~The requirement in paragraph 1 shall be without prejudice to the right of a State Party to require that the requests and communications shall be addressed to it through diplomatic channels, and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization.
- ~~3.~~ ~~3—~~In order to facilitate the efficient communication regarding the execution of an individual request made in accordance with this Convention, each State Party shall, without prejudice to article 13, paragraph 1, 2 and 3, identify a single point of contact within its competent law enforcement authorities. These persons or entities may liaise with each other on practical matters regarding the execution of such a request.
- ~~3.~~ ~~4—~~The transmission of requests, information or communication based on this Convention may, where the States Parties concerned agree, be done by electronic means while taking into account the need to protect confidentiality.
- ~~4.~~ The transmission of requests, information or communication based on this Convention may, where the States Parties concerned agree, be done by secure electronic means.

Met opmerkingen [44]: [UNTOC Article 18, paragraph 13]

Met opmerkingen [MIG45]: Due to the importance of this clause, we suggest to put it here.
Cf. Swiss draft.

Met opmerkingen [46]: [UNTOC Article 18, paragraph 13]

Article 15. Language

Requests made in accordance with this Convention and any communication related thereto shall be made or accompanied by a translation into a language acceptable to both the requesting and the requested State Party.

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PART III MUTUAL LEGAL ASSISTANCE

Article 16. Scope

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions or judicial proceedings in relation to the crimes covered by this Convention.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party in respect of investigations, prosecutions and judicial proceedings in relation to the crimes for which a legal person may be held liable in accordance with article 8 paragraph 1, in the requesting State Party.

Met opmerkingen [47]: [UNTOC Article 18, paragraph 1]

Met opmerkingen [48]: [UNTOC Article 18, paragraph 2]

Article 17. Purpose of the request

Mutual legal assistance to be afforded in accordance with the provisions of this Convention shall include, but not be limited to:

- (a) Taking evidence or statements from persons, including, as far as consistent with the law of the requested State Party, by video conference;
- (b) Effecting service of judicial documents and documents of public authorities;
- (c) Executing searches and seizures, freezing and confiscation;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or copies, if need be certified, of relevant documents, records and digital information, including government, bank, financial, corporate or business records;
- (g) The use of special investigative techniques;
- (h) The establishment of joint investigation teams;
- (i) Identifying, freezing or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (j) Facilitating the voluntary appearance of persons in the requesting State Party;
- (k) The restitution and return/recovery of assets;
- (l) transferring detained persons with a view to interrogation or confrontation;
- (m) searching of persons and of property;
- (n) Measures that allow for the adequate protection of victims and witnesses;
- ~~(o)~~ Any other type of assistance that is not contrary to the domestic law of the requested State Party.

Met opmerkingen [49]: [Based on UNTOC Article 18, paragraph 3]

Met opmerkingen [50]: [UNTOC Article 18, paragraph 3]

Met opmerkingen [51]: [UNTOC Article 18, paragraph 3]

Met opmerkingen [52]: [UNTOC Article 18, paragraph 3]

Met opmerkingen [53]: [UNTOC Article 18, paragraph 3]

Met opmerkingen [54]: [Based on UNTOC Article 18, paragraph 3]

Met opmerkingen [55]: [UNTOC Article 18, paragraph 3]

Met opmerkingen [56]: [UNTOC Article 18, paragraph 3]

Met opmerkingen [57]: [Based on UNCAC Article 46, paragraph 3, sub k]

Met opmerkingen [58]: [UNTOC Article 18, paragraph 3]

Article 18. Request and supporting documents

1. ~~A request for mutual legal assistance shall be made in writing under conditions allowing States Parties to establish authenticity.~~
2. A request for mutual legal assistance shall contain or be accompanied by the following:
 - (a) The identity of the authority making the request;
 - (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
 - (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
 - (d) A statement of the relevant domestic law, accompanied by the reference texts, and a statement of the penalty that can be imposed for the crimes;
 - (e) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
 - (f) Where possible, the identity, location and nationality of any person concerned;
 - (g) The purpose for which the evidence, information or action is sought;
 - (h) Where appropriate, the time limit within which the assistance should be provided and the reasons therefore.
3. In urgent circumstances, where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

Met opmerkingen [59]: [Based on UNTOC Article 18, paragraph 14]

Met opmerkingen [MIG60]: We suggest to transfer this to the general part.

Met opmerkingen [61]: [UNTOC Article 18, paragraph 15]

Met opmerkingen [62]: [UNTOC Article 18, paragraph 15]

Met opmerkingen [63]: [Based on UNTOC Article 18, paragraph 15]

Met opmerkingen [64]: [Based on UNTOC Article 18, paragraph 15]

Met opmerkingen [65]: [UNTOC Article 18, paragraph 15]

Met opmerkingen [66]: [UNTOC Article 18, paragraph 15]

Article 19. Provisional measures

1. At the request of the requesting State Party, the requested State Party, in accordance with its domestic law, may take provisional measures for the purpose of preserving evidence, maintaining an existing situation or protecting endangered legal interests.
2. The requested State Party may grant the request partially or subject to conditions, in particular time limitation.

Met opmerkingen [67]:
European Convention on Mutual Assistance in Criminal Matters (ECMA), Second Additional Protocol, Article 24

Met opmerkingen [MIG68]: Art. 20, 21 and 22 should be in the general part and not in the specific MLA part

Article 20. Additional information

~~If the requested State Party considers that the information provided in support of a request for mutual legal assistance is not sufficient to enable the request to be dealt with, it may request that additional information be furnished within such reasonable time as it specifies.~~

Met opmerkingen [69]: [Based on UNTOC Article 18, paragraph 16]

Article 21. Grounds for refusal

1. Mutual legal assistance 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, political opinion or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

(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 sufficient guarantees that the death penalty sentence will not be imposed or, if imposed, will not be carried out.

2. Mutual legal assistance may be refused if:

(a) The request is not made in conformity with the provisions of this Convention;

(b) The requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) The authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar crime, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) The request has been issued on behalf of an extraordinary or ad hoc tribunal of the requesting State Party.

3. States Parties may not refuse a request for mutual legal assistance on the sole ground that the crime is also considered to involve fiscal matters, nor on the ground of bank secrecy;

4. Reasons shall be given for any refusal of mutual legal assistance.

Met opmerkingen [70]: [UNTOC Article 18, paragraph 21]

Met opmerkingen [71]: [UNTOC Article 18, paragraph 21]

Met opmerkingen [72]: [UNTOC Article 18, paragraph 21]

Met opmerkingen [73]: [UNTOC Article 18, paragraph 8 and 23]

Met opmerkingen [74]: [UNTOC Article 18, paragraph 23]

Article 22. Execution of the request

1. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request;

2. The requested State Party shall execute the request as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request;

3. On the express request of the requesting State Party, the requested State Party shall, as far as possible, state the date and place of execution of the request for mutual assistance. The requested State Party may be asked to authorize the presence of officials from the requesting State Party or

Met opmerkingen [75]: [UNTOC Article 18, paragraph 17]

Met opmerkingen [76]: [UNTOC Article 18, paragraph 24]

~~other persons therein specified. Such presence shall be subject to the approval of the requested State Party.~~

~~4. The execution of the request may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding. Reasons shall be given for any postponement.~~

~~5. Before refusing a request pursuant to article 21 or postponing its execution pursuant to paragraph 4, the central authority of the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.~~

Met opmerkingen [77]: [UNTOC Article 18, paragraph 23 and 25]

Met opmerkingen [78]: [UNTOC Article 18, paragraph 26]

Article 23. Presence of officials

On the express request of the requesting State Party and if the requested measure so permits, the requested State Party shall state the date and place of execution of the request for mutual assistance. The requesting State Party may request the presence of officials and interested persons. Such presence shall be subject to the approval of the requested State Party.

