

Chapter IV

CRIMES AGAINST HUMANITY

A. Introduction

35. 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.⁷ 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.

36. At its sixty-seventh session (2015), the Commission considered the first report of the Special Rapporteur⁸ and provisionally adopted four draft articles and commentaries thereto.⁹ 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 topic.¹⁰

37. At its sixty-eighth session (2016), the Commission considered the second report of the Special Rapporteur,¹¹ 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 Commission,¹² and adopted six additional draft articles and commentaries thereto.¹³

B. Consideration of the topic at the present session

38. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/704), which was considered at its 3348th to 3354th meetings, from 1 to 9 May 2017.

39. In his third report, the Special Rapporteur addressed extradition (chap. I); *non-refoulement* (chap. II); mutual legal assistance (chap. III); victims, witnesses and other affected persons (chap. IV); relationship to competent international criminal tribunals (chap. V); federal State obligations (chap. VI); monitoring mechanisms and dispute settlement (chap. VII); remaining issues (chap. VIII); preamble (chap. IX); final clauses of a convention (chap. X); and the future programme of work on the topic (chap. XI). In that report, the Special Rapporteur proposed seven draft articles and a draft preamble corresponding to the issues addressed in chapters I to VII and IX, respectively.¹⁴

40. At its 3354th meeting, on 9 May 2017, the Commission referred draft articles 11 to 17 and the draft preamble, as contained in the Special Rapporteur’s third report, to the Drafting Committee.

41. At its 3366th and 3377th meetings, on 1 June and 19 July 2017, respectively, the Commission considered and adopted the two reports of the Drafting Committee on the draft preamble, draft articles 1 to 15 and the draft annex. It accordingly adopted the entire set of draft articles on crimes against humanity on first reading (see section C.1 below).

42. At its 3383rd and 3384th meetings, on 31 July 2017, the Commission adopted the commentaries to the draft articles on crimes against humanity (see section C.2 below).

43. At its 3384th meeting, on 31 July 2017, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles on crimes against humanity, through the Secretary-General, to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018.

44. At that same meeting, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Sean D. Murphy, which had enabled the Commission to bring to a successful conclusion its first reading of the draft articles on crimes against humanity.

C. Text of the draft articles on crimes against humanity adopted by the Commission on first reading

1. TEXT OF THE DRAFT ARTICLES

45. The text of the draft articles adopted by the Commission on first reading is reproduced below.

CRIMES AGAINST HUMANITY

Preamble

...

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that crimes against humanity threaten the peace, security and well-being of the world,

international criminal tribunals), draft article 16 (Federal State obligations), draft article 17 (Inter-State dispute settlement) and draft preamble.

⁷ *Yearbook ... 2014*, vol. II (Part Two), para. 266.

⁸ *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/680.

⁹ *Ibid.*, vol. II (Part Two), paras. 110–117.

¹⁰ *Ibid.*, para. 115.

¹¹ *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/690.

¹² *Ibid.*, document A/CN.4/698.

¹³ *Ibid.*, vol. II (Part Two), paras. 79–85.

¹⁴ Draft article 11 (Extradition), draft article 12 (*Non-refoulement*), draft article 13 (Mutual legal assistance), draft article 14 (Victims, witnesses and others), draft article 15 (Relationship to competent

Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling also that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance,

Considering as well the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

...

Article 1 [1].¹⁵ Scope

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

Article 2 [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 [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;
- (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 including, *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 [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; 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.

Article 5. Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

¹⁵ The numbers of the draft articles, as previously provisionally adopted by the Commission, are indicated in square brackets.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Article 6 [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 fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. 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.

7. 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.

8. 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 7 [6]. Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles 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 covered by the present draft articles 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 8 [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 9 [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 covered by the present draft articles 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 7, 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 10 [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 11 [10]. Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles 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.

Article 12. Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Article 13. Extradition

1. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

4. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

7. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

8. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

9. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

10. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Article 14. Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;

(b) taking evidence or statements from persons, including by videoconference;

(c) effecting service of judicial documents;

(d) executing searches and seizures;

(e) examining objects and sites, including obtaining forensic evidence;

(f) providing information, evidentiary items and expert evaluations;

(g) providing originals or certified copies of relevant documents and records;

(h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;

(i) facilitating the voluntary appearance of persons in the requesting State; or

(j) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

Article 15. Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

ANNEX

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and

communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. A request for mutual legal assistance shall contain:

(a) the identity of the authority making the request;

(b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned; and

(f) the purpose for which the evidence, information or action is sought.

5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

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

7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

8. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft annex;

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

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

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

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

10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

12. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

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

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video-conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the present draft articles, may be transferred if the following conditions are met:

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

(a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

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

2. TEXT OF THE DRAFT ARTICLES
AND COMMENTARIES THERETO

46. The text of the draft articles and commentaries thereto adopted by the Commission on first reading at its sixty-ninth session is reproduced below.

CRIMES AGAINST HUMANITY

General commentary

(1) Three crimes typically have featured in the jurisdiction of international criminal tribunals: genocide, crimes against humanity and war crimes. The crime of genocide¹⁶ and war crimes¹⁷ are the subject of global conventions

¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

¹⁷ Geneva Conventions for the Protection of War Victims (hereinafter "Geneva Conventions of 1949"): Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter "Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter "Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (hereinafter "Geneva Convention III"); Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter "Geneva Convention IV"); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 1977 (Protocol I).

that require States within their national law to prevent and punish such crimes, and to cooperate among themselves towards those ends. By contrast, there is no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard, even though crimes against humanity are likely no less prevalent than genocide or war crimes. Unlike war crimes, crimes against humanity may occur in situations not involving armed conflict. Further, crimes against humanity do not require the special intent that is necessary for establishing genocide.¹⁸ On the other hand, the view was expressed that neither the Convention on the Prevention and Punishment of the Crime of Genocide nor the Geneva Conventions of 1949 and the Protocols Additional thereto established detailed inter-State mechanisms for cooperation as provided for in the present draft articles. For that reason, it was considered that other core crimes could also have been addressed in the present draft articles.

(2) Treaties focused on prevention, punishment and inter-State cooperation exist for many offences far less egregious than crimes against humanity, such as corruption¹⁹ and organized crime.²⁰ Consequently, a global convention on prevention and punishment of crimes against humanity might serve as an important additional piece in the current framework of international law, and in particular, international humanitarian law, international criminal law and international human rights law. Such a convention could draw further attention to the need for prevention and punishment and could help States to adopt and harmonize national laws relating to such conduct, thereby opening the door to more effective inter-State cooperation on the prevention, investigation and prosecution of such crimes. In building a network of cooperation, as has been done with respect to other offences, sanctuary would be denied to offenders, thereby—it is hoped—helping both to deter such conduct *ab initio* and to ensure accountability *ex post*.

(3) Hence, the proposal for this topic, as adopted by the Commission at its sixty-fifth session, in 2013, states that the “objective of the International Law Commission on this topic ... would be to draft articles for what would become a convention on the prevention and punishment of crimes against humanity”.²¹ In accordance with the Commission’s practice, and in advance of a decision by States as to whether to use these draft articles as the basis for a convention, the Commission has not included technical language characteristic of treaties (for example, referring to “States Parties”) and has not drafted final clauses on matters such as ratification, reservations, entry into force or amendment.

¹⁸ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, at p. 64, para. 139: “The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution” (citing to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at pp. 121–122, paras. 187–188).

¹⁹ United Nations Convention against Corruption, 2003.

²⁰ United Nations Convention against Transnational Organized Crime, 2000.

²¹ *Yearbook ... 2013*, vol. II (Part Two), annex II, para. 3.

(4) The present draft articles avoid any conflicts with the obligations of States arising under the constituent instruments of international or “hybrid” (containing a mixture of international law and national law elements) criminal courts or tribunals, including the International Criminal Court. Whereas the 1998 Rome Statute of the International Criminal Court (hereinafter “Rome Statute”) regulates relations between the International Criminal Court and its States parties (a “vertical” relationship), the focus of the present draft articles is on the adoption of national laws and on inter-State cooperation (a “horizontal” relationship). Part IX of the Rome Statute, on “International Cooperation and Judicial Assistance”, assumes that inter-State cooperation on crimes within the jurisdiction of the International Criminal Court will continue to exist without prejudice to the Rome Statute, but does not direct itself to the regulation of that cooperation. The present draft articles address inter-State cooperation on the prevention of crimes against humanity, as well as on the investigation, apprehension, prosecution, extradition and punishment in national legal systems of persons who commit such crimes, an objective consistent with the Rome Statute. In doing so, the present draft articles contribute to the implementation of the principle of complementarity under the Rome Statute. Finally, constituent instruments of international or hybrid criminal courts or tribunals address the prosecution of persons for the crimes within their jurisdiction, not steps that should be taken by States to prevent such crimes before they are committed or while they are being committed.

Preamble

...

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that crimes against humanity threaten the peace, security and well-being of the world,

Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling also that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at

the national level and by enhancing international co-operation, including with respect to extradition and mutual legal assistance,

Considering as well the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

...

Commentary

(1) The preamble aims to provide a conceptual framework for the present draft articles on crimes against humanity, setting out the general context in which the topic was elaborated and the main purposes of the present draft articles. In part, it draws inspiration from language used in the preambles of international treaties relating to the most serious crimes of concern to the international community as a whole, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1998 Rome Statute.

(2) The first preambular paragraph recalls the fact that, over the course of history, millions of people have been victimized by acts that deeply shock the conscience of humanity. When such acts, because of their gravity, constitute egregious attacks on humankind itself, they are referred to as crimes against humanity.

