

## Chapter VII

### CRIMES AGAINST HUMANITY

#### A. Introduction

77. At its sixty-sixth session (2014), the Commission decided to include the topic “Crimes against humanity” in its programme of work and appointed Mr. Sean D. Murphy as Special Rapporteur for the topic.<sup>1023</sup> The General Assembly, in paragraph 7 of its resolution 69/118 of 10 December 2014, subsequently took note of the decision of the Commission to include the topic in its programme of work.

78. At its sixty-seventh session (2015), the Commission considered the first report of the Special Rapporteur<sup>1024</sup> and provisionally adopted four draft articles and commentaries thereto.<sup>1025</sup> It also requested the Secretariat to prepare a memorandum providing information on existing treaty-based monitoring mechanisms that may be of relevance to its future work on the present topic.<sup>1026</sup>

#### B. Consideration of the topic at the present session

79. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/690), as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the International Law Commission (A/CN.4/698), which were considered at its 3296th to 3301st meetings, from 11 to 19 May 2016.

80. In his second report, the Special Rapporteur addressed criminalization under national law (chap. I); establishment of national jurisdiction (chap. II); general investigation and cooperation for identifying alleged offenders (chap. III); exercise of national jurisdiction when an alleged offender is present (chap. IV); *aut dedere aut judicare* (chap. V); fair treatment of an alleged offender (chap. VI); and the future programme of work on the topic (chap. VII). The Special Rapporteur proposed six draft articles corresponding to the issues addressed in chapters I to VI, respectively.<sup>1027</sup>

81. At its 3301st meeting, on 19 May 2016, the Commission referred draft articles 5 to 10, as contained in the

Special Rapporteur’s second report, to the Drafting Committee. It also requested the Drafting Committee to consider the question of the criminal responsibility of legal persons, on the basis of a concept paper to be prepared by the Special Rapporteur.

82. At its 3312th and 3325th meetings, on 9 June and 21 July 2016 respectively, the Commission considered two reports of the Drafting Committee and provisionally adopted draft articles 5 to 10 (see sect. C.1 below).

83. At its 3341st meeting, on 9 August 2016, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session (see sect. C.2 below).

#### C. Text of the draft articles on crimes against humanity provisionally adopted so far by the Commission

##### 1. TEXT OF THE DRAFT ARTICLES

84. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

##### *Article 1. Scope*

**The present draft articles apply to the prevention and punishment of crimes against humanity.**

##### *Article 2. General obligation*

**Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.**

##### *Article 3. Definition of crimes against humanity*

**1. For the purpose of the present draft articles, “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;**
- (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;**

<sup>1023</sup> *Yearbook ... 2014*, vol. II (Part Two), para. 266.

<sup>1024</sup> *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/680.

<sup>1025</sup> *Ibid.*, vol. II (Part Two), paras. 110–117.

<sup>1026</sup> *Ibid.*, para. 115.

<sup>1027</sup> Draft article 5 (Criminalization under national law); draft article 6 (Establishment of national jurisdiction); draft article 7 (General investigation and cooperation for identifying alleged offenders); draft article 8 (Exercise of national jurisdiction when an alleged offender is present); draft article 9 (*Aut dedere aut judicare*); and draft article 10 (Fair treatment of the alleged offender).

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(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.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 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;

(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 1, 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.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

*Article 4. Obligation of prevention*

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.<sup>1028</sup>

*Article 5. Criminalization under national law*

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

<sup>1028</sup> The placement of this paragraph will be addressed at a further stage.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

*Article 6. Establishment of national jurisdiction*

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship 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 stateless person 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 shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

*Article 7. Investigation*

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

*Article 8. Preliminary measures when an alleged offender is present*

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person 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, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

*Article 9. Aut dedere aut judicare*

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

*Article 10. Fair treatment of the alleged offender*

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be

guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION

85. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session is reproduced below.

## CRIMES AGAINST HUMANITY

*Article 5. Criminalization under national law*

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

#### Commentary

(1) Draft article 5 sets forth various measures that each State must take under its criminal law to ensure that crimes against humanity constitute offences, to preclude any superior orders defence or any statute of limitation, and to provide for appropriate penalties commensurate with the grave nature of such crimes. Measures of this kind are essential for the proper functioning of the subsequent draft articles relating to the establishment and exercise of jurisdiction over alleged offenders.

*Ensuring that “crimes against humanity” are offences in national criminal law*

(2) The International Military Tribunal at Nuremberg recognized the importance of punishing individuals, *inter alia*, for crimes against humanity when it stated that: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>1029</sup> The Commission’s 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided that: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”<sup>1030</sup> The 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity provided in its preamble that “the effective punishment of ... crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security”.<sup>1031</sup> The preamble to the Rome Statute of the International Criminal Court (Rome Statute) affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.

(3) Many States have adopted laws on crimes against humanity that provide for the prosecution of such crimes in their national system. The Rome Statute, in particular, has inspired the enactment or revision of a number of national laws on crimes against humanity that define such crimes in terms identical to or very similar to the offence as defined in article 7 of that Statute. At the same time, many States have adopted national laws that differ, sometimes significantly, from the definition set forth in article 7. Moreover, still other States have not adopted any national law on crimes against humanity. Those States typically do have national criminal laws that provide for punishment in some fashion of many of the individual acts that, under certain circumstances, may constitute crimes against humanity, such as murder, torture or rape.<sup>1032</sup> Yet those States have not criminalized crimes against humanity as such and this *lacuna* may preclude prosecution and punishment of the conduct, including in terms commensurate with the gravity of the offence.

<sup>1029</sup> Judgment of 30 September 1946 in Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 14 November 1945–1 October 1946), vol. 22 (1948), p. 466.

<sup>1030</sup> Yearbook ... 1950, vol. II, document A/1316, Part III, p. 374, para. 97 (Principle 1).

<sup>1031</sup> As of August 2016, this Convention had 55 parties.

<sup>1032</sup> See Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, International Criminal Court, Appeals Chamber, No. ICC-02/11-01/12 OA, 27 May 2015 (finding that a national prosecution for the ordinary domestic crimes of disturbing the peace, organizing armed gangs and undermining State security was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution). Available from [www.icc-cpi.int/CourtRecords/CR2015\\_06088.PDF](http://www.icc-cpi.int/CourtRecords/CR2015_06088.PDF).

(4) The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 4, paragraph 1, that: “Each State Party shall ensure that all acts of torture are offences under its criminal law.” The Committee against Torture has stressed the importance of fulfilling such an obligation so as to avoid possible discrepancies between the crime as defined in the Convention and the crime as it is addressed in national law:

Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State.<sup>1033</sup>

(5) To help avoid such loopholes with respect to crimes against humanity, draft article 5, paragraph 1, provides that each State shall take the necessary measures to ensure that crimes against humanity, as such, constitute offences under its criminal law. Draft article 5, paragraphs 2 and 3 (discussed below), then further obligate the State to criminalize certain ways by which natural persons might engage in such crimes.

(6) Since the term “crimes against humanity” is defined in draft article 3, paragraphs 1 to 3, the obligation set forth in draft article 5, paragraph 1, requires that the crimes so defined are made offences under the State’s national criminal laws. While there might be some deviations from the exact language of draft article 3, paragraphs 1 to 3, so as to take account of terminological or other issues specific to any given State, such deviations should not result in qualifications or alterations that significantly depart from the meaning of crimes against humanity as defined in draft article 3, paragraphs 1 to 3. The term “crimes against humanity” used in draft article 5 (and in subsequent draft articles), however, does not include the “without prejudice” clause contained in draft article 3, paragraph 4. While that clause recognizes the possibility of a broader definition of “crimes against humanity” in any international instrument or national law, for purposes of these draft articles the definition of “crimes against humanity” is limited to draft article 3, paragraphs 1 to 3.

(7) Like the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, many treaties in the areas of international humanitarian law, human rights and international criminal law require that a State party ensure that the prohibited conduct is an “offence” or “punishable” under its national law, though the exact wording of the obligation varies.<sup>1034</sup> Some

treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>1035</sup> and the Geneva Conventions for the protection of war victims,<sup>1036</sup> contain an obligation to enact “legislation”, but the Commission viewed it appropriate to model draft article 5, paragraph 1, on more recent treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

*Committing, attempting to commit, assisting in or contributing to a crime against humanity*

(8) Draft article 5, paragraph 2, provides that each State shall take the necessary measures to ensure that certain ways by which natural persons might engage in crimes against humanity are criminalized under national law, specifically: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

(9) In the context of crimes against humanity, a survey of both international instruments and national laws suggests that various types (or modes) of individual criminal responsibility are addressed. First, all jurisdictions that have criminalized “crimes against humanity” impose criminal responsibility upon a person who “commits” the offence (sometimes referred to in national law as “direct” commission, as “perpetration” of the act or as being a “principal” in the commission of the act). For example, the Charter of the International Military Tribunal (Nürnberg Charter) provided jurisdiction for the International Military Tribunal over “persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes”.<sup>1037</sup> Likewise, the statutes of both the International Tribunal for the Former Yugoslavia<sup>1038</sup>

Persons, art. III; International Convention for the Suppression of Terrorist Bombings, art. 4; International Convention for the Suppression of the Financing of Terrorism, art. 4; Organization of African Unity Convention on the Prevention and Combating of Terrorism, art. 2 (a); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 5, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Association of Southeast Asian Nations Convention on Counter-Terrorism, art. IX, para. 1.

<sup>1035</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

<sup>1036</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; Geneva Convention relative to the Treatment of Prisoners of War, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146. For the ICRC commentary of 2016 on article 49 (Penal sanctions) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, see [www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84](http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84).

<sup>1037</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, art. 6.

<sup>1038</sup> Statute of the International Tribunal for the Former Yugoslavia, approved by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1), annex, art. 7, para. 1.

<sup>1033</sup> See Committee against Torture, general comment No. 2 (2007), para. 9, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44)*, annex VI; see also Committee against Torture, *ibid.*, *Fifty-eighth Session, Supplement No. 44 (A/58/44)*, chap. III, consideration of reports submitted by States parties under article 19 of the Convention, Slovenia, para. 115 (a), and Belgium, para. 130.