Met opmerkingen [MIG79]: We suggest to add the following MLA measures that according to our experience are important in the context of the crimes concerned.

Cf. Swiss draft.

Article 24. Depositions of persons in the requested State Party

1. Witnesses shall be heard in accordance with the law of the requested State Party. However, they may also refuse to testify if the law of the requesting State Party allows them to do so.
2. If their refusal to testify is based on the law of the requesting State Party, the requested State Party shall send the matter to the requesting State Party for decision. Reasons shall be given for that decision.
3. A witness invoking the right to refuse to testify cannot be subjected to any legal penalty in the requesting State Party for that reason.

Article 23. Confiscation

- A State Party that has received a request for the purpose of confiscation of proceeds of crimes covered by this Convention, or of property, equipment or other instrumentalities used in or destined for use in such crimes, situated in its territory, shall, to the greatest extent possible within its domestic legal system:
 - Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

Met opmerkingen [80]: [UNTOC Article 13, paragraph 1]

Met opmerkingen [81]: [UNTOC Article 13, paragraph 1]

- (b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a **court-competent authority** in the territory of the requesting State Party, insofar as it relates to proceeds of crime, property, equipment or other instrumentalities in or destined for use in the crimes covered by this Convention, situated in the territory of the requested State Party.
2. Following a request made by another State Party having jurisdiction over a crime covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities in or destined for use in the crimes covered by this Convention, for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1, by the requested State Party.
 3. The provisions of article 18 are applicable, mutatis mutandis, to this article. In addition to the information specified in article 18 requests made in accordance with this article shall contain:
 - (a) In the case of a request pertaining to paragraph 1 (a), a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;
 - (b) In the case of a request pertaining to paragraph 1 (b), a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;
 - (c) In the case of a request pertaining to paragraph 2, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.
 4. When acting on the request made by another State Party in accordance with this article, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.
 5. The decisions or actions provided for in paragraphs 1 and 2 shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral Convention, agreement or arrangement to which it may be bound in relation to the requesting State Party.
 6. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.
 7. In applying article 22 the requested State Party may waive the return of articles either before or after handing them over to the requesting State Party if the restitution of such articles to the

Met opmerkingen [MIG82]: Confiscation orders are not issued by courts in some jurisdictions.

Met opmerkingen [83]: [UNTOC Article 13, paragraph 1]

Met opmerkingen [84]: [UNTOC Article 13, paragraph 2]

Met opmerkingen [85]: [UNTOC Article 13, paragraph 3]

Met opmerkingen [86]: [UNTOC Article 13, paragraph 3]

Met opmerkingen [87]: [UNTOC Article 13, paragraph 3]

Met opmerkingen [88]: [UNTOC Article 13, paragraph 3]

Met opmerkingen [89]: [UNTOC Article 14, paragraph 2]

Met opmerkingen [90]: [UNTOC Article 13, paragraph 4]

Met opmerkingen [91]: [UNTOC Article 13, paragraph 8]

rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.

Article 27. Sharing

1. States Parties undertake to afford each other the widest cooperation in sharing matters according to their national laws.
2. In order to share confiscated assets in the sense of this article, States Parties shall conclude, for each individual case, a specific agreement or arrangement laying down the particular conditions for the request, the handing over and transfer of the shared assets.

Met opmerkingen [MIG92]: We suggest to add a legal base for sharing, particularly if we include an elaborate article on confiscation.

Cf. Swiss draft.

Article 24. Temporary transfer of detainees

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to the crimes covered by this Convention may be transferred if the following conditions are met:
 - (a) The person freely gives his or her informed consent;
 - (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.
2. For the purposes of paragraph 1:
 - (a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;
 - (b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;
 - (c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;
 - (d) The person transferred shall receive credit for service of the sentence being served in the State Party from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

Met opmerkingen [93]: [UNTOC Article 18, paragraph 10]

Met opmerkingen [94]: [UNTOC Article 18, paragraph 11]

Met opmerkingen [95]: [UNTOC Article 18, paragraph 11]

Met opmerkingen [96]: [UNTOC Article 18, paragraph 11]

Met opmerkingen [97]: [UNTOC Article 18, paragraph 11]

Article 25. Safe conduct

1. A witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party.
2. The safe conduct provided for in paragraph 1 shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

Met opmerkingen [98]: [UNCAC, Article 46, paragraph 27]

Article 26. Appearances of persons in the requesting State

1. If the requesting State Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, it shall so mention in its request for service of the summons and the requested State Party shall invite the witness or expert to appear. The requested State Party shall inform the requesting State Party of the reply of the witness or expert.
2. In the case provided for under paragraph 1 the request or the summons shall indicate the approximate allowances payable and the travelling and subsistence expenses refundable.
3. If a specific request is made, the requested State Party may grant the witness or expert an advance. The amount of the advance shall be endorsed on the summons and shall be refunded by the requesting State Party.

Met opmerkingen [99]: [ECMA Article 10]

Article 27. Hearing by video conference

1. If a person is in one State Party's territory and has to be heard as a witness or expert by the judicial authorities of another State Party, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by video conference, as provided for in paragraphs 2 to 7.
2. The requested State Party shall agree to the hearing by video conference provided that the use of the video conference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested State Party has no access to the

technical means for video conferencing, such means may be made available to it by the requesting State Party by mutual agreement.

3. Requests for a hearing by video conference shall contain, in addition to the information referred to in Article 18, paragraph 2 of this Convention, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.
4. The judicial authority of the requested State Party shall summon the person concerned to appear in accordance with the forms laid down by its law.
5. With reference to hearing by video conference, the following rules shall apply:
 - (a) a judicial authority of the requested State Party shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested State Party. If the judicial authority of the requested State Party is of the view that during the hearing the fundamental principles of the law of the requested State Party are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;
 - (b) measures for the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Parties;
 - (c) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting State Party in accordance with its own laws;
 - (d) at the request of the requesting State Party or the person to be heard, the requested State Party shall ensure that the person to be heard is assisted by an interpreter, if necessary;
 - (e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting State Party.
6. Without prejudice to any measures agreed for the protection of persons, the judicial authority of the requested State Party shall on the conclusion of the hearing draw up minutes indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested State Party participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The document shall be forwarded by the competent authority of the requested State Party to the competent authority of the requesting State Party.
7. Each State Party shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory, in accordance with this article, and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.

8. State Parties may at their discretion also apply the provisions of this article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving the accused person or the suspect. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the State Parties concerned, in accordance with their national law and relevant international instruments. Hearings involving the accused person or the suspect shall only be carried out with his or her consent.

Met opmerkingen [100]: [ECMA, Second Additional Protocol Article 9]

Article 28. Copies of records

Met opmerkingen [MIG101]: We propose a further reaching article. Cf. below and Swiss draft.

The requested State Party:

- ~~(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;~~
- ~~(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public;~~

Met opmerkingen [102]: [UNTOC Article 18, paragraph 29]

Met opmerkingen [103]: [UNTOC Article 18, paragraph 29]

Article 31. Transmission of objects, documents, records or evidence

1. Upon request, the requested State Party shall transmit objects, documents, records or evidence to the requesting State Party.
2. The requested State Party may transmit copies of documents, records or evidence requested. If the requesting State Party expressly requests the transmission of originals, the requested State Party shall make every effort to comply with the request.
3. The requesting State Party is required to return what was transmitted as quickly as possible or at the latest after the end of the proceeding unless the requested State Party expressly waives the return thereof.
4. Rights claimed by third parties to objects, documents, records or evidence in the requested State Party shall not prevent their transmission to the requesting State Party.

