

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

ICRC written comments, October 2020

The International Committee of the Red Cross (ICRC) would like to thank the MLA Initiative for the opportunity to provide written comments on the Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes (Draft Convention). The ICRC commends the Core Group for its work on the Draft Convention, whose purpose, according to Article 1(1), “is to facilitate international cooperation in criminal matters between States Parties with a view to strengthening the fight against impunity” for these crimes.

The ICRC is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. It therefore also welcomes initiatives that aim to strengthen the implementation of international humanitarian law (IHL), including through the prosecution of serious violations of IHL (war crimes).

The primary responsibility for investigating allegations and prosecuting alleged perpetrators of war crimes lies with States. This requires them to develop effective domestic normative frameworks and judicial mechanisms. The Draft Convention could make a considerable contribution to this effort.

The ICRC notes that the list of war crimes in Article 2 of the Draft Convention mirrors the important war crimes in Article 8 of the Rome Statute in 1998. The ICRC also appreciates the inclusion of Annexes A-E in the Draft Convention, reflecting significant subsequent amendments to Article 8 of the Rome Statute, and that, under Article 3(1)-(2) of the Draft Convention, “[e]ach State Party may ... notify the depositary 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”.

In addition, as previously noted in the context of the MLA initiative, it is the ICRC’s view that war crimes are not limited to those listed in Article 8 of the Rome Statute and its amendments. Additional or broader war crimes may exist or come into existence under international law, including customary international law, or national law. For example, while the Rome Statute lists “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 ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” as a war crime in international armed conflicts (Article 8(2)(b)(iv)), this same conduct is not listed as a war crime in non-international armed conflicts, neither in the 1998 Rome Statute nor in an amendment. However, several States have not made this distinction in their national legislation and have criminalized such attacks also in non-international armed conflicts. Similar considerations apply, for example, with regard to attacks against civilian objects, listed in the Rome Statute as a war crime in international armed conflicts (Article 8(2)(b)(ii)) but not for non-international armed conflicts, yet criminalized in the domestic law of a number of States.

The MLA Initiative could therefore consider the inclusion of a clause in the Draft Convention that provides that it is without prejudice to additional or broader war crimes under international law or national law. Such a clause could, for example, be included as new draft Article 2(6). It may also refer to the other crimes covered by the Draft Convention. The ICRC notes that a similar clause is contained in draft Article 2(3) of the Draft articles on Prevention and Punishment of Crimes Against Humanity adopted by the International Law Commission in 2019.

In light of the above, the ICRC also welcomes the inclusion of Article 3(3) of the Draft Convention, under which, “[w]ithout 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] war crime ... as defined in international law; - ... [a] war crime ... in the law of the requesting State Party; and - [a]n extraditable offence under the law of the requested State Party”. As described in the Explanatory Note to the Draft Convention, this is to provide 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”.

However, the ICRC wonders whether “as defined in international law” in the first requirement risks being understood as referring only to crimes *defined in treaty law* – for example in a potential future amendment to the Rome Statute that, at the time of an ad hoc request, is not yet included as an annex in the Draft Convention – or whether it also includes crimes under customary international law. In the view of the ICRC, it would be important that the ad hoc approach under draft Article 3(3) is open to States Parties also with regard to war crimes that may not be defined in treaty law but may exist under customary international law. If the MLA Initiative shares this view, wording the first requirement in draft Article 3(3) as follows would be helpful for clarity: “- A crime of genocide, crime against humanity, war crime, crime of aggression, torture or enforced disappearance under international law;”. This would be similar to an earlier formulation of draft Article 3(3), in Article 2(6) of the Draft Convention in the version of 2 October 2019.

In addition, as written, the ICRC reads the three requirements in draft Article 3(3) as cumulative. This carries the risk of a potentially unintended limitation of an agreement between a requesting and requested State whose national legislation alone would otherwise allow for mutual cooperation.

The ICRC also welcomes the inclusion of Article 5 of the Draft Convention. The requirement for each State Party to “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”, would reflect an important step in the realization of “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”, recalled in the preamble of the Rome Statute. In particular, the ICRC notes the important jurisdictional cases set out in draft Article 5(1)-(2) and the reference to “any criminal jurisdiction exercised in accordance with domestic law” in draft Article 5(3).

The ICRC once again thanks the MLA Initiative for the opportunity to provide written comments on the Draft Convention and will continue to follow its work with great interest.