<sup>1034</sup> See, for example: Convention for the Suppression of Unlawful Seizure of Aircraft, art. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2; International Convention against the Taking of Hostages, art. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4; Inter-American Convention to Prevent and Punish Torture, art. 6; Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; Inter-American Convention on the Forced Disappearance of

and the International Criminal Tribunal for Rwanda<sup>1039</sup> provide that a person who “committed” crimes against humanity “shall be individually responsible for the crime”. The Rome Statute provides that “[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment” and “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime, whether as an individual [or] jointly with another”.<sup>1040</sup> Similarly, the instruments regulating the Special Court for Sierra Leone,<sup>1041</sup> the Special Panels for Serious Crimes in East Timor,<sup>1042</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>1043</sup> the Supreme Iraqi Criminal Tribunal<sup>1044</sup> and the Extraordinary African Chambers within the Senegalese judicial system<sup>1045</sup> all provide for the criminal responsibility of a person who “commits” crimes against humanity. National laws that address crimes against humanity invariably criminalize the “commission” of such crimes. Treaties addressing other types of crimes also invariably call upon States parties to adopt national laws proscribing “commission” of the offence. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides for individual criminal responsibility for the “commission” of genocide.<sup>1046</sup>

(10) Second, all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in some way other than “commission” of the offence. Such conduct may take the form of an “attempt” to commit the offence, or acting as an “accessory” or “accomplice”

to the offence or an attempted offence. With respect to an “attempt” to commit the crime, the statutes of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone contain no provision for such responsibility. In contrast, the Rome Statute provides for the criminal responsibility of a person who attempts to commit the crime, unless he or she abandons the effort or otherwise prevents completion of the crime.<sup>1047</sup> In the *Banda and Jerbo* case, a pre-trial chamber asserted that criminal responsibility for attempt “requires that, in the ordinary course of events, the perpetrator’s conduct [would] have resulted in the crime being completed, had circumstances outside the perpetrator’s control not intervened”.<sup>1048</sup>

(11) Third, with respect to “accessorial” responsibility, such a concept is addressed in international instruments through various terms, such as “ordering”, “soliciting”, “inducing”, “instigating”, “inciting”, “aiding and abetting”, “conspiracy to commit”, “being an accomplice to”, “participating in” or “joint criminal enterprise”. Thus, the statute of the International Tribunal for the Former Yugoslavia provides: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”<sup>1049</sup> The statute of the International Criminal Tribunal for Rwanda uses virtually identical language.<sup>1050</sup> Both tribunals have convicted defendants for participation in such offences within their respective jurisdictions.<sup>1051</sup> Similarly, the instruments regulating the Special Court for Sierra Leone,<sup>1052</sup> the Special Panels for Serious Crimes in East Timor,<sup>1053</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>1054</sup> the Supreme Iraqi Criminal Tribunal<sup>1055</sup> and the Extraordinary African Chambers within the Senegalese judicial system<sup>1056</sup> all provide for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

<sup>1039</sup> Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994) of 8 November 1994, annex, art. 6, para. 1.

<sup>1040</sup> Rome Statute, art. 25, paras. 2 and 3 (a).

<sup>1041</sup> Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute (hereinafter “Statute of the Special Court for Sierra Leone”)) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, at p. 147, art. 6, para. 1.

<sup>1042</sup> United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 5 (hereinafter, “East Timor Tribunal Charter”).

<sup>1043</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006), art. 5, available from the website of the Extraordinary Chambers in the Courts of Cambodia: [www.eccc.gov.kh](http://www.eccc.gov.kh), *Legal documents* (hereinafter “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia”). See also the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117.

<sup>1044</sup> Statute of the Iraqi Special Tribunal, *International Legal Materials*, vol. 43 (2004), p. 231, art. 10 (b) (hereinafter “Supreme Iraqi Criminal Tribunal Statute”). The Iraqi Interim Government enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal’s name to “Supreme Iraqi Criminal Tribunal”. See Law of the Supreme Iraqi Criminal Tribunal, Law No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005).

<sup>1045</sup> Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990, *International Legal Materials*, vol. 52, No. 4 (2013), p. 1028, at pp. 1028–1029, arts. 4 (b) and 6 (hereinafter “Extraordinary African Chambers Statute”).

<sup>1046</sup> Convention on the Prevention and Punishment of the Crime of Genocide, arts. III (a) and IV.

<sup>1047</sup> Rome Statute, art. 25, para. 3 (f).

<sup>1048</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges” of 7 March 2011, International Criminal Court, Pre-Trial Chamber I, para. 96.

<sup>1049</sup> Statute of the International Tribunal for the Former Yugoslavia (see footnote 1038 above), art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment of 15 July 1999, *Judicial Reports 1999*, p. 3, at p. 189, para. 220 (finding that “the notion of common design as a form of accomplice liability is firmly established in customary international law”).

<sup>1050</sup> Statute of the International Criminal Tribunal for Rwanda (see footnote 1039 above), art. 6, para. 1.

<sup>1051</sup> See, for example, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, International Tribunal for the Former Yugoslavia, Trial Chamber, Judgment of 10 December 1998, *Judicial Reports 1998*, vol. 1, p. 467, at p. 631, para. 246 (finding that: “If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor”).

<sup>1052</sup> Statute of the Special Court for Sierra Leone (see footnote 1041 above), art. 6, para. 1.

<sup>1053</sup> East Timor Tribunal Charter (see footnote 1042 above), sect. 14.

<sup>1054</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (see footnote 1043 above), art. 29.

<sup>1055</sup> Supreme Iraqi Criminal Tribunal Statute (see footnote 1044 above), art. 15.

<sup>1056</sup> Extraordinary African Chambers Statute (see footnote 1045 above), art. 10.

(12) The Rome Statute provides for criminal responsibility if the person commits “such a crime ... through another person”, if the person “[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted”, if the person “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission” or if the person “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”, subject to certain conditions.<sup>1057</sup> The Commission decided to use the various terms set forth in the Rome Statute as the basis for the terms used in draft article 5, paragraph 2.

(13) In these various international instruments, the related concepts of “soliciting”, “inducing” and “aiding and abetting” the crime are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constitutes the offence. Indeed, the Convention on the Prevention and Punishment of the Crime of Genocide addresses not just the commission of genocide, but also “[c]onspiracy to commit genocide”, “[d]irect and public incitement to commit genocide”, an “[a]ttempt to commit genocide” and “[c]omplicity in genocide”.<sup>1058</sup> The Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity broadly provides that: “If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.”<sup>1059</sup>

(14) Further, the concept in these various instruments of “ordering” the crime differs from (and complements) the concept of “command” or other superior responsibility. Here, “ordering” concerns the criminal responsibility of the superior for affirmatively instructing that action be committed that constitutes an offence. In contrast, command or other superior responsibility concerns the criminal responsibility of the superior for a failure to act; specifically, in situations where the superior knew or had reason to know that subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

(15) Treaties addressing crimes other than crimes against humanity typically provide for criminal responsibility of persons who participate in the commission of the offence, using broad terminology that does not seek to require States to alter the preferred terminology or modalities that are well settled in national law. In other words, such treaties use general terms rather than detailed

language, allowing States to spell out the precise details of the criminal responsibility through existing national statutes, jurisprudence and legal tradition. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance broadly provides: “Each State Party shall take the necessary measures to hold criminally responsible at least ... [a]ny person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance.”<sup>1060</sup> The language of draft article 5, paragraph 2, takes the same approach.

#### *Command or other superior responsibility*

(16) Draft article 5, paragraph 3, addresses the issue of command or other superior responsibility. In general, this paragraph provides that superiors are criminally responsible for crimes against humanity committed by subordinates, in circumstances where the superior has engaged in a dereliction of duty with respect to the subordinates’ conduct.

(17) International jurisdictions that have addressed crimes against humanity impute criminal responsibility to a military commander or other superior for an offence committed by subordinates in certain circumstances.<sup>1061</sup> Notably, the Nürnberg Tribunal and the International Military Tribunal for the Far East (Tokyo Tribunal) used command responsibility with respect to both military and civilian commanders, an approach that influenced later tribunals.<sup>1062</sup> As indicated by a trial chamber of the International Criminal Tribunal for Rwanda in *The Prosecutor v. Alfred Musema*: “As to whether the form of individual criminal responsibility referred to under Article 6 (3) of the [International Criminal Tribunal for Rwanda] Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle.”<sup>1063</sup>

(18) The statute of the International Tribunal for the Former Yugoslavia provides that “[t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”<sup>1064</sup> Several defendants were

<sup>1060</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (a).

<sup>1061</sup> See, for example, *United States of America v. Wilhelm von Leeb, et al.* (“The High Command Case”), *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. XI (Washington, D.C., United States Government Printing Office, 1950), pp. 543–544.

<sup>1062</sup> *Ibid.*; see also M. Cherif Bassiouni (ed.), *International Criminal Law*, 3rd ed., vol. III: *International Enforcement* (Leiden, Martinus Nijhoff, 2008), p. 461, and Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press, 2011), pp. 262–263.

<sup>1063</sup> See *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, International Criminal Tribunal for Rwanda, Trial Chamber I, judgment and sentence of 27 January 2000, *Reports of Orders, Decisions and Judgements 2000*, vol. II, p. 1512, at p. 1562, para. 132.

<sup>1064</sup> Statute of the International Tribunal for the Former Yugoslavia (see footnote 1038 above), art. 7, para. 3.

<sup>1057</sup> Rome Statute, art. 25, para. 3 (a)–(d).

<sup>1058</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. III (b)–(e).