Article 29. Joint investigation teams

1. By mutual agreement, the competent authorities of two or more States Parties may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the States Parties setting up the

Met opmerkingen [MIG104]: Streamline wording throughout the whole convention.

team. The composition of the team shall be set out in the agreement. A joint investigation team may, in particular, be set up where:

- (a) A State Party's investigations into criminal offences require difficult and demanding investigations having links with other States Parties;
- (b) A number of States Parties are conducting investigations into criminal offences in which the circumstances of the case necessitate co-ordinated, concerted action in the States Parties involved.

A request for the setting up of a joint investigation team may be made by any of the States Parties concerned. The team shall be set up in one of the States Parties in which the investigations are expected to be carried out.

2. In addition to the information referred to in the relevant provisions of Article 18 of this Convention, requests for the setting up of a joint investigation team shall include proposals for the composition of the team.
3. A joint investigation team shall operate in the territory of the States Parties setting up the team under the following general conditions:
 - (a) The leader of the team shall be a representative of the competent authority participating in criminal investigations from the State Party in which the team operates. The leader of the team shall act within the limits of his or her competence under national law;
 - (b) The team shall carry out its operations in accordance with the law of the State Party in which it operates. The members and seconded members of the team shall carry out their tasks under the leadership of the person referred to in subparagraph (a), taking into account the conditions set by their own authorities in the agreement on setting up the team;
 - (c) The State Party in which the team operates shall make the necessary organisational arrangements for it to do so.
4. In this article, members of the joint investigation team from the State Party in which the team operates are referred to as "members", while members from States Parties other than the State Party in which the team operates are referred to as "seconded members".
5. Seconded members of the joint investigation team shall be entitled to be present when investigative measures are taken in the State Party of operation. However, the leader of the team may, for particular reasons, in accordance with the law of the State Party where the team operates, decide otherwise.
6. Seconded members of the joint investigation team may, in accordance with the law of the State Party where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the State Party of operation and the seconding State Party.

7. Where the joint investigation team needs investigative measures to be taken in one of the States Parties setting up the team, members seconded to the team by that State Party may request their own competent authorities to take those measures. Those measures shall be considered in that State Party under the conditions which would apply if they were requested in a national investigation.
8. Where the joint investigation team needs assistance from a State Party other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operation to the competent authorities of the other State concerned in accordance with the relevant instruments or arrangements.
9. A seconded member of the joint investigation team may, in accordance with his or her national law and within the limits of his or her competence, provide the team with information available in the State Party which has seconded him or her for the purpose of the criminal investigations conducted by the team.
10. Information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the States Parties concerned may be used for the following purposes:
 - (a) For the purposes for which the team has been set up;
 - (b) Subject to ~~the~~ prior consent of the State Party where the information became available, for detecting, investigating and prosecuting other criminal offences. Such consent may be withheld only in cases where such use would endanger criminal investigations in the State Party concerned or in respect of which that State Party could refuse mutual assistance;
 - (c) For preventing an immediate and serious threat to public security, and without prejudice to subparagraph (b) if subsequently a criminal investigation is opened;
 - (d) For other purposes to the extent that this is agreed between States Parties setting up the team.
11. This article shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams.
12. To the extent that the laws of the States Parties concerned or the provisions of any legal instrument applicable between them permit, arrangements may be agreed for persons other than representatives of the competent authorities of the States Parties setting up the joint investigation team to take part in the activities of the team. The rights conferred upon the members or seconded members of the team by virtue of this article shall not apply to these persons unless the agreement expressly states otherwise.

Met opmerkingen [105]: [ECMA, Second Additional Protocol, Article 20]

Article 30. Cross-border observations

1. Police officers of one of the State Parties who, within the framework of a criminal investigation, are keeping under observation in their country a person who is presumed to have taken part in a criminal offence to which extradition may apply, or a person who it is strongly believed will lead to the identification or location of the above-mentioned person, shall be authorised to continue their observation in the territory of another State Party where the latter has authorised cross-border observation in response to a request for assistance which has previously been submitted. Conditions may be attached to the authorisation.
2. On request, the observation will be entrusted to officers of the State Party in whose territory it is carried out.
3. The request for assistance referred to in the first paragraph must be sent to an authority designated by each State Party and having jurisdiction to grant or to forward the requested authorisation.
4. Where, for particularly urgent reasons, prior authorisation of the other State Party cannot be requested, the officers conducting the observation within the framework of a criminal investigation shall be authorised to continue beyond the border the observation of a person presumed to have committed offences listed in paragraph 6, provided that the following conditions are met:
 - (a) The authorities of the State Party designated under paragraph 4, in whose territory the observation is to be continued, must be notified immediately, during the observation, that the border has been crossed;
 - (b) A request for assistance submitted in accordance with paragraph 1 and outlining the grounds for crossing the border without prior authorisation shall be submitted without delay.
5. Observation shall cease as soon as the State Party in whose territory it is taking place so requests, following the notification referred to in a. or the request referred to in b. or where authorisation has not been obtained within five hours of the border being crossed.
6. The observation referred to in paragraphs 1 and 2 shall be carried out only under the following general conditions:
 - (a) The officers conducting the observation must comply with the provisions of this article and with the law of the State Party in whose territory they are operating; they must obey the instructions of the local responsible authorities.
 - (b) Except in the situations provided for in paragraph 2, the officers shall, during the observation, carry a document certifying that authorisation has been granted.
 - (c) The officers conducting the observation must be able at all times to provide proof that they are acting in an official capacity.

- (d) The officers conducting the observation may carry their service weapons during the observation, save where specifically otherwise decided by the requested State Party; their use shall be prohibited save in cases of legitimate self-defence.
- (e) Entry into private homes and places not accessible to the public shall be prohibited.
- (f) The officers conducting the observation may neither stop and question, nor arrest, the person under observation.
- (g) All operations shall be the subject of a report to the authorities of the State Party in whose territory they took place; the officers conducting the observation may be required to appear in person.
- (h) The authorities of the State Party from which the observing officers have come shall, when requested by the authorities of the State Party in whose territory the observation took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.

Met opmerkingen [106]: [ECMA, Second Additional Protocol, Article 17]

Article 31. Covert investigations

1. The requesting and the requested States Parties may agree to assist one another in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations).
2. The decision on the request is taken in each individual case by the competent authorities of the requested State Party with due regard to its national law and procedures. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the States Parties with due regard to their national law and procedures.
3. Covert investigations shall take place in accordance with the national law and procedures of the State Party on the territory of which the covert investigation takes place. The States Parties involved shall co-operate to ensure that the covert investigation is prepared and supervised and to make arrangements for the security of the officers acting under covert or false identity.

Met opmerkingen [107]: [ECMA, Second Additional Protocol, Article 19]

Article 32. Special investigative techniques

1. Each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such

as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the crimes covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.
3. In the absence of an agreement or arrangement as set forth in paragraph 2, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

Article XX. Electronic or other forms of surveillance

1. The competent authorities of each State Party may at the express request of another State Party order the surveillance of postal and telecommunications traffic in order to establish the whereabouts of a person suspected of having committed a crime within the scope of the Convention.
2. States Parties may in particular make a request for:
 - (a) the surveillance of postal services;
 - (b) the interception, recording and immediate or subsequent transmission of telecommunications;
 - (c) the transmission of electronic communications traffic data.
3. The requirements for surveillance and the procedure shall otherwise be governed by the internal law of the requested State Party.