(3) The second preambular paragraph recognizes that such crimes endanger important contemporary values (“the peace, security and well-being of the world”). In so doing, this paragraph echoes the purposes set forth in Article 1 of the Charter of the United Nations, and stresses the link between the pursuit of criminal justice and the maintenance of peace and security.

(4) The third preambular paragraph recognizes that the prohibition of crimes against humanity is not just a rule of international law; it is a peremptory norm of general international law (*jus cogens*). As such, this prohibition is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²² The Commission has previously indicated that the prohibition of crimes against humanity is “clearly accepted and recognized” as a peremptory norm of international law.²³ The International Court of Justice has indicated that the prohibition on certain acts,

such as torture,²⁴ has the character of *jus cogens*,²⁵ which *a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*.²⁶

(5) As indicated in draft article 1 below, the present draft articles have two overall objectives: the prevention and the punishment of crimes against humanity. The fourth preambular paragraph focuses upon the first of these two objectives (prevention); it foreshadows obligations that appear in draft articles 2, 4 and 5 of the present draft articles by affirming that crimes against humanity must be prevented in conformity with international law. In doing so, this paragraph indicates that such crimes are among the most serious crimes of concern to the international community as a whole.

(6) The fifth preambular paragraph affirms the link between the first overall objective (prevention) and the second overall objective (punishment) of the present draft articles, by indicating that prevention is advanced by putting an end to impunity for the perpetrators of such crimes.

(7) The sixth through ninth preambular paragraphs focus upon the second of the two overall objectives (punishment). The sixth preambular paragraph recalls, as a threshold matter, the definition of crimes against humanity set forth in article 7 of the Rome Statute. This definition is used in draft article 3 of the present draft articles and, in conjunction with draft articles 6 and 7, identifies the offences over which States must establish jurisdiction under their national criminal law.

(8) The seventh preambular paragraph recalls the duty of every State to exercise criminal jurisdiction with respect to crimes against humanity. Among other things, this paragraph foreshadows draft articles 8 through 10 on the investigation of crimes against humanity, the taking of certain measures whenever an alleged offender is present, and the submission of the case to the prosecuting authorities unless the alleged offender is extradited or surrendered to another State or a competent international tribunal.

(9) The eighth preambular paragraph considers that the effective prosecution of crimes against humanity must be ensured, both by taking measures at the national level

²² Vienna Convention on the Law of Treaties (hereinafter “1969 Vienna Convention”), art. 53.

²³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary to article 26 of the draft articles on responsibility of States for internationally wrongful acts, adopted by the Commission at its fifty-third session (maintaining that those “peremptory norms that are clearly accepted and recognized include the [prohibition] of ... crimes against humanity”); see also “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission finalized by Martti Koskeniemi (A/CN.4/L.682 and Corr.1 and Add.1), para. 374 (identifying crimes against humanity as one of the “most frequently cited candidates for the status of *jus cogens*”) (available from the Commission’s website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

²⁴ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

²⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.

²⁶ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, at p. 141, para. 95 (indicating that rules prohibiting war crimes and crimes against humanity at issue in *Arrest Warrant of 11 April 2000 [(Democratic Republic of the Congo v. Belgium)]*, Judgment, I.C.J. Reports 2002, p. 3] “undoubtedly possess the character of *jus cogens*”); *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 154, para. 96 (acknowledging the *jus cogens* status of crimes against humanity); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports* 1998, para. 153 (same); *Al-Adsani v. the United Kingdom [GC]*, Application No. 35763/97, Judgment of 21 November 2001, ECHR 2001-XI (same), para. 61.

and by enhancing international cooperation. Such cooperation includes cooperation with respect to extradition and mutual legal assistance, the focus of draft articles 13 and 14, as well as the draft annex.

(10) The ninth preambular paragraph notes that attention must be paid to the rights of individuals when addressing crimes against humanity. Reference to the rights of victims, witnesses and others anticipates the provisions set forth in draft article 12, including the right to complain to competent authorities, to participate in criminal proceedings, and to obtain reparation. At the same time, the reference to the right of alleged offenders to fair treatment anticipates the provisions set forth in draft article 11, including the right to a fair trial and, when appropriate, access to consular authorities.

Article 1. Scope

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

Commentary

(1) Draft article 1 establishes the scope of the present draft articles by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity is focused on precluding the commission of such offences, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed.

(2) The present draft articles focus solely on crimes against humanity, which are grave international crimes wherever they occur. The present draft articles do not address other grave international crimes, such as genocide, war crimes or the crime of aggression. Although a view was expressed that this topic might include those crimes as well, the Commission decided to focus on 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.

Commentary

(1) Draft article 2 sets forth a general obligation of States to prevent and punish crimes against humanity. The content of this general obligation is addressed through the various more specific obligations set forth in the draft articles that follow, beginning with draft article 4. Those specific obligations address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations and, as appropriate, with other organizations.

(2) In the course of stating this general obligation, draft article 2 recognizes crimes against humanity as “crimes under international law”. The Charter of the

International Military Tribunal established at Nürnberg (hereinafter “Nürnberg Charter”) included “crimes against humanity” as a component of the jurisdiction of the Tribunal.²⁷ Among other things, the Tribunal noted that “individuals can be punished for violations of international law. 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”.²⁸ Crimes against humanity were also within the jurisdiction of the International Military Tribunal for the Far East (hereinafter “Tokyo Tribunal”).²⁹

(3) The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1946 by the General Assembly.³⁰ The Assembly also directed the Commission to “formulate” the Nürnberg Charter principles and to prepare a draft code of offences against the peace and security of mankind.³¹ The Commission in 1950 produced the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, which stated that crimes against humanity were “punishable as crimes under international law”.³² Further, in 1954 the Commission completed a draft Code of Offences against the Peace and Security of Mankind, which, in article 2, paragraph 11, included as an offence a series of inhuman acts that are today understood to be crimes against humanity, and which stated in article 1 that “[o]ffences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished”.³³

(4) The characterization of crimes against humanity as “crimes under international law” indicates that they exist as crimes whether or not the conduct has been criminalized under national law. The Nürnberg Charter defined crimes against humanity as the commission of certain acts “whether or not in violation of the domestic law of the country where perpetrated”.³⁴ In 1996, the Commission completed a draft Code of Crimes against the Peace and Security of Mankind, which provided, *inter alia*, that crimes against humanity were “crimes under international law and punishable as such, whether or not they

²⁷ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 1945, art. 6 (c).

²⁸ Judgment of 30 September 1946, International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 14 November 1945–1 October 1946)*, vol. XXII (1948), p. 466.

²⁹ Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946) (as amended on 26 April 1946), C. 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. 28, art. 5 (c) (hereinafter “Tokyo Charter”). No persons, however, were convicted of this crime by that tribunal.

³⁰ Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal, General Assembly resolution 95 (I) of 11 December 1946.

³¹ Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, General Assembly resolution 177 (II) of 21 November 1947.

³² *Yearbook ... 1950*, vol. II, document A/1316, p. 374, at p. 376 (principle VI).

³³ *Yearbook ... 1954*, vol. II, document A/2693, para. 54, p. 151.

³⁴ Nürnberg Charter, art. 6 (c).

are punishable under national law”³⁵ The gravity of such crimes is clear; the Commission has previously indicated that the prohibition of crimes against humanity is “clearly accepted and recognized” as a peremptory norm of international law.

(5) Draft article 2 also identifies crimes against humanity as crimes under international law “whether or not committed in time of armed conflict”. The reference to “armed conflict” should be read as including both international and non-international armed conflict. The Nürnberg Charter definition of crimes against humanity, as amended by the Berlin Protocol,³⁶ was linked to the existence of an international armed conflict; the acts only constituted crimes under international law if committed “in execution of or in connection with” any crime within the jurisdiction of the International Military Tribunal, meaning a crime against peace or a war crime. As such, the justification for dealing with matters that traditionally were within the national jurisdiction of a State was based on the crime’s connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large scale, perhaps as part of a pattern of conduct.³⁷ The International Military Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the war, although in some instances the connection of those crimes with other crimes within the jurisdiction of the International Military Tribunal was tenuous.³⁸

(6) The Commission’s 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal also defined crimes against humanity in principle VI (c) in a manner that required a connection to an armed conflict.³⁹ In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.⁴⁰ At the same time, the Commission maintained that “acts may be crimes

against humanity even if they are committed by the perpetrator against his own population”.⁴¹ The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity referred, in article I (b), to “[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations”.⁴²

(7) The jurisdiction of the International Tribunal for the Former Yugoslavia included “crimes against humanity”. Article 5 of the Statute of the International Tribunal for the Former Yugoslavia provides that the Tribunal may prosecute persons responsible for a series of acts (such as murder, torture or rape) “when committed in armed conflict, whether international or internal in character, and directed against any civilian population”.⁴³ Thus, the formulation used in article 5 retained a connection to armed conflict, but it is best understood contextually. The Statute of the International Tribunal for the Former Yugoslavia was developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia; the Security Council had already determined that the situation constituted a threat to international peace and security, leading to the exercise of the Security Council’s enforcement powers under Chapter VII of the Charter of the United Nations. As such, the formulation used in article 5 (“armed conflict”) was designed principally to dispel the notion that crimes against humanity had to be linked to an “international armed conflict”. To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the Appeals Chamber of the International Tribunal for the Former Yugoslavia later clarified that there was “no logical or legal basis” for retaining a connection to armed conflict, since “it has been abandoned” in State practice since Nürnberg.⁴⁴ The Appeals Chamber also noted that the “obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict”.⁴⁵ Indeed, the Appeals Chamber later maintained that such a connection in the Statute of the International Tribunal for the Former Yugoslavia was simply circumscribing the subject-matter jurisdiction of

³⁵ *Yearbook ... 1996*, vol. II (Part Two), p. 17, art. 1. The 1996 draft Code contained five categories of crimes, one of which was crimes against humanity.