<sup>1059</sup> Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. II.

convicted by the International Tribunal for the Former Yugoslavia on such a basis.<sup>1065</sup> The same language appears in the Statute of the International Criminal Tribunal for Rwanda,<sup>1066</sup> which also convicted several defendants on such a basis.<sup>1067</sup> Similar language appears in the instruments regulating the Special Court for Sierra Leone,<sup>1068</sup> the Special Tribunal for Lebanon,<sup>1069</sup> the Special Panels for Serious Crimes in East Timor,<sup>1070</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>1071</sup> the Supreme Iraqi Criminal Tribunal<sup>1072</sup> and the Extraordinary African Chambers within the Senegalese judicial system.<sup>1073</sup>

(19) Article 28 of the Rome Statute contains a detailed standard by which criminal responsibility applies to a military commander or person effectively acting as a military commander with regard to the acts of others.<sup>1074</sup> As a general matter, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the commander knew or should have known that his or her subordinates were committing or about to commit the offence; and (c) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution. This standard has begun influencing the development of “command responsibility” in national legal systems, both in the criminal and civil contexts. Article 28 also addresses the issue of other “superior and subordinate relationships” arising in a non-military or civilian context. Such superiors include civilians that “lead” but are not “embedded” in military activities. Here, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the civilian superior knew or consciously disregarded information regarding the offences; (c) the offences concerned activities that were within the effective responsibility and control of the superior; and (d) the superior failed

to take all necessary and reasonable measures within his or her power to prevent or repress commission of all the offences or to submit the matter for investigation and prosecution.

(20) A trial chamber of the International Criminal Court applied this standard when convicting Jean-Pierre Bemba Gombo in March 2016 of crimes against humanity. Among other things, the trial chamber found that Mr. Bemba was a person effectively acting as a military commander who knew that the Mouvement de Libération du Congo forces under his effective authority and control were committing or about to commit the crimes charged. Additionally, the trial chamber found that Mr. Bemba failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates during military operations in 2002 and 2003 in the Central African Republic or to submit the matter to the competent authorities after crimes were committed.<sup>1075</sup>

(21) National laws also often contain this type of criminal responsibility for war crimes, genocide and crimes against humanity, but differing standards are used. Moreover, some States have not developed such a standard in the context of crimes against humanity. For these reasons, the Commission viewed it as appropriate to elaborate a clear standard so as to encourage harmonization of national laws on this issue.<sup>1076</sup> To that end, draft article 5, paragraph 3, is modelled on the standard set forth in the Rome Statute.

(22) Treaties addressing offences other than crimes against humanity also often acknowledge an offence in the form of command or other superior responsibility.<sup>1077</sup>

### *Superior orders*

(23) Draft article 5, paragraph 4, provides that each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate.

(24) All jurisdictions that address crimes against humanity provide grounds for excluding criminal responsibility to one degree or another. For example, most jurisdictions preclude criminal responsibility if the alleged perpetrator suffered from a mental disease that prevented

<sup>1065</sup> See, for example, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, International Tribunal for the Former Yugoslavia, Trial Chamber, judgment of 25 June 1999, *Judicial Reports 1999*, p. 513, at pp. 565–573, paras. 66–77; *The Prosecutor v. Zeynil Delalić et al.*, Case No. IT-96-21-T, International Tribunal for the Former Yugoslavia, Trial Chamber, judgment of 16 November 1998, *Judicial Reports 1998*, vol. II, p. 95, at pp. 1201–1255 and 1385–1523, paras. 330–400 and 605–810.

<sup>1066</sup> Statute of the International Criminal Tribunal for Rwanda (see footnote 1039 above), art. 6, para. 3.

<sup>1067</sup> See *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgment of 2 September 1998, *Reports of Orders, Decisions and Judgments 1998*, vol. I, p. 44; *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, International Criminal Tribunal for Rwanda, Trial Chamber, judgment and sentence of 4 September 1998, *ibid.*, vol. II, p. 780.

<sup>1068</sup> Statute of the Special Court for Sierra Leone (see footnote 1041 above), art. 6, para. 3.

<sup>1069</sup> Statute of the Special Tribunal for Lebanon, Security Council resolution 1757 (2007) of 30 May 2007 (including annex and attachment), art. 3, para. 2.

<sup>1070</sup> East Timor Tribunal Charter (see footnote 1042 above), sect. 16.

<sup>1071</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (see footnote 1043 above), art. 29.

<sup>1072</sup> Supreme Iraqi Criminal Tribunal Statute (see footnote 1044 above), art. 15.

<sup>1073</sup> Statute of the Extraordinary African Chambers (see footnote 1045 above), art. 10.

<sup>1074</sup> See, for example, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, International Tribunal for the Former Yugoslavia, Trial Chamber, Judgment of 26 February 2001, para. 369.

<sup>1075</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, International Criminal Court, Trial Chamber III, Judgment of 21 March 2016, paras. 630, 638 and 734.

<sup>1076</sup> See report of the Commission on Human Rights on its sixty-first session, *Official Records of the Economic and Social Council, 2005, Supplement No. 3 (E/2005/23-E/CN.4/2005/135)*, resolution 2005/81 on impunity of 21 April 2005, para. 6 (urging “all States to ensure that all military commanders and other superiors are aware of the circumstances in which they may be criminally responsible under international law for ... crimes against humanity ... including, under certain circumstances, for these crimes when committed by subordinates under their effective authority and control”).

<sup>1077</sup> See, for example, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 86, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1.



the person from appreciating the unlawfulness of his or her conduct. Some jurisdictions provide that a state of intoxication also precludes criminal responsibility, at least in some circumstances. The fact that the person acted in self-defence may also preclude responsibility, as may duress resulting from a threat of imminent harm or death. In some instances, the person must have achieved a certain age to be criminally responsible. The exact grounds vary by jurisdiction and, with respect to national systems, are usually embedded in that jurisdiction's approach to criminal responsibility generally, not just in the context of crimes against humanity.

(25) At the same time, most jurisdictions that address crimes against humanity provide that perpetrators of such crimes cannot invoke as a defence to criminal responsibility that they were ordered by a superior to commit the offence.<sup>1078</sup> Article 8 of the Nürnberg Charter provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Consistent with article 8, the International Military Tribunal found that the fact that "a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality".<sup>1079</sup> Likewise, article 6 of the Charter of the Tokyo Tribunal provided: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."<sup>1080</sup>

(26) While article 33 of the Rome Statute allows for a limited superior orders defence, it does so exclusively with respect to war crimes; orders to commit acts of genocide or crimes against humanity do not fall within the scope of the defence. The instruments regulating the International Tribunal for the Former Yugoslavia,<sup>1081</sup> the International Criminal Tribunal for Rwanda,<sup>1082</sup> the Special Court for Sierra Leone,<sup>1083</sup> the Special Tribunal for Lebanon,<sup>1084</sup> the Special Panels for Serious Crimes in East Timor,<sup>1085</sup> the Extraordinary Chambers in the Courts of

Cambodia,<sup>1086</sup> the Supreme Iraqi Criminal Tribunal<sup>1087</sup> and the Extraordinary African Chambers within the Senegalese judicial system<sup>1088</sup> all similarly exclude superior orders as a defence. While superior orders are not permitted as a defence to prosecution for an offence, some of the international and national jurisdictions mentioned above allow orders from a superior to serve as a mitigating factor at the sentencing stage.<sup>1089</sup>

27) Such exclusion of superior orders as a defence exists in a range of treaties addressing crimes, such as: the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>1090</sup> the 1985 Inter-American Convention to Prevent and Punish Torture;<sup>1091</sup> the 1994 Inter-American Convention on the Forced Disappearance of Persons;<sup>1092</sup> and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.<sup>1093</sup> In the context of the Convention against Torture, the Committee against Torture has criticized national legislation that permits such a defence or is ambiguous on the issue.<sup>1094</sup> In some instances, the problem arises from the presence in a State's national law of what is referred to as a "due obedience" defence.<sup>1095</sup>

<sup>1086</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (see footnote 1043 above), art. 29.

<sup>1087</sup> Supreme Iraqi Criminal Tribunal Statute (see footnote 1044 above), art. 15.

<sup>1088</sup> Extraordinary African Chambers Statute (see footnote 1045 above), art. 10, para. 5.

<sup>1089</sup> See, for example, Statute of the International Tribunal for the Former Yugoslavia (footnote 1038 above), art. 7, para. 4; Statute of the International Criminal Tribunal for Rwanda (footnote 1039 above), art. 6, para. 4; Statute of the Special Court for Sierra Leone (footnote 1041 above), art. 6, para. 4; East Timor Tribunal Charter (footnote 1042 above), sect. 21.

<sup>1090</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

<sup>1091</sup> Inter-American Convention to Prevent and Punish Torture, art. 4 ("The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability").

<sup>1092</sup> Inter-American Convention on the Forced Disappearance of Persons, art. VIII ("The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them").

<sup>1093</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 2 ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance"). This provision "received broad approval" at the drafting stage. See Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 72 (see also the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 6).

<sup>1094</sup> Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Guatemala, para. 32.13.

<sup>1095</sup> See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44* (A/59/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Chile, para. 56 (i); see also, *ibid.*, *Sixtieth Session, Supplement No. 44* (A/60/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Argentina, para. 31 (a) (praising Argentina for declaring its Due Obedience Act "absolutely null and void").

<sup>1078</sup> See Commission on Human Rights, resolution 2005/81 on impunity (footnote 1076 above), para. 6 (urging all States "to ensure that all relevant personnel are informed of the limitations that international law places on the defence of superior orders").

<sup>1079</sup> *Trial of the Major War Criminals ...* (see footnote 1029 above), p. 466.

<sup>1080</sup> Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946, as amended on 26 April 1946), Charles I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776-1949*, vol. 4 (Washington, D.C., Department of State, 1968), p. 20, at p. 23, art. 6 (hereinafter "Tokyo Charter").

<sup>1081</sup> Statute of the International Tribunal for the Former Yugoslavia (see footnote 1038 above), art. 7, para. 4.

<sup>1082</sup> Statute of the International Criminal Tribunal for Rwanda (see footnote 1039 above), art. 6, para. 4.

<sup>1083</sup> Statute of the Special Court for Sierra Leone (see footnote 1041 above), art. 6, para. 4.

<sup>1084</sup> Statute of the Special Tribunal for Lebanon (see footnote 1069 above), art. 3, para. 3.

<sup>1085</sup> East Timor Tribunal Charter (see footnote 1042 above), sect. 21.

### Statutes of limitations

(28) One possible restriction on the prosecution of a person for crimes against humanity in national law concerns the application of a “statute of limitations” (or “period of prescription”), meaning a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution. Draft article 5, paragraph 5, provides that each State shall take the necessary measures to ensure that the offences referred to in the draft article shall not be subject to any statute of limitations.