Met opmerkingen [MIG108]: We suggest to add the following MLA measures that according to our experience are important in the context of the crimes concerned.

Cf. Swiss draft.

PART IV EXTRADITION

Article 33. Scope

1. The provisions of this Part shall apply to the crimes covered by this Convention where the person who is the subject of a State Party's request for extradition is present in the territory of the requested State Party.
2. Without prejudice to article 35, extradition shall be granted if, according to the documents supporting the request for the extradition, the crime:
 - (a) Is punishable by deprivation of liberty for a maximum period of at least one year both under the law of the requested and the requesting State Party;
 - (b) Is not subject to the jurisdiction of the requested State Party or the requested State Party is not exercising its jurisdiction.
3. If the request for extradition includes several separate crimes, at least one of which is extraditable under this Convention and some of which are not covered by this Convention, the requested State Party may, at its discretion, apply this article also in respect of the latter crimes.
4. Each of the crimes covered by this Convention shall be deemed to be included as an extraditable crime in any extradition treaty existing between States Parties. States Parties undertake to include such crimes as extraditable crimes in every extradition treaty to be concluded between them.

Met opmerkingen [109]: [UNCAC Article 44, paragraph 1]

Met opmerkingen [110]: [Based on UNCAC Article 44, paragraph 3]

Met opmerkingen [111]: [UNTOC Article 16, paragraph 3]

~~Article 34. Legal basis~~

~~If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it shall consider this Convention the legal basis for extradition in respect of any crime covered by this Convention.~~

Met opmerkingen [MIG112]: These articles should be in the general part.

Met opmerkingen [113]: [UNTOC Article 16, paragraph 4]

~~Article 35. 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, political opinion or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.
 - (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 or, if imposed, will not be carried out.~~

~~(c) The requested State Party has already made a final judgment against the person to be extradited for the crimes and underlying facts for which extradition is requested;~~

~~(d) There are substantial grounds to believe that the person sought would be subjected to torture or other cruel, inhuman or humiliating treatment or punishment, a flagrant violation of the right to a fair trial or other serious human rights violations in the requesting State Party.~~

~~(e) The person sought is to be tried before an extraordinary or ad hoc tribunal of the requesting State Party.~~

~~2. Before refusing a request pursuant to paragraph 1, or postponing its execution pursuant to article 41, paragraph 2, the central authority of the requested State Party shall consult where appropriate with the requesting State Party to consider whether extradition may be permitted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts extradition subject to those conditions, it shall comply with these conditions.~~

Met opmerkingen [114]: [Inter-American Convention on Extradition Article 4]

Article 36. Principle of speciality

1. In addition to the rules contained in article 6 of this convention, a person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his or her surrender other than that for which he or she was extradited, nor shall he or she be for any other reason restricted in his or her personal freedom, except in the following cases:

(a) when the State Party which surrendered him or her consents. A request for consent shall be submitted, accompanied by the documents mentioned in article 37 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;

(b) when that person, having had an opportunity to leave the territory of the State Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.

2. The requesting State Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.

3. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence

Met opmerkingen [MIG115]: The general principle of speciality has been moved to the General part. We suggest to add the specificities applying to extradition as proposed.

Cf. Swiss draft.

under its new description is shown by its constituent elements to be an offence which would allow extradition under this Convention.

- ~~1. A person who has been extradited shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been extradited.~~
- ~~2. The State Party to which a person has been extradited may request a waiver of the requirements of paragraph 1 from the State Party which surrendered that person and, if necessary, shall provide additional information in accordance with article 42.~~
- ~~3. Paragraph 1 does not apply in respect of a person who, having had an opportunity to leave the territory of the State Party to which he or she has been surrendered, has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it.~~

Met opmerkingen [116]: [Rome Statute Article 101]

Met opmerkingen [117]: [Based on European Convention on Extradition Article 14, paragraph 1(b)]

Article 37. Re-extradition to a third State

Except as provided for in Article 36, paragraph 3, the requesting State Party shall not, without the consent of the requested State Party, surrender to another State Party or to a third State a person surrendered to the requesting State Party and sought by the said other State Party or third State in respect of offences committed before his surrender. The requested State Party may request the production of the documents mentioned in Article 42, paragraph 2.

Met opmerkingen [118]: [European Convention on Extradition Article 15]

Article 38. Extradition of nationals

1. States Parties shall have the right to refuse extradition of their nationals. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of a crime to which this Convention applies solely on this ground, shall be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other crime of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution. For this purpose, the files, information and exhibits relating to the crime shall be transmitted without charge by the means provided for in article 42, paragraph 1. The requesting State Party shall be informed of the result of its request.

Met opmerkingen [119]: [UNTOC Article 16, paragraph 10]

Article 39. Conditional extradition of nationals

Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve

the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in article 38.

Met opmerkingen [120]: [UNTOC Article 16, paragraph 11]

Article 40. Extradition of nationals for purposes of enforcing a sentence

If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits, upon request of the requesting State Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting State Party or the remainder thereof.

Met opmerkingen [121]: [UNTOC, Article 16, paragraph 12]

Article 40. Judgments in absentia

When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him or her in absentia, the requested State Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defense recognized as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting State Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defense.

Met opmerkingen [MIG122]: We are of the opinion that this article contains an important principle in the field of extradition.
Cf. Swiss draft.

Article 41. Execution of the request

- The execution of a request for extradition shall be subject to the conditions provided for by the domestic law of the requested State Party.
- 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.

Met opmerkingen [123]: [Based on UNTOC, Article 16, paragraph 7]

Met opmerkingen [MIG124]: This article has been moved to the general part

Article 42. Request and supporting documents

- A request for extradition shall be made in writing under conditions allowing States Parties to establish authenticity.
- A request for extradition shall contain or be accompanied by the following:
 - As accurate a description as possible of the person sought, together with any other information that may help to establish that person's identity, nationality and location;

Met opmerkingen [MIG125]: This article has been moved to the general part

Met opmerkingen [126]:
[UN Model Treaty on Extradition Article 5, paragraph 2, sub a, i]

- (b) The text of the relevant provision of the law creating the crime or, where necessary, a statement of the law relevant to the crime and a statement of the penalty that can be imposed for the crime;
- (c) If the person is accused of a crime, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the crime for which extradition is requested and a description of the acts or omissions constituting the alleged crime, including an indication of the time and place of its commission;
- (d) If the person has been convicted of a crime, by a statement of the crime for which extradition is requested and a description of the acts or omissions constituting the crime and by the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;
- (e) If the person has been convicted of a crime in his or her absence, in addition to the documents set out in subparagraph (d), by a statement as to the legal means available to the person to prepare his or her defense or to have the case retried in his or her presence;
- (f) If the person has been convicted of a crime but no sentence has been imposed, by a statement of the crime for which extradition is requested and a description of the acts or omissions constituting the crime and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.
3. If the requested State Party considers that the information provided in support of a request for the extradition is not sufficient to enable the request to be dealt with, it may request that additional information be furnished within such reasonable time as it specifies.