³⁶ Protocol Rectifying Discrepancy in Text of Charter, 1945. The Protocol replaced a semicolon after “during the war” with a comma, so as to harmonize the English and French texts with the Russian text. The effect of doing so was to link the first part of the provision to the latter part of the provision (“in connection with any crime within the jurisdiction of the Tribunal”) and hence to the existence of an international armed conflict.

³⁷ See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, His Majesty’s Stationery Office, 1948, p. 179 (“Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims”).

³⁸ See, for example, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, vol. 2, p. 1398, at p. 1779, para. 576 (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the jurisdiction of the International Military Tribunal).

³⁹ *Yearbook ... 1950*, vol. II, document A/1316, p. 377.

⁴⁰ *Ibid.*, para. 123.

⁴¹ *Ibid.*, para. 124.

⁴² As of July 2017, there were 55 States parties to this Convention. For a regional convention of a similar nature, see the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes. As of July 2017, there were eight States parties to this Convention.

⁴³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted 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. 5 (hereinafter “Statute of the International Tribunal for the Former Yugoslavia”).

⁴⁴ *Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Appeals Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. 1, p. 353, at p. 503, para. 140. See also ILM, vol. 35, No. 1 (January 1996), p. 73.

⁴⁵ *Ibid.*

the International Tribunal for the Former Yugoslavia, not codifying customary international law.⁴⁶

(8) In 1994, the Security Council established the International Criminal Tribunal for Rwanda and provided it with jurisdiction over “crimes against humanity”. Although article 3 of the Statute of the International Criminal Tribunal for Rwanda retained the same series of acts as appeared in the Statute of the International Tribunal for the Former Yugoslavia, the chapeau language did not retain the reference to armed conflict.⁴⁷ Likewise, article 7 of the 1998 Rome Statute did not retain any reference to armed conflict.

(9) As such, while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal tribunals, including the Rome Statute. In its place, as discussed in relation to draft article 3 below, are the “chapeau” requirements that the crime be committed as part of a widespread or systematic attack directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack.

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;**

⁴⁶ See, for example, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 33, *Judicial Supplement No. 23*, February/March 2001; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, p. 3, at pp. 215 and 217, paras. 249–251 (“The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law” (p. 217, para. 251)). See also ILM, vol. 38 (1999), p. 1518, at p. 1568.

⁴⁷ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, Security Council resolution 955 (1994) of 8 November 1994, annex, art. 3 (hereinafter “Statute of the International Criminal Tribunal for Rwanda”); see *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005, Appeals Chamber, International Criminal Tribunal for Rwanda, para. 269 (“[C]ontrary to Article 5 of the [Statute of the International Tribunal for the Former Yugoslavia], Article 3 of the [Statute of the International Criminal Tribunal for Rwanda] does not require that the crimes be committed in the context of an armed conflict. This is an important distinction”).

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender 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 including, *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.

Commentary

(1) The first three paragraphs of draft article 3 establish, for the purpose of the present draft articles, a definition of “crime against humanity”. The text of these three paragraphs is verbatim the text of article 7 of the Rome Statute, except for three non-substantive changes (discussed below), which are necessary given the different context in which the definition is being used. Paragraph 4 of draft article 3 is a “without prejudice” clause which indicates that this definition does not affect any broader definitions provided for in international instruments or national laws.

Definitions in other instruments

(2) Various definitions of “crimes against humanity” have been used since 1945, both in international instruments and in national laws that have codified the crime. The Nürnberg Charter, in article 6 (c), defined “crimes against humanity” as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

(3) Principle VI (c) of the Commission’s 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal defined crimes against humanity as:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.⁴⁸

(4) Furthermore, the Commission’s 1954 draft Code of Offences against the Peace and Security of Mankind identified as one of those offences:

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.⁴⁹

(5) Article 5 of the 1993 Statute of the International Tribunal for the Former Yugoslavia stated that the Tribunal “shall have the power to prosecute persons responsible” for a series of acts (such as murder, torture, and rape) “when committed in armed conflict, whether international or internal in character, and directed against any civilian population”. Although the report of the Secretary-General of the United Nations proposing this article indicated that crimes against humanity “refer to inhumane acts of a very serious nature ... committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”,⁵⁰ that particular language was not included in the text of article 5.

(6) By contrast, the 1994 Statute of the International Criminal Tribunal for Rwanda, in article 3, retained the same series of acts, but the chapeau language introduced the formulation from the 1993 Secretary-General’s report of “crimes when committed as part of a widespread or systematic attack against any civilian population” and then continued with “on national, political, ethnic, racial or religious grounds”. As such, the Statute of the International Criminal Tribunal for Rwanda expressly provided that a discriminatory intent was required in order to establish the crime. The Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind also defined “crimes against humanity” to be a series of specified acts “when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group”, but did not include the discriminatory intent language.⁵¹ Crimes against humanity have also been defined in the jurisdiction of hybrid criminal courts or tribunals.⁵²

(7) Article 5, paragraph 1 (b), of the Rome Statute lists crimes against humanity as being within the jurisdiction of the International Criminal Court. Article 7, paragraph 1, defines “crime against humanity” as any of a series of acts “when committed as part of a widespread or systematic attack directed against any civilian population, with

⁴⁹ *Yearbook ... 1954*, vol. II, document A/2693, para. 54, pp. 151–152, art. 2, para. 11.

⁵⁰ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 [and Add.1]), para. 48.

⁵¹ *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

⁵² See, for example, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, at p. 145 (hereinafter “statute of the Special Court for Sierra Leone”); 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, art. 5 (hereinafter “Extraordinary Chambers of Cambodia Law”). Available from the website of the Extraordinary Chambers in the Courts of Cambodia: www.eccc.gov.kh/Legal Documents.

⁴⁸ *Yearbook ... 1950*, vol. II, document A/1316, p. 377.

knowledge of the attack”. Article 7, paragraph 2, contains a series of definitions which, *inter alia*, clarify that an 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” (para. 2 (a)). Article 7, paragraph 3, provides: “[I]t 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”. Article 7, paragraph 1 (h), does not retain the nexus to an armed conflict that characterized the Statute of the International Tribunal for the Former Yugoslavia, nor (except with respect to acts of persecution) the discriminatory intent requirement that characterized the Statute of the International Criminal Tribunal for Rwanda.

(8) The definition of “crime against humanity” in article 7 of the Rome Statute has been accepted by the more than 120 States parties to the Rome Statute and is now being used by many States when adopting or amending their national laws. The Commission considered article 7 an appropriate basis for defining such crimes in paragraphs 1 to 3 of draft article 3. Indeed, the text of article 7 is used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used. First, the opening phrase of paragraph 1 reads “For the purpose of the present draft articles” rather than “For the purpose of this Statute”. Second, the same change has been made in the opening phrase of paragraph 3. Third, article 7, paragraph 1 (h), of the Rome Statute criminalizes acts of persecution when undertaken “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. Again, to adapt to the different context, this phrase reads in draft article 3 as “in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes”. In due course, the International Criminal Court may exercise its jurisdiction over the crime of aggression when the requirements established at the Review Conference of the Rome Statute of the International Criminal Court are met, in which case this paragraph may need to be revisited.

Paragraphs 1 to 3

(9) The definition of “crimes against humanity” set forth in paragraphs 1 to 3 of draft article 3 contains three overall requirements that merit some discussion. These requirements, all of which appear in paragraph 1, have been illuminated through the case law of the International Criminal Court and other international or hybrid courts and tribunals. The definition also lists the underlying prohibited acts for crimes against humanity and defines several of the terms used within the definition (thus providing definitions within the definition). No doubt the evolving jurisprudence of the International Criminal Court and other international or hybrid tribunals will continue to help inform national authorities, including courts, as to the meaning of this definition, and thereby will promote harmonized approaches at the national level. The Commission notes that relevant case law continues to develop over time, such that the following discussion is meant simply to indicate some of the parameters of these terms as of July 2017.

“Widespread or systematic attack”

(10) The first overall requirement is that the acts must be committed as part of a “widespread or systematic” attack. This requirement first appeared in the Statute of the International Criminal Tribunal for Rwanda,⁵³ although some decisions of the International Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in the Statute of the International Tribunal for the Former Yugoslavia, given the inclusion of such language in the Secretary-General’s report proposing that Statute.⁵⁴ Jurisprudence of both the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda maintained that the conditions of “widespread” and “systematic” were disjunctive rather than conjunctive requirements; either condition could be met to establish the existence of the crime.⁵⁵ This reading of the widespread/systematic requirement is also reflected in the Commission’s commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, where it stated that “an act could constitute a crime against humanity if either of these conditions [of scale or systematicity] is met”.⁵⁶

⁵³ Unlike the English version, the French version of article 3 of the Statute of the International Criminal Tribunal for Rwanda used a conjunctive formulation (“*généralisée et systématique*”). In the *Akayesu* case, the Trial Chamber indicated: “In the original French version of the Statute, these requirements were worded cumulatively ... thereby significantly increasing the threshold for application of this provision. Since customary international law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation” (*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, Trial Chamber I, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 1998*, vol. I, p. 44, at p. 334, para. 579, footnote 149).

⁵⁴ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, vol. 1, p. 557, at p. 703, para. 202; *Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, vol. 1, p. 3, at p. 431, para. 648.