(29) No rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg or Tokyo Charters, or in the constituent instruments of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone. In contrast, Control Council Law No. 10, adopted in December 1945 by the Allied Control Council for Germany to ensure the continued prosecution of alleged offenders, provided that in any trial or prosecution for crimes against humanity (as well as war crimes and crimes against the peace) “the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945”.<sup>1096</sup> Likewise, the Rome Statute expressly addresses the matter, providing that: “The crimes within the jurisdiction of the court shall not be subject to any statute of limitations.”<sup>1097</sup> The drafters of the Rome Statute strongly supported this provision as applied to crimes against humanity.<sup>1098</sup> Similarly, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal Statute and the East Timor Tribunal Charter all explicitly defined crimes against humanity as offences for which there is no statute of limitations.<sup>1099</sup>

(30) With respect to whether a statute of limitations may apply to the prosecution of an alleged offender in national courts, in 1967 the General Assembly noted that “the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of

serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes”.<sup>1100</sup> The following year, States adopted the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which requires State parties to adopt “any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment” of these two types of crimes.<sup>1101</sup> Similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which uses substantially the same language.<sup>1102</sup> At present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.

(31) Many treaties addressing crimes in national law other than crimes against humanity have not contained a prohibition on a statute of limitations. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains no prohibition on the application of a statute of limitations to torture-related offences. Even so, the Committee against Torture has stated that, taking into account their grave nature, such offences should not be subject to any statute of limitations.<sup>1103</sup> Similarly, while the International Covenant on Civil and Political Rights does not directly address the issue, the Human Rights Committee has called for the abolition of statutes of limitations in relation to serious violations of the Covenant.<sup>1104</sup> In contrast, the International Convention for the Protection of All Persons from Enforced Disappearance does address the issue of statutes of limitations, providing that: “A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (a) is of long duration and is proportionate to the extreme seriousness of this offence”.<sup>1105</sup> The *travaux préparatoires* of the Convention indicate that this provision was intended to distinguish between those offences that might constitute a crime against humanity—for which

<sup>1096</sup> Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, art. II, para. 5, 20 December 1945 (*Official Gazette of the Control Council for Germany*, vol. 3 (1946), p. 22, at p. 52).

<sup>1097</sup> Rome Statute, art. 29.

<sup>1098</sup> See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, vol. II: *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.183/13 (Vol. II), United Nations publication, Sales No. E.02.I.5), 2nd meeting of the Committee of the Whole (A/CONF.183/C.1/SR.2), pp. 141–143, paras. 45–74.

<sup>1099</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (see footnote 1043 above), art. 5; Supreme Iraqi Criminal Tribunal Statute (see footnote 1044 above), art. 17 (d); East Timor Tribunal Charter (see footnote 1042 above), sect. 17.1; see also report of the Third Committee (A/57/806), para. 10 (Khmer Rouge trials) and General Assembly resolution 57/228 B of 13 May 2003. Further, it should be noted that the Extraordinary Chambers in the Courts of Cambodia were provided with jurisdiction over crimes against humanity committed decades prior to their establishment, between 1975 and 1979, when the Khmer Rouge held power.

<sup>1100</sup> General Assembly resolution 2338 (XXII) of 18 December 1967, entitled “Question of the punishment of war criminals and of persons who have committed crimes against humanity”; see also General Assembly resolution 2712 (XXV) of 15 December 1970 and General Assembly resolution 2840 (XXVI) of 18 December 1971.

<sup>1101</sup> Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. IV.

<sup>1102</sup> European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, art. 1.

<sup>1103</sup> See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 44* (A/62/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Italy, para. 40.19.

<sup>1104</sup> See, for example, report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40* (A/63/40), vol. I, chap. IV, consideration of reports submitted by States parties under article 40 of the Covenant and of country situations in the absence of a report resulting in public concluding observations, Panama (sect. A, para. 79), para. (7).

<sup>1105</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 8, para. 1 (a). In contrast, the Inter-American Convention on the Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations (art. VII).

there should be no statute of limitations—and all other offences under the Convention.<sup>1106</sup>

### *Appropriate penalties*

(32) Draft article 5, paragraph 6, provides that each State shall ensure that the offences referred to in the article shall be punishable by appropriate penalties that take into account the grave nature of the offences.

(33) The Commission provided in its 1996 draft code of crimes against the peace and security of mankind that: “An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.”<sup>1107</sup> The commentary further explained that “[t]he character of a crime is what distinguishes that crime from another crime ... The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author.”<sup>1108</sup> Thus, “while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty.”<sup>1109</sup>

(34) To the extent that an international court or tribunal has jurisdiction over crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. The statute of the International Tribunal for the Former Yugoslavia provides that: “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.”<sup>1110</sup> Furthermore, the Criminal Tribunal for the Former Yugoslavia is to “take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”.<sup>1111</sup> The statute of the International Criminal Tribunal for Rwanda includes identical language, except that recourse is to be had to “the general practice regarding prison sentences in the courts of Rwanda”.<sup>1112</sup> Even for convictions for the most serious crimes of international concern, this can result in a wide range of sentences. The Rome Statute also allows for flexibility of this kind, by providing for a term of imprisonment of up to 30 years or life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”.<sup>1113</sup> Similar formulations may be found in the instruments regulating the Special Court for

Sierra Leone,<sup>1114</sup> the Special Tribunal for Lebanon,<sup>1115</sup> the Special Panels for Serious Crimes in East Timor,<sup>1116</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>1117</sup> the Supreme Iraqi Criminal Tribunal,<sup>1118</sup> and the Extraordinary African Chambers within the Senegalese judicial system.<sup>1119</sup> Likewise, to the extent that a national jurisdiction has criminalized crimes against humanity, the penalties attached to such an offence may vary, but are expected to be commensurate with the gravity of the offence.

(35) International treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, allow them the discretion to determine the punishment, based on the circumstances of the particular offender and offence.<sup>1120</sup> The Convention on the Prevention and Punishment of the Crime of Genocide simply calls for “effective penalties for persons guilty of genocide or any of the other acts enumerated ...”.<sup>1121</sup> The Geneva Conventions for the protection of war victims also provide a general standard and leave to individual States the discretion to set the appropriate punishment, by simply requiring “[t]he High Contracting Parties [to] undertake to enact any legislation necessary to provide effective penal sanctions for ... any of the grave breaches of the present Convention ...”.<sup>1122</sup> More recent treaties addressing crimes in national legal systems typically indicate that the penalty should be “appropriate”. Although the Commission initially proposed the term “severe penalties” for use in its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the term “appropriate penalties” was instead used by States in the 1973 Convention on the

<sup>1114</sup> Statute of the Special Court for Sierra Leone (see footnote 1041 above), art. 19.

<sup>1115</sup> Statute of the Special Tribunal for Lebanon (see footnote 1069 above), art. 24.

<sup>1116</sup> East Timor Tribunal Charter (see footnote 1042 above), sect. 10.

<sup>1117</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (see footnote 1043 above), art. 39.

<sup>1118</sup> Supreme Iraqi Criminal Tribunal Statute (see footnote 1044 above), art. 24.

<sup>1119</sup> Extraordinary African Chambers Statute (see footnote 1045 above), art. 24.

<sup>1120</sup> See the report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59) (footnote 1093 above), para. 58 (indicating that “[s]everal delegations welcomed the room for manoeuvre granted to States” in this provision); see also report of the *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 39* (A/32/39), annex I (summary records of the 1st to the 19th meetings of the Committee), 13th meeting (15 August 1977), para. 4 (similar comments by the representative of the United States of America); Commission on Human Rights resolution 2005/81 on impunity (see footnote 1076 above), para. 15 (calling upon “all States ... to ensure that penalties are appropriate and proportionate to the gravity of the crime”).

<sup>1121</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

<sup>1122</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; Geneva Convention relative to the Treatment of Prisoners of War, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146. See also the ICRC commentary of 2016 on article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field (footnote 1036 above), paras. 2838–2846.

<sup>1106</sup> Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59) (see footnote 1093 above), paras. 43–46 and 56.

<sup>1107</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 22, art. 3.

<sup>1108</sup> *Ibid.*, p. 23, para. (3) of the commentary to art. 3.

<sup>1109</sup> *Ibid.*

<sup>1110</sup> Statute of the International Tribunal for the Former Yugoslavia (see footnote 1038 above), art. 24, para. 1.

<sup>1111</sup> *Ibid.*, art. 24, para. 2.

<sup>1112</sup> Statute of the International Criminal Tribunal for Rwanda (see footnote 1039 above), art. 23, para. 1.

<sup>1113</sup> Rome Statute, art. 77, para. 1 (b).

Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.<sup>1123</sup> That term has served as a model for subsequent treaties. At the same time, the provision on “appropriate” penalties in the 1973 Convention was accompanied by language calling for the penalty to take into account the “grave nature” of the offence. The Commission commented that such a reference was intended to emphasize that the penalty should take into account the important “world interests” at stake in punishing such an offence.<sup>1124</sup> Since 1973, this approach—that “[e]ach State Party shall make these offences punishable by appropriate penalties which take into account their grave nature”—has been adopted for numerous treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>1125</sup> In some treaties, the issue of gravity is expressed using terms such as “extreme seriousness”, “serious nature” or “extreme gravity” of the offences.<sup>1126</sup>

### Legal persons

(36) Paragraphs 1 to 6 of draft article 5 are directed at criminal liability of offenders who are natural persons, although the term “natural” is not used, which is consistent with the approach taken in treaties addressing crimes. Paragraph 7, in contrast, addresses the liability of “legal persons” for the offences referred to in draft article 5.

(37) Criminal liability of legal persons has become a feature of the national laws of many States in recent years, but it is still unknown in many other States.<sup>1127</sup> In States where the concept is known, such liability sometimes exists with respect to international crimes.<sup>1128</sup> Acts that can lead to such liability are, of course, committed by natural persons, who act as officials, directors, officers, or through some other position or agency of the legal person. Such liability, in States where the concept exists, is typically imposed when

the offence at issue was committed by a natural person on behalf of or for the benefit of the legal person.