Met opmerkingen [127]: [UN Model Treaty on Extradition Article 5, paragraph 2, sub a, ii]

Met opmerkingen [128]: [UN Model Treaty on Extradition Article 5, paragraph 2, sub b]

Met opmerkingen [129]: [UN Model Treaty on Extradition Article 5, paragraph 2, sub c]

Met opmerkingen [130]: [UN Model Treaty on Extradition Article 5, paragraph 2, sub d]

Met opmerkingen [131]: [UN Model Treaty on Extradition, Article 5, paragraph 2, sub e]

Article 43. Provisional arrest

1. The requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings;
2. The request for provisional arrest shall contain the information referred to in article 42, paragraph 2, subparagraphs (a) and (b), a description of the crime giving rise to the request and underlying facts, a statement of the existence of documents referred to in article 42 and a statement that a formal request for extradition of the person sought will follow.
3. The requested State Party shall, without undue delay, inform the requesting State Party of the result of its handling of the request.

Met opmerkingen [132]: [UNTOC Article 16, paragraph 9]

4. Provisional arrest shall be terminated if, within a period of sixty days after the arrest of the person sought, the requested State Party has not received the formal request for extradition. The possibility of provisional release at any time is not excluded, but the requested State Party shall take any measures which it considers necessary to prevent the escape of the person sought.
5. The termination of provisional arrest pursuant to paragraph 4 shall not prejudice the re-arrest and his or her subsequent extradition of the person sought if the requested State Party has subsequently received the formal request for extradition.

Met opmerkingen [MIG133]: We propose to change it to 40 days, which can be extended to 60 days upon written motivated request.

Article 44. Simplified procedures

States Parties shall endeavor to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any crime covered by this Convention.

Met opmerkingen [134]: [UNTOC Article 16, paragraph 8]

Article 45. Transit

1. Where a person is to be extradited to a State Party from a third State through the territory of the other State Party, the State Party to which the person is to be extradited shall request the other State Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other State Party is scheduled.
2. Upon receipt of such a request, which shall contain relevant information, and be supported by the documents mentioned in article 42, paragraph 2, the requested State Party shall deal with this request in accordance with procedures provided by its own law. The requested State Party shall grant the request expeditiously unless its essential interests would be prejudiced thereby.
3. The State Party of transit shall ensure that legal provisions exist that would enable detaining the person in custody during transit.
4. In the event of an unscheduled landing, the State Party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for 48 hours, pending receipt of the transit request to be made in accordance with paragraph 1.
5. The transit of the extradited person shall not be carried out through any territory where there is a reason to believe that his or her life may be threatened or if there is a high risk of his or her rights being violated by reasons of his or her race, sex, religion, nationality, ethnic origin, political beliefs, belonging to a certain social group or other grounds that are universally recognized as impermissible under international law.

Met opmerkingen [135]: [UN Model Treaty on Extradition, Article 15, paragraph 1]

Met opmerkingen [136]: [UN Model Treaty on Extradition Article 15, paragraph 2]

Met opmerkingen [137]: [UN Model Treaty on Extradition Article 15, paragraph 3]

Met opmerkingen [138]: [UN Model Treaty on Extradition Article 15, paragraph 4]

Article 47. Non bis in idem

Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested State Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested State Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

Met opmerkingen [MIG139]: We are of the opinion that this is an important principle in the field of extradition.

Article 48. Handing over of property

1. The requested State Party shall, in so far as its law permits and at the request of the requesting State Party, seize and hand over property:
 - (a) which may be required as evidence; or
 - (b) which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently.
2. The property mentioned in paragraph 1 of this article shall be handed over even if extradition, having been agreed to, cannot be carried out owing to the death or escape of the person claimed.
3. When the said property is liable to seizure or confiscation in the territory of the requested State Party, the latter may, in connection with pending criminal proceedings, temporarily retain it or hand it over on condition that it is returned.
4. Any rights which the requested State Party or third parties may have acquired in the said property shall be preserved. Where these rights exist, the property shall be returned without charge to the requested State Party as soon as possible after the trial.

Met opmerkingen [MIG140]: We are of the opinion that this is a useful disposition in practice. It allows for the handing over of objects found on the person extradited in one and the same procedure (without opening a separate MLA-procedure).

Part V TRANSFER OF SENTENCED PERSONS

Article 46. Scope

1. Wherever possible and consistent with fundamental principles of domestic law, a person sentenced in a State Party for a crime covered by this Convention may be transferred to another State Party in order to serve the sentence imposed on him or her.
2. For the purposes of this Part of the Convention:
 - (a) Sentencing State Party means the State Party in which the sentence was imposed and from which the sentenced person would be transferred or has been transferred;
 - (b) Administering State Party means the State Party to which the sentenced person may be or has been transferred in order to serve his or her sentence;
 - (c) Sentence means the 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. A sentence is understood to be final when no ordinary legal appeal against the conviction or sentence is pending in the sentencing State Party and the period for its appeal has expired.

Met opmerkingen [141]: [Based on CoE Convention on the Transfer of Sentenced Persons Article 2, paragraph 2]

Met opmerkingen [142]: [Inter-American Convention on Serving Criminal Sentences Abroad Article 2]

Article 47. Conditions for transfer

1. Transfer may be requested by the sentencing State Party or the administering State Party.
2. The person to be transferred can ask either State Party to request his or her transfer. To that end, he or she may express his or her interest to the sentencing State Party or to the administering State Party in being transferred under this Convention.
3. A sentenced person may be transferred under this Convention only on the following conditions:
 - (a) If that person is a national or a permanent resident of the administering State Party;
 - (b) If the judgment is final and enforceable;
 - (c) If, at the time of receipt of the request for transfer, the sentenced person still has at least one year of the sentence to serve or if the sentence is indeterminate;
 - (d) If the transfer is consented to by the sentenced person or, where in view of his or her age or his or her physical or mental condition one of the two States Parties consider it necessary, by the sentenced person's legal representative; and
 - (e) If the sentencing and the administering States Parties agree to the transfer.
4. If a State Party which makes the transfer of sentenced persons conditional on the existence of a treaty receives a request for the transfer of a sentenced person from another State Party with

Met opmerkingen [143]: [Based on CoE Convention on the Transfer of Sentenced Persons Article 2, paragraph 3]

Met opmerkingen [144]: [CoE Convention on the Transfer of Sentenced Persons Article 3, paragraph 1]

Met opmerkingen [145]: [CoE Convention on the Transfer of Sentenced Persons Article 3, paragraph 1, sub a]

Met opmerkingen [146]: [Based on CoE Convention on the Transfer of Sentenced Persons Article 3, paragraph 1, sub b]

Met opmerkingen [147]: [CoE Convention on the Transfer of Sentenced Persons Article 3, paragraph 1, sub c]

Met opmerkingen [148]: [CoE Convention on the Transfer of Sentenced Persons Article 3, paragraph 1, sub d]

Met opmerkingen [149]: [CoE Convention on the Transfer of Sentenced Persons Article 3, paragraph 1, sub f]

which it has no applicable treaty, it shall consider this Convention as the necessary legal basis for the transfer of sentenced persons in respect of the crimes covered by this Convention.

Article 48. Obligation to provide information

1. Any sentenced person to whom this Convention may apply, shall be informed by the sentencing State Party of the substance of this Convention.
2. If the sentenced person has expressed an interest to the sentencing State Party in being transferred under this Convention, that State Party shall so inform the administering State Party as soon as practicable after the judgment becomes final.
3. The information shall include:
 - (a) The name, date and place of birth of the sentenced person;
 - (b) His or her address, if any, in the administering State Party;
 - (c) A statement of the facts upon which the sentence was based;
 - (d) The nature, duration and date of commencement of the sentence.
4. If the sentenced person has expressed to the administering State Party his or her interest in being transferred by virtue of this Convention, the sentencing State Party shall, upon request of the administering State Party, provide that State Party with the information referred to in paragraph 3.
5. The sentenced person shall be informed, in writing, of any action taken by the sentencing State Party or by the administering State Party under the preceding paragraphs, as well as of any decision taken by either State Party on a request for transfer.