⁵⁵ See, for example, *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Judgment, 27 September 2007, Trial Chamber II, International Tribunal for the Former Yugoslavia, para. 437 (“the attack must be widespread or systematic, the requirement being disjunctive rather than cumulative”); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, Trial Chamber II, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 1999*, vol. II, p. 824, at p. 896, para. 123 (“The attack must contain one of the alternative conditions of being widespread or systematic”); *Akayesu*, Judgment, 2 September 1998 (footnote 53 above), para. 579; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 648 (“either a finding of widespreadness ... or systematicity ... fulfils this requirement”).

⁵⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to article 18. See also the report of the Ad Hoc Committee on the Establishment of an International Criminal Court, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22)*, para. 78 (“elements that should be reflected in the definition of crimes against humanity included ... [that] the crimes usually involved a widespread or systematic attack”); *Yearbook ... 1995*, vol. II (Part Two), para. 90 (“the concepts of ‘systematic’ and ‘massive’ violations were complementary elements of the crimes concerned”); *Yearbook ... 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to article 20 (“the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations”); *Yearbook ... 1991*, vol. II (Part Two), p. 103, para. (3) of the commentary to article 21 (“Either one of these aspects—systematic or mass-scale—in any of the acts enumerated ... is enough for the offence to have taken place”).

(11) When this standard was considered for the Rome Statute, some States expressed the view that the conditions of “widespread” and “systematic” should be conjunctive requirements—that they both should be present to establish the existence of the crime—because otherwise the standard would be overinclusive.⁵⁷ Indeed, these States maintained that if “widespread” commission of acts alone were sufficient, spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity. Owing to that concern, a compromise was developed that involved leaving these conditions in the disjunctive,⁵⁸ but adding to article 7, paragraph 2 (a), of the Rome Statute a definition of “attack directed against any civilian population” which, as discussed below at paragraphs (17) to (27) of the commentary to the present draft article, contains a policy element.

(12) According to the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, “[t]he adjective ‘widespread’ connotes the large-scale nature of the attack and the number of its victims”.⁵⁹ As such, this requirement refers to a “multiplicity of victims”⁶⁰

⁵⁷ 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.02.1.5, p. 148 (India); *ibid.*, p. 150 (United Kingdom of Great Britain and Northern Ireland, France); *ibid.*, p. 151 (Thailand, Egypt); *ibid.*, p. 152 (Islamic Republic of Iran); *ibid.*, p. 154 (Turkey); *ibid.*, p. 155 (Russian Federation); *ibid.*, p. 156 (Japan).

⁵⁸ Case law of the International Criminal Court has affirmed that the conditions of “widespread” and “systematic” in article 7 of the Rome Statute are disjunctive. See *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, Pre-Trial Chamber II, International Criminal Court, para. 94; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges, 15 June 2009, Pre-Trial Chamber II, International Criminal Court, para. 82; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, Trial Chamber III, International Criminal Court, para. 162. The decisions of the International Criminal Court are available from the Court’s website: www.icc-cpi.int/.

⁵⁹ *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 428, *Judicial Supplement No. 23* (February/March 2001); see also *Bemba*, Judgment, 21 March 2016 (footnote 58 above), para. 163; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, 7 March 2014, Trial Chamber II, International Criminal Court, para. 1123; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, Pre-Trial Chamber I, International Criminal Court, para. 394; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, Trial Chamber I, International Tribunal for the Former Yugoslavia, paras. 545–546; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment [and corrigendum], 17 December 2004, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 94.

⁶⁰ *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 83; *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 580; draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission at its forty-eighth session, *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18 (using the phrase “on a large scale” instead of “widespread”); see also *Mrkšić*, Judgment, 27 September 2007 (footnote 55 above), para. 437 (“‘widespread’ refers to the large scale nature of the attack and the number of victims”). In *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the

and excludes isolated acts of violence,⁶¹ such as murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative. Such an attack may be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.⁶² At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign.⁶³ There is no specific numerical threshold of victims that must be met for an attack to be “widespread”.

(13) “Widespread” can also have a geographical dimension, with the attack occurring in different locations.⁶⁴ Thus, in the *Bemba* case, the International Criminal Court Pre-Trial Chamber found that there was sufficient evidence to establish that an attack was “widespread” based on reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass gravesites and a large number of victims.⁶⁵ Yet a large geographic area is not required; the International Tribunal for the Former Yugoslavia has found that the attack can be in a small geographic area against a large number of civilians.⁶⁶

(14) In its *Situation in the Republic of Kenya* decision, the International Criminal Court Pre-Trial Chamber indicated that “[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts”.⁶⁷ An attack may be widespread due to the cumulative effect of multiple

Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, Pre-Trial Chamber II, International Criminal Court, para. 24, the Chamber found that the attack against the civilian population was widespread, “as it resulted in a large number of civilian victims”.

⁶¹ See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, Pre-Trial Chamber II, International Criminal Court, para. 19; *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad al Abdal-Rahman*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58 (7) of the Statute, 27 April 2007, Pre-Trial Chamber I, International Criminal Court, para. 62; see also *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment, 6 December 1999, Trial Chamber I, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 1999*, vol. II, p. 1704, at pp. 1734–1736, paras. 67–69; *Kayishema*, Judgment, 21 May 1999 (footnote 55 above), paras. 122–123; *Yearbook ... 1996*, vol. II (Part Two), p. 47; *Yearbook ... 1991*, vol. II (Part Two), p. 103.

⁶² *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 163 (citing to *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 83).

⁶³ *Kupreškić*, Judgment, 14 January 2000 (see footnote 38 above), para. 550; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 649.

⁶⁴ See, for example, *Ntaganda*, Decision, 13 July 2012 (footnote 61 above), para. 30; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, para. 177.

⁶⁵ *Bemba*, Decision, 15 June 2009 (see footnote 58 above), paras. 117–124; see *Bemba*, Judgment, 21 March 2016 (footnote 58 above), paras. 688–689.

⁶⁶ *Kordić*, Judgment, 17 December 2004 (see footnote 59 above), para. 94; *Blaškić*, Judgment, 3 March 2000 (see footnote 54 above), para. 206.

⁶⁷ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 95; see also *Bemba*, Judgment, 21 March 2016 (footnote 58 above), para. 163.

inhumane acts or the result of a single inhumane act of great magnitude.⁶⁸

(15) Like “widespread”, the term “systematic” excludes isolated or unconnected acts of violence,⁶⁹ and jurisprudence from the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court reflects a similar understanding of what is meant by the term. The International Tribunal for the Former Yugoslavia defined “systematic” as “the organised nature of the acts of violence and the improbability of their random occurrence”⁷⁰ and found that evidence of a pattern or methodical plan establishes that an attack was systematic.⁷¹ Thus, the Appeals Chamber in *Kunarac* confirmed that “patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence.”⁷² The International Criminal Tribunal for Rwanda has taken a similar approach.⁷³

(16) Consistent with jurisprudence of the International Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda, an International Criminal Court Pre-Trial Chamber in *Harun* found that “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”⁷⁴ An International Criminal Court Pre-Trial Chamber in *Katanga* found that the term “has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as ‘patterns of crimes’ such that the crimes constitute a ‘non-accidental repetition of similar criminal conduct on a regular basis’.”⁷⁵ In applying the standard, an International Criminal Court Pre-Trial Chamber in *Ntaganda* found an attack to be systematic since “the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with

heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting.”⁷⁶ Additionally, in the *Ntaganda* confirmation of charges decision, a Pre-Trial Chamber held that the attack was systematic as it followed a “regular pattern” with a “recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines, and coordinated the commission of the unlawful acts ... in order to attack the non-Hema civilian population.”⁷⁷ In *Gbagbo*, an International Criminal Court Pre-Trial Chamber found an attack to be systematic when “preparations for the attack were undertaken in advance” and the attack was planned and coordinated with acts of violence revealing a “clear pattern.”⁷⁸

“Directed against any civilian population”

(17) The second overall requirement is that the act must be committed as part of an attack “directed against any civilian population”. Draft article 3, paragraph 2 (a), defines “attack directed against any civilian population” for the purpose of paragraph 1 as “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.”⁷⁹ As discussed below, jurisprudence from the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court has construed the meaning of each of these terms: “directed against”, “any”, “civilian”, “population”, “a course of conduct involving the multiple commission of acts” and “State or organizational policy”.

(18) The International Tribunal for the Former Yugoslavia has found that the phrase “directed against” requires that civilians be the intended primary target of the attack, rather than incidental victims.⁸⁰ The International Criminal Court Pre-Trial Chambers subsequently adopted this interpretation in the *Bemba* case and the *Situation in the Republic of Kenya* decision,⁸¹ as did the International Criminal Court Trial Chambers in the *Katanga* and *Bemba* trial judgments.⁸² In the *Bemba* case, the International Criminal Court Pre-Trial Chamber found that there was

⁶⁸ *Yearbook ... 1996*, vol. II (Part Two), p. 47 (para. (4) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind); see also *Bemba*, Decision, 15 June 2009 (footnote 58 above), para. 83 (finding that “widespread” “entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians”).

⁶⁹ See *Yearbook ... 1996*, vol. II (Part Two), p. 47; *Yearbook ... 1991*, vol. II (Part Two), p. 103.

⁷⁰ *Mrkšić*, Judgment, 27 September 2007 (see footnote 55 above), para. 437; *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 429.

⁷¹ See, for example, *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 648.

⁷² *Prosecutor v. Kunarac*, Case No. IT-96-23 and IT-96-23/1-A, Judgment, 12 June 2002, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 94, *Judicial Supplement No. 34* (June 2002).

⁷³ *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 580.