(38) Criminal liability of legal persons has not featured significantly to date in the international criminal courts or tribunals. The Nürnberg Charter, in articles 9 and 10, authorized the International Military Tribunal to declare any group or organization as a criminal organization during the trial of an individual, which could lead to the trial of other individuals for membership in the organization. In the course of the Tribunal’s proceedings, as well as subsequent proceedings under Control Council Law No. 10, a number of such organizations were so designated, but only natural persons were tried and punished.<sup>1129</sup> The International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda did not have criminal jurisdiction over legal persons, nor does the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal, or the Extraordinary African Chambers within the Senegalese judicial system. The drafters of the Rome Statute noted that “[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute”<sup>1130</sup> and, although proposals for inclusion of a provision on such responsibility were made, the Rome Statute ultimately did not contain such a provision.

(39) Liability of legal persons also has not been included in many treaties addressing crimes at the national level, including: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the Geneva Conventions for the protection of war victims; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1997 International Convention for the Suppression of Terrorist Bombings; and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The Commission’s 1996 draft code of crimes only addressed the criminal responsibility of “an individual”.<sup>1131</sup>

(40) On the other hand, the 2014 African Union protocol amending the Statute of the African Court of Justice and Human Rights, though not yet in force, provides jurisdiction to the reconstituted African Court over legal persons for international crimes, including crimes against humanity.<sup>1132</sup> Further, although criminal jurisdiction over

<sup>1123</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2 (“[e]ach State Party shall make these crimes punishable by appropriate penalties”). For the draft articles adopted by the Commission at its twenty-fourth session (1972), see *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 312, at p. 315, art. 2, para. 2.

<sup>1124</sup> Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, pp. 316, para. (12) of the commentary to draft article 2.

<sup>1125</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4; see also Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 4 (b); International Convention for the Suppression of the Financing of Terrorism, art. 4 (b); Organization of African Unity Convention on the Prevention and Combating of Terrorism, art. 2 (a).

<sup>1126</sup> See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Inter-American Convention to Prevent and Punish Torture, art. 6; Inter-American Convention on the Forced Disappearance of Persons, art. III.

<sup>1127</sup> See, for example, *New TV S.A.L. Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/PT/AP/AR126.1*, Special Tribunal for Lebanon, Appeals Panel, Decision of 2 October 2014 on interlocutory appeal concerning personal jurisdiction in contempt proceedings, para. 58 (“the practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems”).

<sup>1128</sup> See, for example, Ecuador, Comprehensive Organic Criminal Code, *Official Gazette, Supplement*, vol. I, No. 180, 10 February 2014, art. 90 (Penalty for a legal person), providing, in a section addressing crimes against humanity, that “[w]hen a legal person is responsible for any of the crimes in this Section, it will be penalized by being dissolved”.

<sup>1129</sup> See, for example, *United States of America v. Krauch and Others (“The Farben Case”), Trials of War Criminals before the Nuernberg Military Tribunals*, vols. VII–VIII (Washington, D.C., United States Government Printing Office, 1953 and 1952, respectively).

<sup>1130</sup> *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, vol. III: Reports and other documents (A/CONF.183/13 (Vol. III)), United Nations publication, Sales No. C.02.I.5), report of the Preparatory Committee on the Establishment of an International Criminal Court (A/CONF.183/2), draft Statute, art. 23 (Individual criminal responsibility), para. 6, footnote 71.

<sup>1131</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 18, art. 2.

<sup>1132</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), 27 June 2014, art. 46C.

legal persons (as well as over crimes against humanity) is not expressly provided for in the Statute of the Special Tribunal for Lebanon, the Tribunal's Appeals Panel concluded in 2014 that the Tribunal had jurisdiction to prosecute a legal person for contempt of court.<sup>1133</sup>

(41) Moreover, there are several treaties that address the liability of legal persons for criminal offences, notably: the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*;<sup>1134</sup> the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;<sup>1135</sup> the 1999 International Convention for the Suppression of the Financing of Terrorism;<sup>1136</sup> the 2000 United Nations Convention against Transnational Organized Crime;<sup>1137</sup> the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;<sup>1138</sup> the 2003 United Nations Convention against Corruption;<sup>1139</sup> the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;<sup>1140</sup> and a series of treaties concluded within the Council of Europe.<sup>1141</sup> Other regional instruments address the issue as well, mostly in the

context of corruption.<sup>1142</sup> Such treaties typically do not define the term "legal person", leaving it to national legal systems to apply whatever definition would normally operate therein.

(42) The Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.

(43) Paragraph 7 of draft article 5 is modelled on the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The Optional Protocol was adopted by the General Assembly in 2000<sup>1143</sup> and entered into force in 2002. As of August 2016, 173 States are party to the Optional Protocol and another 9 States have signed but not yet ratified it. Article 3, paragraph 1, of the Optional Protocol obligates States parties to ensure that certain acts are covered under its criminal or penal law, such as the sale of children for sexual exploitation or the offering of a child for prostitution. Article 3, paragraph 4, then reads: "Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present Article. Subject to the legal principles of the State Party, this liability of legal persons may be criminal, civil or administrative."

(44) Paragraph 7 of draft article 5 uses the same language, but replaces "State Party" with "State" and replaces "for offences established in paragraph 1 of the present Article" with "for the offences referred to in this draft article". As such, paragraph 7 imposes an obligation upon the State that it "shall take measures", meaning that it is required to pursue such measures in good faith. At the same time, paragraph 7 provides the State with considerable flexibility to shape those measures in accordance with its national law. First, the clause "[s]ubject to the provisions of its national law" should be understood as according to the State considerable discretion as to the measures that will be adopted; the obligation is "subject to" the State's existing approach to liability of legal persons for criminal offences under its national law. For example, in most States, liability of legal persons for criminal offences will only apply under national law with respect to certain types of legal persons and not to others. Indeed, under most national laws, "legal persons" in this context likely excludes States, Governments, other public bodies in the exercise of State authority, and public international organizations.<sup>1144</sup> Likewise, the liability of

<sup>1133</sup> *New TV S.A.L. Karma Mohamed Tahsin Al Khayat, Appeals Panel, Decision of 2 October 2014* (see footnote 1127 above). The Tribunal ultimately found that the legal person, Al Jadeed TV, was not guilty. See *Al Jadeed [Co.] S.A.L./New T.V.S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ*, Special Tribunal for Lebanon, *Contempt Judge*, Decision of 18 September 2015, para. 55; *Al Jadeed [Co.] S.A.L./New T.V.S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/A/AP, Appeals Panel*, Decision of 8 March 2016.

<sup>1134</sup> International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. I, para. 2 ("The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*").

<sup>1135</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, art. 2, para. 14 ("For the purposes of this Convention: ... 'Person' means any natural or legal person") and art. 4, para. 3 ("The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal").

<sup>1136</sup> International Convention for the Suppression of the Financing of Terrorism, art. 5. For the proposals submitted during the negotiations that led to article 5, see "Measures to eliminate international terrorism: report of the Working Group" (A/C.6/54/L.2) (26 October 1999).

<sup>1137</sup> United Nations Convention against Transnational Organized Crime, art. 10.

<sup>1138</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 3, para. 4.

<sup>1139</sup> United Nations Convention against Corruption, art. 26. For background, see United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (United Nations publication, Sales No. E. 10.V.13), pp. 233–235, and *Legislative guide for the implementation of the United Nations Convention against Corruption* (2nd rev. ed., 2012), pp. 107–113. For the analogous convention adopted by the Organisation for Economic Co-operation and Development, see Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official").

<sup>1140</sup> Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, art. 5.

<sup>1141</sup> See, for example, *Criminal Law Convention on Corruption*, art. 18, supplemented by the Additional Protocol of 2003 relating to bribery of arbitrators and jurors; see also the European Convention on the Suppression of Terrorism, art. 10.

<sup>1142</sup> See, for example, the Inter-American Convention against Corruption, art. VIII; the Southern African Development Community Protocol against Corruption, art. 4, para. 2; and the African Union Convention on Preventing and Combating Corruption, art. 11, para. 1.

<sup>1143</sup> General Assembly resolution 54/263 of 25 May 2000, annex II.

<sup>1144</sup> The Council of Europe Criminal Law Convention on Corruption makes explicit such exclusion (see, for example, art. 1 (d): "For the purposes of this Convention: ... 'legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations").

legal persons under national laws can vary based on the range of natural persons whose conduct can be attributed to the legal person, which modes of liability of natural persons can result in liability of the legal person, whether it is necessary to prove the *mens rea* of a natural person to establish liability of the legal person, or whether it is necessary to prove that a specific natural person committed the offence.<sup>1145</sup>

(45) Second, each State is obliged to take measures to establish the legal liability of legal persons “where appropriate”. Even if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the specific context of crimes against humanity.

(46) For measures that are adopted, the second sentence of paragraph 7 provides that: “Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.” Such a sentence appears not just in the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as discussed above, but also in other widely adhered-to treaties, such as the 2000 United Nations Convention against Transnational Organized Crime<sup>1146</sup> and the 2003 United Nations Convention against Corruption.<sup>1147</sup> The flexibility indicated in such language again acknowledges and accommodates the diversity of approaches adopted within national legal systems. As such, there is no obligation to establish criminal liability if doing so is inconsistent with a State’s national legal principles; in those cases, a form of civil or administrative liability may be used as an alternative. In any event, whether criminal, civil or administrative, such liability is without prejudice to the criminal liability of natural persons provided for in draft article 5.

#### **Article 6. Establishment of national jurisdiction**

**1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:**

**(a) when the offence is committed in any territory under its jurisdiction or on board a ship 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 stateless person who is habitually resident in that State’s territory;**

<sup>1145</sup> For a brief overview of divergences in various common law and civil law jurisdictions on liability of legal persons, see *Al Jadeed [Co.] S.A.L./New T.V.S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat, Contempt Judge*, Decision of 18 September 2015 (footnote 1133 above), paras. 63–67.

<sup>1146</sup> Art. 10, para. 2 (“Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative”); see also the International Convention for the Suppression of the Financing of Terrorism, art. 5, para. 1 (“Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative”).

<sup>1147</sup> Art. 26, para. 2 (“Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative”).