Met opmerkingen [150]: [CoE Convention on the Transfer of Sentenced Persons Article 4]

Article 49. Requests, replies and supporting documents

1. Requests for transfer and replies thereto shall be made in writing under conditions allowing States Parties to establish the authenticity of the supporting documents detailed in paragraph 5.
2. The requested State Party shall promptly inform the requesting State Party of its decision whether or not to agree to the requested transfer.
3. If requested by the sentencing State Party, the administering State Party shall provide:
 - (a) A document or statement indicating that the sentenced person is a national or a permanent resident of that State;
 - (b) 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 according to the law of the administering State Party, or would constitute a criminal offence if committed on its territory;

- (c) Copies of relevant domestic laws on conversion of sentences.
4. The administering State Party, if requested, shall inform the sentencing State Party before the transfer of the sentenced person which procedure under articles 54 or 55 it will apply to the sentences.
 5. If a transfer is requested, the sentencing State Party shall provide the following documents to the administering State Party, unless either State Party has already indicated that it will not agree to the transfer:
 - (a) A certified copy of the judgment and the law on which it is based;
 - (b) A statement indicating how much of the sentence has already been served, including information on any pre-trial detention, remission, and any other factor relevant to the enforcement of the sentence;
 - (c) Other than the case mentioned in article 51, a written declaration containing the consent to the transfer as referred to in article 50;
 - (d) A report of the conduct of the sentenced person during his or her detention; and
 - (e) Whenever appropriate, any medical or social reports on the sentenced person, information about his or her treatment in the sentencing State Party, and any recommendation for his or her further treatment in the administering State Party.
 6. Either State Party may ask to be provided with any of the documents or statements referred to in paragraphs 3 or 5 before making a request for transfer or taking a decision on whether or not to agree to the transfer.

Met opmerkingen [151]: [CoE Convention on the Transfer of Sentenced Persons Articles 5 and 6]

Article 50. Consent and its verification

1. The sentencing State Party shall ensure that the person required to give consent to the transfer in accordance with article 47, paragraph 3, subparagraph (d), does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State Party.
2. The sentencing State Party shall afford an opportunity to the administering State Party to verify through a consul or other official agreed upon with the administering State Party, that the consent is given in accordance with the conditions set out in paragraph 2.

Met opmerkingen [152]: [CoE Convention on the Transfer of Sentenced Persons Article 7]

Article 51. Persons who have left the sentencing State Party

1. Where a national of a State Party is the subject of a final sentence, the sentencing State Party may request the State of nationality to take over the execution of the sentence under the following circumstances:

- (a) When the national has fled to or otherwise returned to the State of his or her nationality being aware of the criminal proceedings pending against him or her in the sentencing State Party;
or
- (b) When the national has fled to or otherwise returned to the State of his or her nationality being aware that a judgment has been issued against him or her.
2. At the request of the sentencing State Party, the administering State Party may, before receiving the documents supporting the request, or pending the decision on this request, have the sentenced person arrested or take any other steps such as to ensure that he remains on its territory pending a decision regarding the request. Any such request shall be accompanied by the information mentioned in article 49, paragraph 3. Arrest of the sentenced person under this heading shall not lead to an aggravation of his or her penal situation.
3. The transfer of the administration of the sentence does not require the consent of the sentenced person.

Met opmerkingen [153]: [Based on Convention CoE on the Transfer of Sentenced Persons, Protocol amending the Additional Protocol to Article 1]

Met opmerkingen [154]: [CoE Convention on the Transfer of Sentenced Persons, Additional Protocol Article 2]

Article 52. Effect of transfer for the sentencing State Party

1. The transfer of the administration of the sentence to the authorities of the administering State Party shall have the effect of suspending the enforcement of the sentence in the sentencing State Party.
2. The sentencing State Party may no longer enforce the sentence if the administering State Party considers enforcement of the sentence to have been completed.

Met opmerkingen [155]: [Based on CoE Convention on the Transfer of Sentenced Persons Article 8]

Article 53. Effect of transfer for the administering State Party

1. The competent authorities of the administering State Party shall:
- (a) Continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in article 54; or
- (b) Convert the sentence, through a judicial or administrative procedure, into a decision of that State Party, thereby substituting for the sanction imposed in the sentencing State Party a sanction prescribed by the law of the administering State Party for the same offence, under the conditions set out in article 55.
2. The administering State Party, if requested, shall inform the sentencing State Party before the transfer of the sentenced person as to which of these procedures it will follow.
3. The enforcement of the sentence shall be governed by the law of the administering State Party and that State Party alone shall be competent to take all appropriate decisions.

4. Any State Party which, according to its domestic law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in the territory of another State Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration indicate the procedures it will follow in such cases.

Met opmerkingen [156]: [CoE Convention on the Transfer of Sentenced Persons Article 9]

Article 54. Continued enforcement

1. In the case of continued enforcement, the administering State Party shall be bound by the legal nature and duration of the sentence as determined by the sentencing State Party.
2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State Party, or its law so requires, that State Party may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State Party, nor exceed the maximum prescribed by the law of the administering State Party.

Met opmerkingen [157]: [CoE Convention on the Transfer of Sentenced Persons Article 10]

Article 55. Conversion of sentence

1. In the case of conversion of sentence, the procedures provided for by the law of the administering State Party apply. When converting the sentence, the competent authority:
 - (a) Shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State Party;
 - (b) May not convert a sanction involving deprivation of liberty to a pecuniary sanction;
 - (c) Shall deduct the full period of deprivation of liberty served by the sentenced person;
 - (d) Shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State Party may provide for the crime or crimes committed.
2. If the conversion procedure takes place after the transfer of the sentenced person, the administering State Party shall keep that person in custody or otherwise ensure his or her presence in the administering State Party pending the outcome of that procedure.

Met opmerkingen [158]: [CoE Convention on the Transfer of Sentenced Persons Article 11]

Article 56. Review of judgment

The sentencing State Party alone shall have the right to decide on any application for review of the judgment.

Met opmerkingen [159]: [CoE Convention on the Transfer of Sentenced Persons Article 13]

Article 57. Termination of enforcement

The administering State Party shall terminate enforcement of the sentence as soon as it is informed by the sentencing State Party of any decision or measure as a result of which the sentence ceases to be enforceable.

Met opmerkingen [160]: [CoE Convention on the Transfer of Sentenced Persons Article 14]

Article 58. Information on enforcement

The administering State Party shall provide information to the sentencing State Party concerning the enforcement of the sentence:

- (a) When it considers enforcement of the sentence to have been completed;
- (b) If the sentenced person has escaped from custody before enforcement of the sentence has been completed; or
- (c) If the sentencing State Party requests a special report.

Met opmerkingen [161]: [CoE Convention on the Transfer of Sentenced Persons Article 15]

DRAFT CORE GROUP

PART VI VICTIMS, WITNESSES AND EXPERTS

Article 59. Protection of victims, witnesses and experts

1. Each State Party shall take the necessary measures to ensure that victims, witnesses and their relatives and representatives, experts, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of this Convention, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given.
2. Each State Party shall take the necessary measures to ensure that any person who alleges that crimes covered by this Convention have been or are being committed has the right to complain to the competent authorities. States Parties shall undertake to examine these complaints in order to determine whether there is reasonable ground to believe that these crimes have been or are being committed.
3. The measures envisaged in paragraph 1 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 witnesses and experts to give testimony in a manner that ensures the safety of such persons.
4. States Parties shall consider entering into agreements or arrangements with other States Parties for the relocation of persons referred to in paragraph 1.