⁷⁴ *Harun*, Decision, 27 April 2007 (see footnote 61 above), para. 62 (citing to *Kordić*, Judgment, 17 December 2004 (see footnote 59 above), para. 94, which in turn cites to *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 429); see also *Ruto*, Decision, 23 January 2012 (footnote 64 above), para. 179; *Situation in the Republic of Kenya*, Decision, 31 March 2010 (footnote 58 above), para. 96; *Katanga*, Decision, 30 September 2008 (footnote 59 above), para. 394.

⁷⁵ *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 397.

⁷⁶ *Ntaganda*, Decision, 13 July 2012 (see footnote 61 above), para. 31; see also *Ruto*, Decision, 23 January 2012 (footnote 64 above), para. 179.

⁷⁷ *Ntaganda*, Decision, 9 June 2014 (see footnote 60 above), para. 24.

⁷⁸ *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, Pre-Trial Chamber I, International Criminal Court, para. 225.

⁷⁹ Rome Statute, art. 7, para. 2 (a); see also *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, first session, New York, 3–10 September 2002* (ICC-ASP/1/3, United Nations publication, Sales No. E.03.V.2 and corrigendum), part II, sect. B, p. 116, art. 7, Introduction, para. 3.

⁸⁰ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 59 above), para. 421 (“The expression ‘directed against’ specifies that in the context of a crime against humanity the civilian population is the primary object of the attack”).

⁸¹ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 82; *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 76.

⁸² *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1104; *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 154.

sufficient evidence showing the attack was “directed against” civilians of the Central African Republic.⁸³ The Chamber concluded that Mouvement de libération du Congo (MLC) soldiers were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.⁸⁴ The Chamber further found that MLC soldiers targeted *primarily* civilians, demonstrated by an attack at one locality where the MLC soldiers did not find any rebel troops that they claimed to be chasing.⁸⁵ The term “directed” places its emphasis on the intention of the attack rather than the physical result of the attack.⁸⁶ It is the attack, not the acts of the individual perpetrator, which must be “directed against” the target population.⁸⁷ The Trial Chamber in *Bemba* later confirmed “that the civilian population was the primary, as opposed to incidental, target of the attack, and in turn, that the attack was directed against the civilian population in the [Central African Republic]”.⁸⁸ In doing so, it explained that “[w]here an attack is carried out in an area containing both civilians and non-civilians, factors relevant to determining whether an attack was directed against a civilian population include the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the form of resistance to the assailants at the time of the attack, and the extent to which the attacking force complied with the precautionary requirements of the laws of war”.⁸⁹

(19) The word “any” indicates that “civilian population” is to have a wide definition and should be interpreted broadly.⁹⁰ An attack can be committed against any civilians, “regardless of their nationality, ethnicity or other distinguishing feature”,⁹¹ and can be committed against either nationals or foreigners.⁹² Those targeted may “include a group defined by its (perceived) political affiliation”.⁹³ In order to qualify as a “civilian population” during a time of armed conflict, those targeted must be

“predominantly” civilian in nature; the presence of certain combatants within the population does not change its character.⁹⁴ This approach is in accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the 1949 Geneva Conventions states: “The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.⁹⁵ The Trial Chamber of the International Criminal Tribunal for Rwanda in *Kayishema* found that during a time of peace, “civilian” includes all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.⁹⁶ The status of any given victim must be assessed at the time the offence is committed,⁹⁷ a person should be considered a civilian if there is any doubt as to his or her status.⁹⁸

(20) “Population” does not mean that the entire population of a given geographical location must be subject to the attack,⁹⁹ rather, the term implies the collective

⁸³ *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 94; see also *Ntaganda*, Decision, 13 July 2012 (footnote 61 above), paras. 20–21.

⁸⁴ *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 94.

⁸⁵ *Ibid.*, paras. 95–98.

⁸⁶ See, for example, *Blaškić*, Judgment, 3 March 2000 (footnote 54 above), para. 208, footnote 401.

⁸⁷ *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 103.

⁸⁸ *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 674.

⁸⁹ *Ibid.*, para. 153 (citing to the jurisprudence of various international courts and tribunals).

⁹⁰ See, for example, *Mrkšić*, Judgment, 27 September 2007 (footnote 55 above), para. 442; *Kupreškić*, Judgment, 14 January 2000 (footnote 38 above), para. 547 (“[A] wide definition of ‘civilian’ and ‘population’ is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity”); *Kayishema*, Judgment, 21 May 1999 (footnote 55 above), para. 127; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 643.

⁹¹ *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 399 (quoting *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 635); see also *Katanga*, Judgment, 7 March 2014 (footnote 59 above), para. 1103; *Bemba*, Judgment, 21 March 2016 (footnote 58 above), para. 155.

⁹² See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 59 above), para. 423.

⁹³ *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 164.

⁹⁴ See, for example, *Katanga*, Judgment, 7 March 2014 (footnote 59 above), para. 1105 (holding that the population targeted “must be primarily composed of civilians” and that the “presence of non-civilians in its midst has therefore no effect on its status of civilian population”); *Mrkšić*, Judgment, 27 September 2007 (footnote 55 above), para. 442; *Kunarac*, Judgment, 22 February 2001 (footnote 59 above), para. 425 (“the presence of certain non-civilians in its midst does not change the character of the population”); *Kordić*, Judgment, 26 February 2001 (footnote 46 above), para. 180; *Blaškić*, Judgment, 3 March 2000 (footnote 54 above), para. 214 (“the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population”); *Kupreškić*, Judgment, 14 January 2000 (footnote 38 above), para. 549 (“the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian”); *Kayishema*, Judgment, 21 May 1999 (footnote 55 above), para. 128; *Akayesu*, Judgment, 2 September 1998 (footnote 53 above), para. 582 (“Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character”); *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 638.

⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50, para. 3.

⁹⁶ *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 127 (referring to “all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the [Forces armées rwandaises], the [Rwandese Patriotic Front], the police and the Gendarmerie Nationale”).

⁹⁷ *Blaškić*, Judgment, 3 March 2000 (see footnote 54 above), para. 214 (“[T]he specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian”); see also *Kordić*, Judgment, 26 February 2001 (footnote 46 above), para. 180 (“individuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity”); *Akayesu*, Judgment, 2 September 1998 (footnote 53 above), para. 582 (finding that “civilian population” includes “members of the armed forces who laid down their arms and those persons placed *hors de combat*”).

⁹⁸ *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 426.

⁹⁹ See *Situation in the Republic of Kenya*, Decision, 31 March 2010 (footnote 58 above), para. 82; *Bemba*, Decision, 15 June 2009 (footnote 58 above), para. 77; *Kunarac*, Judgment, 22 February 2001 (footnote 59 above), para. 424; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 644; see also *Yearbook ... 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to article 20 (defining crimes against humanity as “inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part”).

nature of the crime as an attack upon multiple victims.¹⁰⁰ As the Trial Chamber of the International Tribunal for the Former Yugoslavia noted in *Gotovina*, the concept means that the attack is upon more than just “a limited and randomly selected number of individuals”.¹⁰¹ The International Criminal Court decisions in the *Bemba* case and the *Situation in the Republic of Kenya* case have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against more than just a limited group of individuals.¹⁰²

(21) The first part of draft article 3, paragraph 2 (a), refers to “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population”. Although no such language was contained in the statutory definition of crimes against humanity for the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, this language reflects jurisprudence from both of these tribunals,¹⁰³ and was expressly stated in article 7, paragraph 2 (a), of the Rome Statute. The Elements of Crimes under the Rome Statute provides that the “acts” referred to in article 7, paragraph 2 (a), “need not constitute a military attack”.¹⁰⁴ The Trial Chamber in *Katanga* stated that “the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population”.¹⁰⁵

(22) The second part of draft article 3, paragraph 2 (a), states that the attack must be “pursuant to or in furtherance of a State or organizational policy to commit such attack”. The requirement of a “policy” element did not appear as part of the definition of crimes against humanity in the statutes of international courts and tribunals until the adoption of the 1998 Rome Statute.¹⁰⁶ While the statutes

of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contained no policy requirement in their definition of crimes against humanity,¹⁰⁷ some early jurisprudence required it.¹⁰⁸ Indeed, the *Tadić* Trial Chamber provided an important discussion of the policy element early in the work of the International Tribunal for the Former Yugoslavia, one that would later influence the drafting of the Rome Statute. The Trial Chamber found that

the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts ... Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.¹⁰⁹

The Trial Chamber further noted that, because of the policy element, such crimes “cannot be the work of isolated individuals alone”.¹¹⁰ Later jurisprudence of the International Tribunal for the Former Yugoslavia, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.¹¹¹

(23) Prior to the 1998 Rome Statute, the work of the Commission in its draft codes tended to require a policy element. The Commission’s 1954 draft Code of Offences against the Peace and Security of Mankind defined crimes against humanity as “Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities**”.¹¹² The Commission decided to include the State instigation or

¹⁰⁰ See *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 644.

¹⁰¹ *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment, 15 April 2011, Trial Chamber I, International Tribunal for the Former Yugoslavia, para. 1704.

¹⁰² *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 81; *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 77; *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 154.

¹⁰³ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 59 above), para. 415 (defining “attack” as “a course of conduct involving the commission of acts of violence”); *Kayishema*, Judgment, 21 May 1999 (footnote 55 above), para. 122 (defining “attack” as the “event in which the enumerated crimes must form part”); *Akayesu*, Judgment, 2 September 1998 (footnote 53 above), para. 581 (“The concept of ‘attack’ may be defined as an unlawful act of the kind enumerated [in the Statute] ... An attack may also be non violent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner”).

¹⁰⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court* ... (ICC-ASP/1/3) (see footnote 79 above), art. 7, Introduction, para. 3.

¹⁰⁵ *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1101.