**(c) when the victim is a national of that State if that State considers it appropriate.**

**2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.**

**3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.**

#### *Commentary*

(1) Draft article 6 provides that each State must establish jurisdiction over the offences referred to in draft article 5 in certain cases, such as when the crime occurs in territory under its jurisdiction, has been committed by one of its nationals or when the offender is present in territory under its jurisdiction.

(2) As a general matter, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern, so that there is no safe haven for those who commit the offence. Thus, according to the Commission’s 1996 draft code of crimes against the peace and security of mankind, “each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes” set out in the draft code, other than the crime of aggression, “irrespective of where or by whom those crimes were committed”.<sup>1148</sup> The breadth of such jurisdiction was necessary because “[t]he Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court.”<sup>1149</sup> The preamble to the Rome Statute provides “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level”, and further “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

(3) As such, when treaties concerning crimes address national law implementation, they typically include a provision on the establishment of national jurisdiction. For example, discussions within a working group of the Commission on Human Rights convened to draft an international instrument on enforced disappearance concluded that “[t]he establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective.”<sup>1150</sup> At the same

<sup>1148</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 27, art. 8.

<sup>1149</sup> *Ibid.*, p. 28, para. (5) of the commentary to art. 8.

<sup>1150</sup> Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 65.

time, such treaties typically only obligate a State party to exercise its jurisdiction when an alleged offender is present in the State party's territory (see draft article 8), leading either to a submission of the matter to the prosecuting authorities within that State party or to extradition or surrender of the alleged offender to another State party or competent international tribunal (see draft article 9).

(4) Reflecting on the acceptance of such an obligation in treaties, and in particular within the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, stated:

The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases.<sup>1151</sup>

(5) Provisions comparable to those appearing in draft article 6 exist in many treaties addressing crimes.<sup>1152</sup> While no treaty yet exists relating to crimes against humanity, in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal indicated in their separate opinion that:

The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking [and] torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted.<sup>1153</sup>

(6) Draft article 6, paragraph 1 (a), requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to

as "territorial jurisdiction". Rather than refer solely to a State's "territory", the Commission considered it appropriate to refer to territory "under [the State's] jurisdiction", which is intended to encapsulate the territory *de jure* of the State, as well as territory under its jurisdiction or *de facto* control. Such terminology aligns with the formulations used by relevant treaties in the field. The text of draft article 4 will need to be revisited in the future to ensure consistency in terminology.<sup>1154</sup> Further, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State; indeed, States that have adopted national laws on crimes against humanity typically establish jurisdiction over acts occurring on such a vessel or aircraft.

(7) Draft article 6, paragraph 1 (b), calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction". Paragraph 1 (b) also indicates that the State may, on an optional basis, establish jurisdiction where the offender is "a stateless person who is habitually resident in that State's territory". This formulation is based on the language of certain existing conventions, such as article 5, paragraph 1 (b), of the International Convention against the Taking of Hostages.

(8) Draft article 6, paragraph 1 (c), concerns jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as "passive personality jurisdiction". Given that many States prefer not to exercise this type of jurisdiction, this jurisdiction is optional; a State may establish such jurisdiction "if that State considers it appropriate", but the State is not obliged to do so. This formulation is also based on the language of a wide variety of existing conventions.

(9) Draft article 6, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in the territory under the State's jurisdiction and the State does not extradite or surrender the person in accordance with the present draft articles. In such a situation, even if the crime was not committed in its territory, the alleged offender is not its national and the victims of the crime are not its nationals, the State nevertheless is obligated to establish jurisdiction given the presence of the alleged offender in territory under its jurisdiction. This obligation helps to prevent an alleged offender from seeking refuge in a State that otherwise has no connection with the offence.

(10) Draft article 6, paragraph 3, makes clear that, while each State is obligated to enact these types of jurisdiction, it does not exclude any other jurisdiction that is available under the national law of that State. Indeed, to preserve the right of States parties to establish national jurisdiction beyond the scope of the treaty, and without prejudice to any applicable rules of international law, treaties addressing crimes typically leave open the possibility that a State party may have established other jurisdictional grounds upon which to hold an alleged

<sup>1151</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 451, para. 75.

<sup>1152</sup> See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 5, para. 1 (a)–(b); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 3; International Convention against the Taking of Hostages, art. 5; Inter-American Convention to Prevent and Punish Torture, art. 12; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5; Convention on the Safety of United Nations and Associated Personnel, art. 10; Inter-American Convention on the Forced Disappearance of Persons, art. IV; International Convention for the Suppression of Terrorist Bombings, art. 6; International Convention for the Suppression of the Financing of Terrorism, art. 7; Organization of African Unity Convention on the Prevention and Combating of Terrorism, art. 6, para. 1; United Nations Convention against Transnational Organized Crime, art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, paras. 1–2; Association of Southeast Asian Nations Convention on Counter-Terrorism, art. VII, paras. (1)–(3).

<sup>1153</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 78, para. 51.

<sup>1154</sup> See *Yearbook ... 2015*, vol. II (Part Two), chap. VII, sect. C, art. 4, para. 1 (a) (referring to "any territory under its jurisdiction or control").



offender accountable.<sup>1155</sup> In their joint separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal cited, *inter alia*, such a provision in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and stated:

We reject the suggestion that the battle against impunity is “made over” to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis.<sup>1156</sup>

(11) Establishment of the various types of national jurisdiction set out in draft article 6 are important for supporting an *aut dedere aut judicare* obligation, as set forth in draft article 9. In his separate opinion in the *Arrest Warrant of 11 April 2000* case, Judge Guillaume remarked on the “system” set up under treaties of this sort:

Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. *It must have first conferred jurisdiction on its courts to try him if he is not extradited.\** Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States.<sup>1157</sup>

### Article 7. Investigation

**Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.**

#### Commentary

(1) Draft article 7 addresses situations where there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in territory under a State’s jurisdiction. That State is best situated to conduct such an investigation, so as to determine whether crimes in fact have occurred or are occurring and, if so, whether governmental forces under its control committed the crimes, whether forces under the control of another State did so or whether they were committed by members of a non-State organization. Such an investigation can lay the foundation not only for identifying alleged offenders and their location, but also for helping to prevent the continuance of ongoing crimes or their recurrence by identifying their source. Such an investigation should be contrasted with a preliminary inquiry into the facts

concerning a particular alleged offender who is present in a State, which is addressed in draft article 8, paragraph 2.

(2) A comparable obligation has featured in some treaties addressing other crimes.<sup>1158</sup> For example, article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” That obligation is different from the State party’s obligation under article 6, paragraph 2, of the Convention against Torture to undertake an inquiry into the facts concerning a particular alleged offender. As indicated, article 12 of the Convention against Torture requires that the investigation be carried out whenever there is “reasonable ground to believe” that the offence has been committed, regardless of whether victims have formally filed complaints with the State’s authorities.<sup>1159</sup> Indeed, since it is likely that the more systematic the practice of torture is in a given country, the fewer the number of official torture complaints that will be made, a violation of article 12 of the Convention against Torture is possible even if the State has received no such complaints. The Committee against Torture has indicated that State authorities must “proceed automatically” to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with “no special importance being attached to the grounds for the suspicion”.<sup>1160</sup>

(3) The Committee against Torture has also found violations of article 12 if the State’s investigation is not “prompt and impartial”.<sup>1161</sup> The requirement of promptness means that as soon as there is suspicion of a crime having been committed, investigations should be initiated immediately or without any delay. In most cases where the Committee found a lack of promptness, no investigation had been carried out at all or the investigation had only been commenced after a long period of time had passed. For example, the Committee considered “that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention”.<sup>1162</sup> The rationale underlying the promptness requirement is that physical traces that may prove torture can quickly disappear and that victims may

<sup>1155</sup> See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, revised draft United Nations Convention against Transnational Organized Crime (A/AC.254/4/Rev.4), footnote 102; see also Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, European Treaty Series, No. 173, para. 83 (“Jurisdiction is traditionally based on territoriality or nationality. In the field of corruption these principles may, however, not always suffice to exercise jurisdiction, for example over cases occurring outside the territory of a Party, not involving its nationals, but still affecting its interests (e.g. national security). Paragraph 4 of this article allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well”).

<sup>1156</sup> *Arrest Warrant of 11 April 2000* (see footnote 1153 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 78–79, para. 51.

<sup>1157</sup> *Ibid.*, Separate Opinion of President Guillaume, p. 39, para. 9.

<sup>1158</sup> See, for example, Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 2; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 55, para. 1.

<sup>1159</sup> See *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, 14 May 1998, para. 8.2, in report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex X, sect. A.3; *Danilo Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, para. 7.3, *ibid.*, *Sixty-first Session, Supplement No. 44* (A/61/44), annex VIII, sect. A.

<sup>1160</sup> See *Dhaou Belgacem Thabti v. Tunisia*, Communication No. 187/2001, 14 November 2003, para. 10.4, *ibid.*, *Fifty-ninth Session, Supplement No. 44* (A/59/44), annex VII, sect. A.

<sup>1161</sup> See, for example, *Bairamov v. Kazakhstan*, Communication No. 497/2012, 14 May 2014, paras. 8.7–8.8, *ibid.*, *Sixty-ninth Session, Supplement No. 44* (A/69/44), annex XIV.

<sup>1162</sup> *Qani Halimi-Nedzibi v. Austria*, Communication No. 8/1991, 18 November 1993, para. 13.5, *ibid.*, *Forty-ninth Session, Supplement No. 44* (A/49/44), annex V.



be in danger of further torture, which a prompt investigation may be able to prevent.<sup>1163</sup>

(4) The requirement of impartiality means that States must proceed with their investigations in a serious, effective and unbiased manner. In some instances, the Committee against Torture has recommended that investigation of offences be “under the direct supervision of independent members of the judiciary”.<sup>1164</sup> In other instances, it has stated that “[a]ll government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so”.<sup>1165</sup> The Committee has stated that an impartial investigation gives equal weight to assertions that the offence did or did not occur, and then pursues appropriate avenues of inquiry, such as checking available government records, examining relevant government officials or ordering exhumation of bodies.<sup>1166</sup>

(5) Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. For example, although the International Covenant on Civil and Political Rights contains no such express obligation, the Human Rights Committee has repeatedly asserted that States must investigate, in good faith, violations of the Covenant.<sup>1167</sup> Regional human rights bodies have also interpreted their legal instruments as implicitly containing a duty to conduct an investigation.<sup>1168</sup>

#### **Article 8. Preliminary measures when an alleged offender is present**

**1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence**

<sup>1163</sup> *Encarnacion Blanco Abad v. Spain* (see footnote 1159 above), para. 8.2.