Article 60. Victims' rights

1. For the purpose of this Convention, a "victim" is a natural persons who has suffered harm as a result of the commission of any crime covered by this Convention.
2. Each State Party shall take the necessary measures to ensure in its legal system that the victims of a crime covered by this Convention, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Met opmerkingen [MIG162]: The protection of victims, witnesses and experts is a question of the substantive law of the State prosecuting a crime. This part is thus unusual in a MLA Convention. If retained, it needs to be adapted to the **specific situation of international cooperation** in criminal matters.

There are no victims in an MLA procedure. There are only victims in the criminal procedure supported by the MLA procedure.

Regarding witnesses and experts, they usually are already in a States different from the one leading the investigation. Thus, their need for protection (in the MLA procedure) is different.

We do, e.g. not understand, what a "witness participating in an extradition" should be...

Met opmerkingen [163]: [Based on ILC Draft Articles on Crimes against Humanity, Article 12(1)(b)]

Met opmerkingen [164]: [UNTOC, Article 24, paragraph 2]

Met opmerkingen [165]: [UNTOC, Article 24, paragraph 2, sub a)

Met opmerkingen [166]: [UNTOC, Article 24, paragraph 2, sub b)

Met opmerkingen [167]: [UNTOC, Article 24, paragraph 3]

Met opmerkingen [168]: [Rules of Procedure and Evidence of the International Criminal Court, Rule 85 (a)]

Met opmerkingen [SAC169]: Also when contributing to the procedure via MLA – or just when leading an investigation? How would, in the first case, these damages be split between the State leading the investigation and the one just contributing to it via MLA or an extradition? And will it really encourage States to contribute to a foreign proceeding via MLA if this comes with a risk of damages?

Met opmerkingen [170]: [ILC draft Articles on Crimes against Humanity Article 12(3)]

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 defense.

Met opmerkingen [171]: [UNTOC, Article 25, paragraph 3]

DRAFT CORE GROUP

PART VII FINAL PROVISIONS

Article 61. Relation with other Agreements

Nothing in this Convention shall prevent States Parties which have already concluded an agreement or treaty, or have in any other manner established relations between themselves, in respect of a subject-matter dealt with in this Convention to apply such agreements or to conduct their relations accordingly, in lieu of the present Convention, if that facilitates their cooperation.

Article 62. Conference of States Parties

1. A Conference of States Parties shall be convened by the depositary at the proposal of at least one third of the States Parties to this Convention, or in accordance with Article 64.
2. The United Nations, its specialized agencies, the International Committee of the Red Cross as well as any State not a Party to this Convention may be represented at meetings of the Conference of States Parties as observers. The admission and participation of other bodies or agencies as observer shall be subject to the rules of procedure adopted by the Conference of States Parties.
3. The costs of the Conferences of States Parties shall be borne by the States Parties to this Convention, in accordance with the United Nations scale of assessment adjusted appropriately. The Conference of States Parties may agree on specific financial arrangements for the participation of observers at meetings of the Conference of States Parties.

Article 63. Settlement of disputes

1. States Parties shall endeavor to settle disputes concerning the interpretation or application of this Convention through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within six months from the date of request for such settlement shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2.
4. Any State Party that has made a reservation in accordance with article 63, paragraph 3, may at any time withdraw that reservation by notification to the depositary.

Met opmerkingen [MIG172]: Swiss draft has this clause at the beginning of the treaty

Met opmerkingen [173]: [Based on Agreement on Illicit Traffic by Sea, art. 30, paragraph 3]

Met opmerkingen [MIG174]: We propose a more detailed regulation:

Article 62. Conference of States Parties

1. A Conference of the States Parties is hereby established.
 2. The first meeting of the Conference of States Parties shall be convened by the depositary of the Convention no later than five years after the date of entry into force of this Convention. Thereafter, meetings of the Conference of States Parties shall be held at intervals to be decided by the Conference of States Parties.
 3. At each meeting, the Conference of States Parties shall elect the President of the following meeting of the Conference of States Parties. He or she shall be the Host of the next meeting of the Conference of States Parties and shall make arrangements for that purpose. The President of the Conference of States Parties shall act in that capacity from the moment of the conclusion of the meeting of the Conference of States Parties at which he or she is elected, until the conclusion of the meeting he or she is hosting.
 4. The Conference of States Parties shall by consensus agree upon and adopt at its first meeting rules of procedure and financial rules for itself and any of its subsidiary bodies.
 5. The Conference of States Parties shall keep under continuous review and evaluation the implementation of this Convention, taking into account the progressive development of international criminal law. It shall perform the functions assigned to it by this Convention and, to that end, shall:
 - (a) establish such subsidiary bodies as it considers necessary for the implementation of the Convention;
 - (b) cooperate, where appropriate, with competent international organizations and intergovernmental and non-governmental bodies;
 - (c) consider and adopt amendments to this Convention in accordance with article 64;
 - (d) consider and adopt a template for a request for mutual assistance in order to facilitate international cooperation and assistance in accordance with Parts IV, V and VI of this Convention;
 - (e) consider and undertake any additional action that may be required for the achievement of the objectives of this Convention.
 6. The United Nations, its specialized agencies, the International Committee of the Red Cross, the International Criminal Court as well as any State not a Party to this Convention may be represented at meetings of the Conference of States Parties as observers. The admission and participation of other bodies or agencies as observers shall be subject to the rules of procedure adopted by the Conference of States Parties.
- The costs of the Conferences of States Parties shall be borne by the States Parties to this Convention, in accordance with the United Nations scale of assessment adjusted appropriately. The Conference of States Parties may agree on specific financial arrangements for the participation of observers at meetings of the Conference of States Parties in its financial rules agreed upon in accordance with paragraph 4 of this article.

Met opmerkingen [175]: [UNTOC, Article 35, paragraph 1]

Met opmerkingen [176]: [UNTOC, Article 35, paragraph 2]

Met opmerkingen [177]: [UNTOC, Article 35, paragraph 3]

Met opmerkingen [178]: [UNTOC, Article 35, paragraph 4]

Article 64. Amendments to the Convention

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment to this Convention.
2. Any proposal for an amendment shall be communicated to the host of the meeting of the Conference of States Parties, who shall circulate the proposal forthwith to all States Parties for the purpose of considering and deciding on the proposal at the next meeting of the Conference of States Parties. The host of next meeting of the Conference of States Parties shall also communicate proposed amendments to the signatories to this Convention and, for information, to the depositary.
3. States Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting of the Conference of States Parties. For the purposes of this article, States Parties present and voting means States Parties present and casting an affirmative or negative vote.
4. The host of the Conference of States Parties shall communicate any adopted amendments to the depositary, which shall communicate the amendment to all States Parties and signatories of the Convention for ratification, acceptance or approval.
5. Without prejudice to paragraph 6, an amendment to this Convention adopted in accordance with this Article shall enter into force for the States Parties which have consented to be bound by it on the ninetieth day after the date of deposit of the second instrument of ratification, acceptance or approval of the amendment. Thereafter, the amendment shall enter into force for any other State Party on the ninetieth day after the date of deposit of its instrument of ratification, acceptance or approval of the amendment.

Article 65. Adoption of additional annexes

1. Any State Party may propose, at any time after the expiry of five years after entry into force of this Convention, additional annexes to this Convention containing one or more international crimes not listed in any other annex.
2. Additional annexes shall be proposed and adopted and shall enter into force according to the procedure laid down in Article 64, paragraphs 2 to 4, and paragraph 3 of this Article.
3. An additional annex adopted in accordance with paragraph 2 shall enter into force for the States Parties which have declared to apply this Convention to the crime or crimes listed in this additional annex, on the ninetieth day after the date of deposit of the second declaration to that effect.