¹⁰⁶ Article 6 (c) of the Nürnberg Charter contains no explicit reference to a plan or policy. The International Military Tribunal’s Judgment of 30 September 1946, however, did use a “policy” descriptor when discussing article 6 (c) in the context of the concept of the “attack” as a whole: “The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out” (*Trial of the Major War Criminals* ... vol. XXII (see footnote 28 above), p. 498). Article II (1) (c) of Control Council

Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity also contains no reference to a plan or policy in its definition of crimes against humanity (Control Council Law No. 10, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3 (31 January 1946), p. 51).

¹⁰⁷ The Appeals Chamber of the International Tribunal for the Former Yugoslavia determined that there was no policy element on crimes against humanity in customary international law; see *Kunarac*, Judgment, 12 June 2002 (footnote 72 above), para. 98 (“There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes”), although that position has been criticized in writings.

¹⁰⁸ *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), paras. 626, 644 and 653–655.

¹⁰⁹ *Ibid.*, para. 653.

¹¹⁰ *Ibid.*, para. 655 (citing to *Prosecutor v. Dragan Nikolić a/k/a “Jenki”*, Case No. IT-94-2-R61, Review of indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, Trial Chamber, International Tribunal for the Former Yugoslavia [*Judicial Reports 1994–1995*, vol. II, p. 739, at p. 765], para. 26).

¹¹¹ See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 72 above), para. 98; *Kordić*, Judgment, 26 February 2001 (footnote 46 above), para. 182 (finding that “the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity”); *Kayishema*, Judgment, 21 May 1999 (footnote 55 above), para. 124 (“For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan”); *Akayesu*, Judgment, 2 September 1998 (footnote 53 above), para. 580.

¹¹² *Yearbook* ... 1954, vol. II, document A/2693, para. 54, pp. 151–152, art. 2, para. 11.

tolerance requirement in order to exclude inhumane acts committed by private persons on their own without any State involvement.¹¹³ At the same time, the definition of crimes against humanity included in the 1954 draft Code of Offences against the Peace and Security of Mankind did not include any requirement of scale (“widespread”) or systematicity.

(24) The Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind also recognized a policy requirement, defining crimes against humanity as “any of the following acts, when committed in a systematic manner or on a large scale and *instigated or directed by a Government or by any organization or group*”.¹¹⁴ The Commission included this requirement to exclude inhumane acts committed by an individual “acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization”.¹¹⁵ In other words, the policy element sought to exclude “ordinary” crimes of individuals acting on their own initiative and without any connection to a State or organization.

(25) Draft article 3, paragraph 2 (a), contains the same policy element as set forth in article 7, paragraph 2 (a), of the Rome Statute. The Elements of Crimes under the Rome Statute provide that a “‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population”,¹¹⁶ and that “a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack”.¹¹⁷

(26) This “policy” element has been addressed in several cases at the International Criminal Court.¹¹⁸ In the 2014 judgment in *Katanga*, an International Criminal Court Trial Chamber stressed that the policy requirement is not synonymous with “systematic”, since that would contradict the disjunctive requirement in article 7 of the Rome Statute of a “widespread” or “systematic” attack.¹¹⁹ Rather, while “systematic” requires high levels of organization and patterns of conduct or recurrence of

violence,¹²⁰ to “establish a ‘policy’, it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community”.¹²¹ Further, the “policy” requirement does not require formal designs or pre-established plans, can be implemented by action or inaction, and can be inferred from the circumstances.¹²² The Trial Chamber found that the policy need not be formally established or promulgated in advance of the attack and can be deduced from the repetition of acts, from preparatory activities, or from a collective mobilization.¹²³ Moreover, the policy need not be concrete or precise, and it may evolve over time as circumstances unfold.¹²⁴ Furthermore, the Trial Chamber in *Bemba* held that the requirement that the course of conduct was committed pursuant to or in furtherance of the State or organizational policy is satisfied not only where a perpetrator deliberately acts to further the policy, but also where a perpetrator has engaged in conduct envisaged by the policy, and with knowledge thereof.¹²⁵

(27) Similarly, in its decision confirming the indictment of Laurent Gbagbo, an International Criminal Court Pre-Trial Chamber held that “policy” should not be conflated with “systematic”.¹²⁶ Specifically, the Chamber stated that “evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7 (1) and (2) (a) of the Statute”.¹²⁷ The policy element requires that the acts be “linked” to a State or organization,¹²⁸ and it excludes “spontaneous or isolated acts of violence”, but a policy need not be formally adopted¹²⁹ and proof of a particular rationale or motive is not required.¹³⁰ In the *Bemba* case, an International Criminal Court Pre-Trial Chamber found that the attack was pursuant to an organizational policy based on evidence establishing that the MLC troops “carried out attacks following the same pattern”.¹³¹ The Trial Chamber later found that the MLC troops knew that their individual acts were part of a broader attack directed against the civilian population in the Central African Republic.¹³²

¹¹³ *Ibid.*, commentary.

¹¹⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

¹¹⁵ *Ibid.*, p. 47 (para. (5) of the commentary). In explaining its inclusion of the policy requirement, the Commission noted: “It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18” (*ibid.*).

¹¹⁶ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court ...* (ICC-ASP/1/3) (see footnote 79 above), art. 7, Introduction, para. 3.

¹¹⁷ *Ibid.*, footnote 6. Other precedents also emphasize that deliberate failure to act can satisfy the policy element. See *Kupreškić*, Judgment, 14 January 2000 (footnote 38 above), paras. 554–555 (“approved”, “condoned”, “explicit or implicit approval”); *Yearbook ... 1954*, vol. II, document A/2693, para. 54, pp. 151–152 (1954 draft Code, art. 2, para. 11) (“toleration”); Final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992) (S/1994/674, annex), para. 85.

¹¹⁸ See, for example, *Ntaganda*, Decision, 13 July 2012 (footnote 61 above), para. 24; *Bemba*, Decision, 15 June 2009 (footnote 58 above), para. 81; *Katanga*, Decision, 30 September 2008 (footnote 59 above), para. 396.

¹¹⁹ *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1112; see also *ibid.*, para. 1101; *Gbagbo*, Decision, 12 June 2014 (footnote 78 above), para. 208.

¹²⁰ *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), paras. 1111–1113.

¹²¹ *Ibid.*, para. 1113.

¹²² *Ibid.*, paras. 1108–1109 and 1113.

¹²³ *Ibid.*, para. 1109; see also *Gbagbo*, Decision, 12 June 2014 (footnote 78 above), paras. 211–212 and 215.

¹²⁴ *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1110.

¹²⁵ *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 161.

¹²⁶ *Gbagbo*, Decision, 12 June 2014 (see footnote 78 above), paras. 208 and 216.

¹²⁷ *Ibid.*, para. 216.

¹²⁸ *Ibid.*, para. 217.

¹²⁹ *Ibid.*, para. 215.

¹³⁰ *Ibid.*, para. 214.

¹³¹ *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 115.

¹³² *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 669.

(28) The second part of draft article 3, paragraph 2 (a), refers to either a “State” or “organizational” policy to commit such an attack, as does article 7, paragraph 2 (a), of the Rome Statute. In its *Situation in the Republic of Kenya* decision, an International Criminal Court Pre-Trial Chamber suggested that the meaning of “State” in article 7, paragraph 2 (a), is “self-explanatory”.¹³³ The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of a State policy.¹³⁴

(29) Jurisprudence from the International Criminal Court suggests that “organizational” includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, a Pre-Trial Chamber in *Katanga* stated: “Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population.”¹³⁵ An International Criminal Court Trial Chamber in *Katanga* held that the organization must have “sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts” and “a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population”.¹³⁶

(30) In its *Situation in the Republic of Kenya* decision, a majority of an International Criminal Court Pre-Trial Chamber rejected the idea that “only State-like organizations may qualify” as organizations for the purpose of article 7, paragraph 2 (a), and further stated that “the formal nature of a group and the level of its organization should not be the defining criterion. Instead ... a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values”.¹³⁷ In 2012, an International Criminal Court Pre-Trial Chamber in *Ruto* stated that, when determining whether a particular group qualifies as an “organization” under article 7 of the Rome Statute,

the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an

¹³³ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 89.

¹³⁴ *Ibid.*

¹³⁵ *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 396 (citing case law of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as para. (5) of the commentary to draft article 21 of the draft Code of Crimes against the Peace and Security of Mankind provisionally adopted by the Commission in 1991, *Yearbook ... 1991*, vol. II (Part Two), pp. 103–104); see also *Bemba*, Decision, 15 June 2009 (footnote 58 above), para. 81.

¹³⁶ *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1119.

¹³⁷ *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 90. This understanding was similarly adopted by the Trial Chamber in the *Katanga* judgment, which stated: “That the attack must further be characterised as widespread or systematic does not, however, mean that the organisation that promotes or encourages it must be structured so as to assume the characteristics of a State” (*Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1120). The Trial Chamber also found that “the ‘general practice accepted as law’ ... adverts to crimes against humanity committed by States and organisations that are not specifically defined as requiring quasi-State characteristics” (*ibid.*, para. 1121).

established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.¹³⁸

(31) As a consequence of the “policy” potentially emanating from a non-State organization, the definition set forth in paragraphs 1 to 3 of draft article 3 does not require that the offender be a State official or agent. This approach is consistent with the development of crimes against humanity under international law. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 draft Code of Crimes against the Peace and Security of Mankind, stated “that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone” and that it “does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code”.¹³⁹ As discussed previously, the 1996 draft Code added the requirement that, to be crimes against humanity, the inhumane acts must be “instigated or directed by a Government *or by any organization or group*”.¹⁴⁰ In its commentary to this requirement, the Commission noted: “The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.”¹⁴¹

(32) Jurisprudence of the International Tribunal for the Former Yugoslavia accepted the possibility of non-State actors being prosecuted for crimes against humanity. For example, a Trial Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case stated that “the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory”.¹⁴² That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army as prosecutable for crimes against humanity.¹⁴³

¹³⁸ *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 185; see also *Situation in the Republic of Kenya*, Decision, 31 March 2010 (footnote 58 above), para. 93; *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”, 15 November 2011, Pre-Trial Chamber III, International Criminal Court, paras. 45–46.