<sup>1164</sup> Report of the Committee against Torture, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44 (A/49/44)*, chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Ecuador, paras. 97–105, at para. 105.

<sup>1165</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 44 (A/56/44)*, chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Guatemala, paras. 67–76, at para. 76 (d).

<sup>1166</sup> *Khaled Ben M'Barek v. Tunisia*, Communication No. 60/1996, 10 November 1999, paras. 11.9–11.10, *ibid.*, *Fifty-fifth Session, Supplement No. 44 (A/55/44)*, annex VIII, sect. A.

<sup>1167</sup> See Human Rights Committee, general comment No. 31, para. 15 (report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III); see also *Nazriev v. Tajikistan*, Communication No. 1044/2002, views adopted on 17 March 2006, para. 8.2 (*ibid.*, *Sixty-first Session, Supplement No. 40 (A/61/40)*, vol. II, annex V, sect. P); *Kouidis v. Greece*, Communication No. 1070/2002, views adopted on 28 March 2006, para. 9 (*ibid.*, sect. T); *Agabekov v. Uzbekistan*, Communication No. 1071/2002, views adopted on 16 March 2007, para. 7.2 (*ibid.*, *Sixty-second Session, Supplement No. 40 (A/62/40)*, vol. II, annex VII, sect. I); *Karimov v. Tajikistan* and *Nursatov v. Tajikistan*, Communications Nos. 1108/2002 and 1121/2002, views adopted on 26 March 2007, para. 7.2 (*ibid.*, sect. H).

<sup>1168</sup> See, for example, European Court of Human Rights, *Ergi v. Turkey*, 28 July 1998, *Reports of Judgments and Decisions 1998-IV*, paras. 82 and 85–86; *Bati and Others v. Turkey*, Nos. 33097/96 and 57834/00, ECHR 2004-IV, para. 133; *Paniagua Morales et al. v. Guatemala*, Judgment of 8 March 1998, Inter-American Court of Human Rights, Series C No. 37; *Extrajudicial Executions and Forced Disappearances of Persons v. Peru*, Report No. 101/01, 11 October 2001, Inter-American Commission on Human Rights (OEA/Ser./L/V/II.114 doc. 5 rev.).

referred to in draft article 5 is present shall take the person 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, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

**2. Such State shall immediately make a preliminary inquiry into the facts.**

**3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.**

#### *Commentary*

(1) Draft article 8 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present. Paragraph 1 calls upon the State to take the person into custody or take other legal measures to ensure his or her presence, in accordance with that State's law, but only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. Such measures are a common step in national criminal proceedings, in particular to avoid further criminal acts and a risk of flight by the alleged offender.

(2) Paragraph 2 provides that the State shall immediately make a preliminary inquiry into the facts. The national criminal laws of States typically provide for such a preliminary inquiry to determine whether a prosecutable offence exists.

(3) Paragraph 3 provides that the State shall also immediately notify the States referred to in draft article 6, paragraph 1, of its actions, and whether it intends to exercise jurisdiction. Doing so allows those other States to consider whether they wish to exercise jurisdiction, in which case they might seek extradition. In some situations, the State may not be fully aware of which other States have established jurisdiction (such as a State that optionally has established jurisdiction with respect to a stateless person who is habitually resident in that State's territory); in such situations, the feasibility of fulfilling the obligation may depend on the circumstances.

(4) Both the General Assembly and the Security Council have recognized the importance of such preliminary measures in the context of crimes against humanity. Thus, the General Assembly has called upon “all the States concerned to take the necessary measures for the thorough investigation of ... crimes against humanity ... and for the detection, arrest, extradition and punishment of all ... persons guilty of crimes against humanity who have not yet been brought to trial or punished”.<sup>1169</sup> Simi-

<sup>1169</sup> General Assembly resolution 2583 (XXIV) of 15 December 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 1.

larly, it has said that “refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of ... crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law”.<sup>1170</sup> The Security Council has emphasized “the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for ... crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation”.<sup>1171</sup>

(5) Treaties addressing crimes typically provide for such preliminary measures,<sup>1172</sup> such as article 6 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Reviewing, *inter alia*, the provisions contained in article 6 of the Convention against Torture, the International Court of Justice has explained that “incorporating the appropriate legislation into domestic law ... would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts ... , a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution”.<sup>1173</sup> The Court found that the preliminary inquiry is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. Those authorities who conduct the inquiry have the task of drawing up a case file containing relevant facts and evidence; “this may consist of documents or witness statements relating to the events at issue and to the suspect’s possible involvement in the matter concerned”.<sup>1174</sup> The Court further noted that “the choice of means for conducting the inquiry remains in the hands of the States parties”, but that “steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case”.<sup>1175</sup> Further, the purpose of such preliminary measures is “to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts”.<sup>1176</sup>

<sup>1170</sup> General Assembly resolution 2840 (XXVI) of 18 December 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 4.

<sup>1171</sup> Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

<sup>1172</sup> See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6; International Convention against the Taking of Hostages, art. 6; Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Suppression of Terrorist Bombings, art. 7; International Convention for the Suppression of the Financing of Terrorism, art. 9; Organization of African Unity Convention on the Prevention and Combating of Terrorism, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10; Association of Southeast Asian Nations Convention on Counter-Terrorism, art. VIII.

<sup>1173</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 1151 above), p. 450, para. 72.

<sup>1174</sup> *Ibid.*, p. 453, para. 83.

<sup>1175</sup> *Ibid.*, p. 454, para. 86.

<sup>1176</sup> *Ibid.*, p. 451, para. 74.

## Article 9. Aut dedere aut judicare

**The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.**

### Commentary

(1) Draft article 9 obliges a State, in the territory under whose jurisdiction an alleged offender is present, to submit the alleged offender to prosecution within the State’s national system. The only alternative means of meeting this obligation is if the State extradites or surrenders the alleged offender to another State or competent international criminal tribunal that is willing and able itself to submit the matter to prosecution. This obligation is commonly referred to as the principle of *aut dedere aut judicare*, a principle that has been recently studied by the Commission<sup>1177</sup> and that is contained in numerous multilateral treaties addressing crimes.<sup>1178</sup> While a literal translation of *aut dedere aut judicare* may not fully capture the meaning of this obligation, the Commission chose to retain the term in the title, given its common use when referring to an obligation of this kind.

(2) The Commission’s 1996 draft code of crimes against the peace and security of mankind defined crimes against humanity in article 18 and further provided, in article 9, that “without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.”<sup>1179</sup>

(3) Most multilateral treaties containing such an obligation<sup>1180</sup> use what is referred to as “The Hague formula”,

<sup>1177</sup> See *Yearbook ... 2014*, vol. II (Part Two), chap. VI.

<sup>1178</sup> See study by the Secretariat, “Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’”, *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/630, p. 317.

<sup>1179</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 30, art. 9; see also Commission on Human Rights resolution 2005/81 on impunity (footnote 1076 above), para. 2 (recognizing “that States must prosecute or extradite perpetrators, including accomplices, of international crimes such as ... crimes against humanity ... in accordance with their international obligations in order to bring them to justice, and urg[ing] all States to take effective measures to implement these obligations”).

<sup>1180</sup> Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa, arts. 8 and 9, paras. 2–3; European Convention on the Suppression of Terrorism, art. 7; Inter-American Convention to Prevent and Punish Torture, art. 14; South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism, art. IV; Inter-American Convention on the Forced Disappearance of Persons, art. 6; Inter-American Convention on International Traffic in Minors, art. 9; Inter-American Convention against Corruption, art. XIII, para. 6; Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, art. XIX, para. 6; Arab Convention on the Suppression of Terrorism, art. 6; Criminal Law

after the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.<sup>1181</sup> Under that formula, the obligation arises whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition. Although regularly termed the obligation to extradite or “prosecute”, the obligation is to “submit the case to its competent authorities for the purpose of prosecution”, meaning to submit the matter to prosecutorial authorities, which may or may not decide to prosecute. In particular, if the competent authorities determine that there is insufficient evidence of guilt, then the accused need not be indicted, nor stand trial or face punishment.<sup>1182</sup> The *travaux préparatoires* of the Convention for the Suppression of Unlawful Seizure of Aircraft indicate that the formula established “the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution”.<sup>1183</sup>

(4) In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice analysed The Hague formula in the context of article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the “obligation to prosecute”) was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties’ judicial systems. These two conventions emphasize, moreover, that the 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 the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven. ...

...

Convention on Corruption, art. 27, para. 5; Convention of the Organization of the Islamic Conference on Combating International Terrorism, art. 6; Convention on Cybercrime, art. 24, para. 6; African Union Convention on Preventing and Combating Corruption, art. 15, para. 6; Council of Europe Convention on the Prevention of Terrorism, art. 18; Council of Europe Convention on Action against Trafficking in Human Beings, art. 31, para. 3; and Association of Southeast Asian Nations Convention on Counter-Terrorism, art. XIII, para. 1.

<sup>1181</sup> See, in particular, article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft.

<sup>1182</sup> See study by the Secretariat, “Survey of multilateral instruments ...” (A/CN.4/630) (footnote 1178 above), p. 357–358, paras. 145–147.

<sup>1183</sup> Statement by Gilbert Guillaume (Chairperson of the Subcommittee of the Legal Committee and delegate of France), ICAO, *Legal Committee, Seventeenth Session, Montreal, 9 February–11 March 1970, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Montreal, 1970), 30th meeting (3 March 1970) (Doc. 8877-LC/161), para. 15.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

...

114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention’s object and purpose, which is “to make more effective the struggle against torture” (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

...