Thereafter, the additional annex shall enter into force for any other State Party on the date on which that State Party deposits its declaration.

Met opmerkingen [MIG179]: We suggest a flexible approach without annexes, cf. Swiss Draft and comment to art. 3.

Article 66. Signature, ratification, acceptance, approval and accession

1. This Convention shall be open to all ~~UN Member States and UN Observer States~~ States for signature from [PM] to [PM] in [PM], and thereafter at [PM] until [PM].
2. This Convention shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the depositary.
3. This Convention shall be open for accession by any ~~UN Member State and UN Observer States~~ States. Instruments of accession shall be deposited with the depositary.

Met opmerkingen [180]: [UNTOC, Article 36, paragraph 1]

Met opmerkingen [181]: [Based on UNTOC, Article 36, paragraph 3]

Met opmerkingen [182]: [Based on UNTOC, Article 36, paragraph 4]

Article 67. Entry into force

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the second instrument of ratification, acceptance, approval or accession.
2. For each State ratifying, accepting, approving or acceding to this Convention after the deposit of the second instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the ninetieth day after the date of deposit by such State of its instrument of ratification, acceptance, approval or accession.
3. ~~Notifications-Declarations~~ referred to in article 3, paragraph 1, made at the time of ratification, acceptance or approval of or accession to this Convention shall take effect on the date of entry into force of the Convention for the State concerned, in accordance with paragraph 1 or 2 of this article.
4. ~~NotificationsDeclarations~~ referred to in article 3, paragraph 1, made after ratification, acceptance or approval of or accession to this Convention shall take effect on the date of entry into force of the Convention for the State concerned, in accordance with paragraph 1 of this article or, thereafter, on the date on which that State notifies the depositary.
5. This Convention shall apply to any request presented after the date of entry into force for the States Parties concerned, including where the relevant acts or omissions occurred before that date. ~~However, any State may, at the time of signature, ratification, acceptance, approval of or accession to this Convention, declare that it reserves the right not to apply this Convention or any part thereof to requests relating to acts or omissions that occurred before the date indicated by that State Party, provided that this date is no later than the entry into force of the Convention.~~

Met opmerkingen [MIG183]: If the Convention is limited to international cooperation, this part is not necessary.

Article 68. Provisional application

1. Any State may at the time of signature, or at the time of ratification, acceptance, approval or accession, or at any later time thereafter, declare that it will apply this Convention or any part thereof, pending the entry into force of this Convention for that State.
2. Requests for cooperation from States that have made a declaration as described in paragraph 1 may be refused.
3. Any State Party may terminate its provisional application of this Convention or any part thereof by written notification to the depositary. Termination of the provisional application of this Convention shall take effect on the first day of the month following notification.

Article 69. Reservations

No reservations may be made to this Convention other than those expressly provided for in this Convention.

Article 70. Withdrawal

1. A State Party may withdraw from this Convention by giving written notification to the depositary.
2. A withdrawal shall become effective one year after the date of receipt of the notification by the depositary, or on such later date as may be specified in the notification of withdrawal.
3. A withdrawal will not affect the obligations of that State under the Convention regarding requests pursuant to this Convention made prior to the notification.

Met opmerkingen [184]: [Based on UNTOC, Article 40, paragraph 1]

Article 71. Depositary and languages

1. The *[PM]* is designated depositary of this Convention.
2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary.

Met opmerkingen [185]: [UNTOC, Article 41, paragraph 1]

Met opmerkingen [186]: [UNTOC, Article 41, paragraph 2]

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE at *[place of adoption]* on this *[date]* day of *[month]*, *[year]*.

ANNEXES

Met opmerkingen [SAC187]: We suggest deletion.

DRAFT CORE GROUP

Annex A. War crimes

In addition to the “acts” listed in Article 2, paragraph 5 (e) (i) to (xii) of this Convention, this Convention shall also apply to the following “acts”, listed (xiii) to (xv), in respect of States Parties which have made a notification under Article 3 of this Convention:

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

Met opmerkingen [188]: [2010 Rome Statute amendment to Article 8, paragraph 2(e)]

Met opmerkingen [189]: [2010 Rome Statute amendment to Article 8, paragraph 2(e)]

Met opmerkingen [190]: [2010 Rome Statute amendment to Article 8, paragraph 2(e)]

Annex B. War crimes

In addition to the “acts” listed in Article 2, paragraph 5 (b) (i) to (xxv) and Article 2, paragraph 5 (e) (i) to (xii) of this Convention, this Convention shall also apply to the following “act”, in respect of States Parties which have made a notification under Article 3 of this Convention:

Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;

Met opmerkingen [191]: [2017 Rome Statute amendment to be inserted as Article 8, paragraph 2(b)(xxvii) and Article 8, paragraph 2(e)(xvi)]

DRAFT CORE GROUP

Annex C. War crimes

In addition to the “acts” listed in Article 2, paragraph 5 (b) (i) to (xxv) and Article 2, paragraph 5 (e) (i) to (xii) of this Convention, this Convention shall also apply to the following “act”, in respect of States Parties which have made a notification under Article 3 of this Convention:

Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;

Met opmerkingen [192]: [2017 Rome Statute amendment to be inserted as Article 8, paragraph 2(b)(xxviii) and Article 8, paragraph 2(e)(xvii)]

DRAFT CORE GROUP

Annex D. War crimes

In addition to the “acts” listed in Article 2, paragraph 5 (b) (i) to (xxv) and Article 2, paragraph 5 (e) (i) to (xii) of this Convention, this Convention shall also apply to the following “act”, in respect of States Parties which have made a notification under Article 3 of this Convention:

Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices;

Met opmerkingen [193]: [2017 Rome Statute amendment to be inserted as Article 8, paragraph 2(b)(xxix) and Article 8, paragraph 2 (e)(xviii)]

DRAFT CORE GROUP

Annex E. War crimes

In addition to the “acts” listed in Article 2, paragraph 5 (e) (xii) of this Convention, this Convention shall also apply to the following “act”, in respect of States Parties which have made a notification under Article 3 of this Convention:

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.

Met opmerkingen [194]: [2019 Rome Statute amendment to be inserted as Article 8, paragraph 2(e)(xix)]

DRAFT CORE GROUP

Annex F. Torture

1. In addition to the crimes listed in Article 2, paragraph 1 of this Convention, this Convention shall also apply to the crime of torture, in respect of States Parties which have made a notification under Article 3 of this Convention.
2. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Met opmerkingen [195]: [UNCAT Article 1, paragraph 1]

Annex G. Enforced disappearance

1. In addition to the crimes listed in Article 2, paragraph 1 of this Convention, this Convention shall also apply to the crime of enforced disappearance, in respect of States Parties which have made a notification under Article 3 of this Convention.
2. 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.

Met opmerkingen [196]: [International Convention for the Protection of All Persons from Enforced Disappearance Article 2]

Annex H. Crime of aggression

1. In addition to the crimes listed in Article 2, paragraph 1 of this Convention, this Convention shall also apply to the crime of aggression, in respect of States Parties which have made a notification under Article 3 of this Convention.
2. For the purpose of this Convention, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
3. For the purpose of paragraph 2, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
 - (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
 - (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
 - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
 - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
 - (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
 - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Met opmerkingen [197]: [Rome Statute Article 8bis]