¹³⁹ *Yearbook ... 1991*, vol. II (Part Two), pp. 103–104 (commentary to draft article 21 provisionally adopted by the Commission in 1991, para. (5)).

¹⁴⁰ *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

¹⁴¹ *Ibid.*, p. 47 (para. (5) of the commentary).

¹⁴² *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.

¹⁴³ *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005, Trial Chamber II, International Tribunal for the Former Yugoslavia, paras. 212–213.

(33) In the *Ntaganda* case at the International Criminal Court, charges were confirmed against a defendant associated with two paramilitary groups, the Union des patriotes congolais and the Forces patriotiques pour la libération du Congo in the Democratic Republic of the Congo.¹⁴⁴ Similarly, in the *Mbarushimana* case, the Prosecutor pursued charges against a defendant associated with the Forces démocratiques de libération du Rwanda, described, according to its statute, as an “armed group seeking to ‘reconquérir et défendre la souveraineté nationale’ of Rwanda”.¹⁴⁵ In the case against Joseph Kony relating to the *Situation in Uganda*, the defendant is allegedly associated with the Lord’s Resistance Army, “an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army”¹⁴⁶ which “is organised in a military-type hierarchy and operates as an army”.¹⁴⁷ With respect to the situation in Kenya, a Pre-Trial Chamber confirmed charges of crimes against humanity against defendants due to their association in a “network” of perpetrators “comprised of eminent [Orange Democratic Movement Party (ODM)] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders”.¹⁴⁸ Likewise, charges were confirmed with respect to other defendants associated with “coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity (‘PNU’) youth in different parts of Nakuru and Naivasha” that “were targeted at perceived [ODM] supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language”.¹⁴⁹

“With knowledge of the attack”

(34) The third overall requirement is that the perpetrator must commit the act “with knowledge of the attack”. Jurisprudence from the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda has concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.¹⁵⁰ This two-part approach is reflected in the Elements of Crimes under the Rome Statute, which for each of the proscribed acts requires as that act’s last element: “The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.” Even so,

¹⁴⁴ *Ntaganda*, Decision, 13 July 2012 (see footnote 61 above), para. 22.

¹⁴⁵ *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, Case No. ICC-01/04-01/10, 16 December 2011, Pre-Trial Chamber I, International Criminal Court, para. 2.

¹⁴⁶ *Situation in Uganda*, Case No. ICC-02/04-01/05, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 27 September 2005, Pre-Trial Chamber II, International Criminal Court, para. 5.

¹⁴⁷ *Ibid.*, para. 7.

¹⁴⁸ *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 182.

¹⁴⁹ *Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, para. 102.

¹⁵⁰ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 59 above), para. 418; *Kayishema*, Judgment, 21 May 1999 (footnote 55 above), para. 133.

the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.¹⁵¹

(35) In its decision confirming the charges against Laurent Gbagbo, an International Criminal Court Pre-Trial Chamber found that “it is only necessary to establish that the person had knowledge of the attack in general terms”.¹⁵² Indeed, it need not be proven that the perpetrator knew the specific details of the attack;¹⁵³ rather, the perpetrator’s knowledge may be inferred from circumstantial evidence.¹⁵⁴ Thus, when finding in the *Bemba* case that the MLC troops acted with knowledge of the attack, an International Criminal Court Pre-Trial Chamber stated that the troops’ knowledge could be “inferred from the methods of the attack they followed”, which reflected a clear pattern.¹⁵⁵ In the *Katanga* case, an International Criminal Court Pre-Trial Chamber found that

knowledge of the attack and the perpetrator’s awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused’s position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.¹⁵⁶

(36) Furthermore, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.¹⁵⁷ According to the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most “be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack”.¹⁵⁸ It is the perpetrator’s knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that

¹⁵¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court ...* (ICC-ASP/1/3) (see footnote 79 above), p. 116, art. 7, Introduction, para. 2.

¹⁵² *Gbagbo*, Decision, 12 June 2014 (see footnote 78 above), para. 214.

¹⁵³ *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 434 (finding that the knowledge requirement “does not entail knowledge of the details of the attack”).

¹⁵⁴ See *Blaškić*, Judgment, 3 March 2000 (footnote 54 above), para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including “the nature of the crimes committed and the degree to which they are common knowledge”); *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 657 (“While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances”); see also *Kayishema*, Judgment, 21 May 1999 (footnote 55 above), para. 134 (finding that “actual or constructive knowledge of the broader context of the attack” is sufficient).

¹⁵⁵ *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 126; see *Bemba*, Judgment, 21 March 2016 (footnote 58 above), paras. 166–169.

¹⁵⁶ *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 402.

¹⁵⁷ See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 72 above), para. 103; *Kupreškić*, Judgment, 14 January 2000 (footnote 38 above), para. 558.

¹⁵⁸ *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 103.

the underlying offence was committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.¹⁵⁹ For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture, and enslavement in regard to Muslim women and girls. A Trial Chamber of the International Tribunal for the Former Yugoslavia found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack “by directly taking advantage of the situation created” and “fully embraced the ethnicity-based aggression”.¹⁶⁰ Likewise, an International Criminal Court Trial Chamber has held that the perpetrator must know that the act is part of the widespread or systematic attack against the civilian population, but the perpetrator’s motive is irrelevant for the act to be characterized as a crime against humanity. It is not necessary for the perpetrator to have knowledge of all the characteristics or details of the attack, nor is it required for the perpetrator to subscribe to the “State or the organisation’s criminal design”.¹⁶¹

Prohibited acts

(37) Like article 7 of the Rome Statute, draft article 3, paragraph 1 (a)–(k), lists the prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind, although the language differs slightly. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual’s act must be “part of” a widespread or systematic attack directed against any civilian population.¹⁶² Determining whether the requisite nexus exists requires making “an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act. Isolated acts that clearly differ in their context and circumstances from other acts that occur during an attack fall outside the scope of” draft article 3, paragraph 1.¹⁶³ The offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the offence can be part of the attack if it can be sufficiently connected to the attack.¹⁶⁴

¹⁵⁹ See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 59 above), para. 592.

¹⁶⁰ *Ibid.*

¹⁶¹ *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1125.

¹⁶² See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 72 above), para. 100; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 54 above), para. 649.

¹⁶³ *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 165.

¹⁶⁴ See, for example, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 41; *Prosecutor v. Mladen Naletilić aka “Tuta” and Vinko Martinović aka “Štela”*, Case No. IT-98-34-T, Judgment, 31 March 2003, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 234, *Judicial Supplement No. 42* (June 2003); *Mrkšić*, Judgment, 27 September 2007 (footnote 55 above), para. 438; *Tadić*, Judgment, 15 July 1999 (footnote 46 above), para. 249.

Definitions within the definition

(38) As noted above, draft article 3, paragraph 2 (a), defines “attack directed against any civilian population” for the purpose of draft article 3, paragraph 1. The remaining subparagraphs (b)–(i) of draft article 3, paragraph 2, define further terms that appear in paragraph 1, specifically “extermination”, “enslavement”, “deportation or forcible transfer of population”, “torture”, “forced pregnancy”, “persecution”, “the crime of apartheid” and “enforced disappearance of persons”. Further, draft article 3, paragraph 3, provides a definition for the term “gender”. These definitions also appear in article 7 of the Rome Statute and were viewed by the Commission as relevant for retention in draft article 3.

Paragraph 4

(39) Paragraph 4 of draft article 3 provides: “This draft article is without prejudice to any broader definition provided for in any international instrument or national law.” This provision is similar to article 1, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: “This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.” Article 10 of the Rome Statute (appearing in part 2 on “Jurisdiction, Admissibility and Applicable Law”) also contains a “without prejudice” clause, which reads: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

(40) Paragraph 4 is meant to ensure that the definition of “crimes against humanity” set forth in draft article 3 does not call into question any broader definitions that may exist in other international instruments or national legislation. “International instrument” is to be understood in the broad sense and not only in the sense of being a binding international agreement. For example, the definition of “enforced disappearance of persons” as contained in draft article 3 follows article 7 of the Rome Statute but differs from the definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,¹⁶⁵ the 1994 Inter-American Convention on the Forced Disappearance of Persons and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. Those differences principally are that the latter instruments do not include the element “with the intention of removing them from the protection of the law”, do not include the words “for a prolonged period of time” and do not refer to organizations as potential perpetrators of the crime when they act without State participation.

(41) In the light of such differences, the Commission thought it prudent to include draft article 3, paragraph 4. In essence, while the first three paragraphs of draft article 3 define crimes against humanity for the purpose of the draft articles, this is without prejudice to broader definitions in international instruments or national laws.

¹⁶⁵ Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992.

Thus, if a State wishes to adopt a broader definition in its national law, the present draft articles do not preclude it from doing so. At the same time, an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation. Any elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.

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; and

(b) cooperation with other States, relevant inter-governmental 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.

Commentary

(1) Draft article 4 sets forth an obligation of prevention with respect to crimes against humanity. In considering such an obligation, the Commission viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts. In many instances, those treaties address acts that, when committed under certain circumstances, can constitute crimes against humanity (for example, genocide, torture, apartheid, or enforced disappearance). As such, the obligation of prevention set forth in those treaties extends as well to prevention of the acts in question when they also qualify as crimes against humanity.