120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.<sup>1184</sup>

(5) The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State,<sup>1185</sup> referral of the matter to a regional organization,<sup>1186</sup> or difficulties with implementation under the State’s internal law.<sup>1187</sup>

(6) The first sentence of draft article 9 recognizes that the State’s obligation can be satisfied by extraditing or surrendering the alleged offender not just to a State, but also to an international criminal tribunal that is competent to prosecute the offender. This third option has arisen in conjunction with the establishment of the International Criminal Court and other international criminal tribunals.<sup>1188</sup> While the term “extradition” is often associated with the sending of a person to a State and the term “surrender” is typically used for the sending of a person to a competent international criminal tribunal, draft article 9 is written so as not to limit the use of the terms in that way. The terminology used in national criminal systems and in

<sup>1184</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 1151 above), pp. 454, 455, 460 and 461, paras. 90–91, 94–95, 114–115 and 120.

<sup>1185</sup> *Ibid.*, p. 460, para. 112.

<sup>1186</sup> *Ibid.*

<sup>1187</sup> *Ibid.*, para. 113.

<sup>1188</sup> See *Yearbook ... 2014*, vol. II (Part Two), chap. VI, sect. C, pp. 100–101, para. (35).

international relations can vary<sup>1189</sup> and, for that reason, the Commission considered that a more general formulation is preferable. Further, while draft article 9 might condition the reference to an international criminal tribunal so as to say that it must be a tribunal whose jurisdiction the sending State has recognized,<sup>1190</sup> such a qualification was viewed as unnecessary.

(7) The second sentence of draft article 9 provides that, when a State submits the matter to prosecution or extradites or surrenders the person, its “authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State”. Most treaties containing The Hague formula include such a clause, the objective of which is to help ensure that the normal procedures and standards of evidence relating to serious offences are applied.

#### *Article 10. Fair treatment of the alleged offender*

**1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.**

**2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:**

**(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person’s rights or, if such person is a stateless person, of the State which, at that person’s request, is willing to protect that person’s rights;**

**(b) to be visited by a representative of that State or those States; and**

**(c) to be informed without delay of his or her rights under this paragraph.**

**3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.**

<sup>1189</sup> See, for example, European Union, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, L 190, 18 July 2002, p. 1, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:en:HTML>. Article 1, paragraph 1 of the framework decision provides: “The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and *surrender*\* by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”

<sup>1190</sup> See International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 1.

#### *Commentary*

(1) Draft article 10 is focused on the obligation of the State to accord to an alleged offender who is present in territory under the State’s jurisdiction fair treatment, including a fair trial and full protection of his or her rights. Moreover, draft article 10 acknowledges the right of an alleged offender, who is not of the State’s nationality but who is in prison, custody or detention, to have access to a representative of his or her State.

(2) All States provide within their national law for protections of one degree or another for persons whom they investigate, detain, try or punish for a criminal offence. Such protections may be specified in a constitution, statute, administrative rule or judicial precedent. Further, detailed rules may be codified or a broad standard may be set referring to “fair treatment”, “due process”, “judicial guarantees” or “equal protection”. Such protections are extremely important in ensuring that the extraordinary power of the State’s criminal justice apparatus is not improperly brought to bear upon a suspect, among other things preserving for that individual the ability to contest fully the State’s allegations before an independent court (hence, allowing for an “equality of arms”).

(3) Important protections are also now well recognized in international criminal law and human rights law. At the most general level such protections are acknowledged in articles 10 and 11 of the 1948 Universal Declaration of Human Rights,<sup>1191</sup> while more specific standards binding upon States are set forth in article 14 of the International Covenant on Civil and Political Rights. As a general matter, instruments establishing standards for an international court or tribunal seek to specify the standards set forth in article 14 of the Covenant, while treaties addressing national law provide a broad standard that is intended to acknowledge and incorporate the specific standards of article 14 and of other relevant instruments “at all stages” of the national proceedings involving the alleged offender.<sup>1192</sup>

(4) These treaties addressing national law do not define the term “fair treatment”, but the term is viewed as incorporating the specific rights possessed by an alleged offender, such as those under article 14 of the International Covenant on Civil and Political Rights. Thus, when

<sup>1191</sup> General Assembly resolution 217 (III) A of 10 December 1948.

<sup>1192</sup> See, for example, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 9; International Convention against the Taking of Hostages, art. 8, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, para. 3; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 10, para. 2; Convention on the Rights of the Child, art. 40, para. 2 (b); International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 11; International Convention for the Suppression of Terrorist Bombings, art. 14; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 17, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 17; United Nations Convention against Transnational Organized Crime, art. 16, para. 13; United Nations Convention against Corruption, art. 44, para. 14; International Convention for the Suppression of Acts of Nuclear Terrorism, art. 12; International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 3; Association of Southeast Asian Nations Convention on Counter-Terrorism, art. VIII, para. 1.

crafting article 8 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission asserted that the formulation of “fair treatment” at all stages of the proceedings was “intended to incorporate all the guarantees generally recognized to a detained or accused person”, and that “[a]n example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights”.<sup>1193</sup> Further, the Commission noted that “[t]he expression ‘fair treatment’ was preferred, because of its generality, to more usual expressions such as ‘due process’, ‘fair hearing’ or ‘fair trial’ which might be interpreted in a narrow technical sense”.<sup>1194</sup> Finally, the Commission also explained that the formulation of “all stages of the proceedings” was “intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case”.<sup>1195</sup>

(5) While the term “fair treatment” includes the concept of a “fair trial”, in many treaties reference to a fair trial is expressly included to stress its particular importance. Indeed, the Human Rights Committee has found the right to a fair trial to be a “key element of human rights protection” and a “procedural means to safeguard the rule of law”.<sup>1196</sup> Consequently, draft article 10, paragraph 1, refers to fair treatment “including a fair trial”.

(6) In addition to fair treatment, an alleged offender is also entitled to the highest protection of his or her rights, whether arising under applicable national or international law, including human rights law. Such rights are set forth in the constitutions, statutes or other rules within the national legal systems of States. At the international level, they are set out in global human rights treaties, in regional human rights treaties<sup>1197</sup> or in other applicable instruments.<sup>1198</sup> Consequently, draft article 10, paragraph 1, also recognizes that the State must provide full protection of the offender’s “rights under applicable national and international law, including human rights law”.

(7) Paragraph 2 of draft article 10 addresses the State’s obligations with respect to an alleged offender who is not of the State’s nationality and who is in “prison, custody or detention”. That term is to be understood as embracing

all situations where the State restricts the person’s ability to communicate freely with and be visited by a representative of his or her State of nationality. In such situations, the State in the territory under whose jurisdiction the alleged offender is present is required to allow the alleged offender to communicate, without delay, with the nearest appropriate representative of the State or States of which such a person is a national, or the State or States otherwise entitled to protect that person’s rights. Further, the alleged offender is entitled to be visited by a representative of that State or those States. Finally, the alleged offender is entitled to be informed without delay of these rights. Moreover, paragraph 2 applies these rights as well to a stateless person, requiring that such person be entitled to communicate without delay with the nearest appropriate representative of the State which, at that person’s request, is willing to protect that person’s rights and to be visited by that representative.

(8) Such rights are spelled out in greater detail in article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations, which accords rights to both the detained person and to the State of nationality,<sup>1199</sup> and in customary international law. Recent treaties addressing crimes typically do not seek to go into such detail but, like draft article 10, paragraph 2, instead simply reiterate that the alleged offender is entitled to communicate with, and be visited by, a representative of his or her State of nationality (or, if a stateless person, of the State where he or she usually resides or that is otherwise willing to protect that person’s rights).<sup>1200</sup>

(9) Paragraph 3 of draft article 10 provides that the rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, provided that such laws and regulations do not prevent such rights being given the full effect for which they are intended. Those national laws and regulations may relate, for example, to the ability of an investigating magistrate to impose restrictions on communication for the protection of victims or witnesses, as well as standard conditions with respect to visitation of a person being held at a detention facility. A comparable provision exists in article 36, paragraph 2, of the Vienna Convention on Consular Relations and has also been included in many treaties

<sup>1193</sup> *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 320, commentary to art. 8.

<sup>1194</sup> *Ibid.*

<sup>1195</sup> *Ibid.*

<sup>1196</sup> Human Rights Committee, general comment No. 32 (Right to equality before courts and tribunals and to a fair trial), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40* (A/62/40), vol. I, annex VI, para. 2; see also paras. 18–28.

<sup>1197</sup> See, for example, American Convention on Human Rights, art. 8; African Charter on Human and Peoples’ Rights, art. 7; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 6.

<sup>1198</sup> See, for example, Universal Declaration of Human Rights (footnote 1191 above); American Declaration of the Rights and Duties of Man (Bogota, 2 May 1948), adopted by the Ninth International Conference of American States, available from [www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf](http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf); Cairo Declaration on Human Rights in Islam, Organisation of the Islamic Conference resolution No. 49/19-P, annex, available from ; Charter of Fundamental Rights of the European Union.

<sup>1199</sup> See *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, at p. 492, para. 74 (“Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection”), and p. 494, para. 77 (“Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights”).

<sup>1200</sup> See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6, para. 3; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 6, para. 2; International Convention against the Taking of Hostages, art. 6, para. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 6, para. 3; Convention on the Safety of United Nations and Associated Personnel, art. 17, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 3; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 3; Organization of African Unity Convention on the Prevention and Combating of Terrorism, art. 7, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10, para. 3; Association of Southeast Asian Nations Convention on Counter-Terrorism, art. VIII, para. 4.

addressing crimes.<sup>1201</sup> The Commission explained the provision in its commentary to what became the Vienna Convention on Consular Relations as follows:

(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of

a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.

...

(7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the rights in question.<sup>1202</sup>

(10) In the *LaGrand* case, the International Court of Justice found that the reference to “rights” in article 36, paragraph 2, of the Vienna Convention on Consular Relations “must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual”.<sup>1203</sup>

<sup>1201</sup> See, for example, International Convention against the Taking of Hostages, art. 4; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 4; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 4; Organization of African Unity Convention on the Prevention and Combating of Terrorism, art. 7, para. 4; Association of Southeast Asian Nations Convention on Counter-Terrorism, art. VIII, para. 5.

<sup>1202</sup> *Yearbook ... 1961*, vol. II, document A/4843, draft articles on consular relations, and commentaries, p. 113, paras. (5) and (7) of the commentary to art. 36.

<sup>1203</sup> *LaGrand* (see footnote 1199 above), p. 497, para. 89.