(2) An early significant example of an obligation of prevention may be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provides in article I: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Further, article V provides: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.” Article VIII provides: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.” As such, the Convention on the Prevention and Punishment of the Crime of Genocide contains within it

several elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention; and a provision on cooperation of States parties with the United Nations for the prevention of genocide.

(3) Such an obligation of prevention is a feature of most multilateral treaties addressing crimes since the 1960s. Examples include the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;¹⁶⁶ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;¹⁶⁷ the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;¹⁶⁸ the 1979 International Convention against the Taking of Hostages;¹⁶⁹ the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁷⁰ the 1985 Inter-American Convention to Prevent and Punish Torture;¹⁷¹ the 1994 Inter-American Convention on the Forced Disappearance of Persons;¹⁷² the 1994 Convention on the Safety of United Nations and Associated Personnel;¹⁷³ the 1997 International Convention for the Suppression of Terrorist Bombings;¹⁷⁴ the 2000 United Nations Convention against Transnational Organized Crime;¹⁷⁵ the 2000

¹⁶⁶ Article 10, paragraph 1, provides: “Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.”

¹⁶⁷ Article 4 provides: “States Parties shall co-operate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories.”

¹⁶⁸ Article IV provides: “The States Parties to the present Convention undertake ... (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.”

¹⁶⁹ Article 4 provides: “States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of ... offences ... including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages.”

¹⁷⁰ Article 2, paragraph 1, provides: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”

¹⁷¹ Article 1 provides: “The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.” Article 6 provides: “The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.”

¹⁷² Article I provides: “The States Parties to this Convention undertake ... (c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; (d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.”

¹⁷³ Article 11 provides: “States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.”

¹⁷⁴ Article 15 provides: “States Parties shall cooperate in the prevention of the offences set forth in article 2.”

¹⁷⁵ Article 9, paragraph 1, provides: “In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative,

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;¹⁷⁶ the 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁷⁷ and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.¹⁷⁸

(4) Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain obligations to prevent and suppress human rights violations. Examples include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination;¹⁷⁹ the 1979 Convention on the Elimination of All Forms of Discrimination against Women;¹⁸⁰ and the 2011 Council of Europe Convention

administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials"; article 9, paragraph 2, provides: "Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions"; article 29, paragraph 1, provides: "Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention"; article 31, paragraph 1, provides: "States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime."

¹⁷⁶ Article 9, paragraph 1, provides: "States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization."

¹⁷⁷ The fifth preambular paragraph provides: "Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures." Article 3 provides: "Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment."

¹⁷⁸ The sixth preambular paragraph provides: "Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance." Article 23 provides:

"1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.

"2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.

"3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy."

¹⁷⁹ Article 3 provides: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

¹⁸⁰ Article 2 provides: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women." Article 3 provides: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all

on Preventing and Combating Violence against Women and Domestic Violence.¹⁸¹ Some treaties do not refer expressly to "prevention" or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to "give effect" to or to "implement" the treaty, which may be seen as encompassing necessary or appropriate measures to prevent the act. Examples include the 1966 International Covenant on Civil and Political Rights¹⁸² and the 1989 Convention on the Rights of the Child.¹⁸³

(5) International courts and tribunals have addressed these obligations of prevention. The International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* noted that the duty to punish in the context of that convention is connected to, but distinct from, the duty to prevent. While "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent",¹⁸⁴ the Court found that "the duty to prevent genocide and the duty to punish its perpetrators ... are ... two distinct yet connected obligations".¹⁸⁵ Indeed, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty".¹⁸⁶

(6) Such treaty practice, jurisprudence, and the well-settled acceptance by States that crimes against humanity are crimes under international law that should be punished whether or not committed in time of armed conflict, and whether or not criminalized under national law, imply that States have undertaken an obligation to prevent crimes against humanity. Paragraph 1 of draft article 4, therefore, formulates an obligation of prevention in a manner similar to that set forth in article I of the Convention on the Prevention and Punishment of the Crime of Genocide, by beginning: "Each State undertakes to prevent crimes against humanity ...".

appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

¹⁸¹ Article 4, para. 2, provides: "Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women."

¹⁸² Article 2, para 2, provides: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

¹⁸³ Article 4 provides: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."

¹⁸⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 18 above), p. 219, para. 426.

¹⁸⁵ *Ibid.*, para. 425.

¹⁸⁶ *Ibid.*, p. 220, para. 427.

(7) In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice analysed the meaning of “undertake to prevent” as contained in article I of the Convention on the Prevention and Punishment of the Crime of Genocide. At the provisional measures phase, the Court determined that such an undertaking imposes “a clear obligation” on the parties “to do all in their power to prevent the commission of any such acts in the future”.¹⁸⁷ At the merits phase, the Court described the ordinary meaning of the word “undertake” in that context as

to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties ... It is not merely hortatory or purposive. The undertaking is unqualified ... and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles.¹⁸⁸

The undertaking to prevent crimes against humanity, as formulated in paragraph 1 of draft article 4, is intended to express the same kind of legally binding effect upon States; it, too, is not merely hortatory or purposive, and is not merely an introduction to later draft articles.

(8) In the same case, the International Court of Justice further noted that, when engaging in measures of prevention, “it is clear that every State may only act within the limits permitted by international law”.¹⁸⁹ The Commission deemed it important to express that requirement explicitly in paragraph 1 of draft article 4, and therefore has included a clause indicating that any measures of prevention must be “in conformity with international law”. Thus, the measures undertaken by a State to fulfil this obligation must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

(9) As set forth in paragraph 1 of draft article 4, this obligation of prevention either expressly or implicitly contains four elements. First, by this undertaking, States have an obligation not “to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law”.¹⁹⁰ According to the International Court of Justice, when considering the analogous obligation of prevention contained in article I of the Convention on the Prevention and Punishment of the Crime of Genocide:

Under Article I the States parties are bound to prevent such an act, which it describes as “a crime under international law”, being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the

Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.¹⁹¹

(10) The Court also decided that the substantive obligation reflected in article I was not, on its face, limited by territory but, rather, applied “to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligation ... in question”.¹⁹²

(11) A breach of this obligation not to commit directly such acts implicates the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on State responsibility. Indeed, in the context of disputes that may arise under the Convention on the Prevention and Punishment of the Crime of Genocide, article IX refers, *inter alia*, to disputes “relating to the responsibility of a State for genocide”. Although much of the focus of the Convention on the Prevention and Punishment of the Crime of Genocide is upon prosecuting individuals for the crime of genocide, the International Court of Justice stressed that the breach of the obligation to prevent is not a *criminal* violation by the State but, rather, concerns a breach of international law that engages State responsibility.¹⁹³ The Court’s approach is consistent with views previously expressed by the Commission,¹⁹⁴ including in the commentary to the 2001 draft articles on responsibility of States for internationally wrongful acts: “Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them.”¹⁹⁵

(12) Second, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation “to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing” such acts.¹⁹⁶ In this instance, the State party is expected to use its best efforts (a due diligence standard) when it has a “capacity to influence effectively the action of persons likely to commit, or already committing, genocide”, which in

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, p. 120, para. 183.

¹⁹³ *Ibid.*, p. 114, para. 167 (finding that international responsibility is “quite different in nature from criminal responsibility”).

¹⁹⁴ *Yearbook ... 1998*, vol. II (Part Two), p. 65, para. 249 (finding that the Convention on the Prevention and Punishment of the Crime of Genocide “did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility”).

¹⁹⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142, para. (3) of the commentary to draft article 58.

¹⁹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 18 above), p. 113, para. 166.

¹⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, *I.C.J. Reports* 1993, p. 3, at p. 22, para. 45.

¹⁸⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 18 above), p. 111, para. 162.

¹⁸⁹ *Ibid.*, p. 221, para. 430.

¹⁹⁰ *Ibid.*, p. 113, para. 166.

turn depends on the State party's geographic, political and other links to the persons or groups at issue.¹⁹⁷ Such a standard with respect to the obligation of prevention in the Convention on the Prevention and Punishment of the Crime of Genocide was analysed by the International Court of Justice as follows:

[I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce.¹⁹⁸

At the same time, the Court maintained that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed".¹⁹⁹

(13) Third, and following from the above, the undertaking set forth in paragraph 1 of draft article 4 obliges States to pursue actively and in advance measures designed to help prevent the offence from occurring, such as by taking "effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction", as indicated in subparagraph (a). This text is inspired by article 2, paragraph 1, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

(14) The term "other preventive measures" rather than just "other measures" is used to reinforce the point that the measures at issue in this clause relate solely to prevention. The term "effective" implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective

measures. In commenting on the analogous provision in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has stated:

States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.²⁰⁰

(15) As to the specific types of measures that shall be pursued by a State, in 2015 the Human Rights Council adopted a resolution on the prevention of genocide²⁰¹ that provides some insights into the kinds of measures that are expected in fulfilment of article I of the Convention on the Prevention and Punishment of the Crime of Genocide. Among other things, the resolution: (a) reiterated "the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means";²⁰² (b) encouraged "Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention";²⁰³ and (c) encouraged "States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and subregional mechanisms".²⁰⁴

(16) In the regional context, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention on Human Rights") contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed article 2, paragraph 1 (on the right to life), to contain such an obligation and to require that appropriate measures of prevention be taken, such as "putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".²⁰⁵ At the same time, the Court has

²⁰⁰ Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, para. 4, in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44)*, annex VI.

²⁰¹ Report of the Human Rights Council, *Official Records of the General Assembly, Seventieth Session, Supplement No. 53 (A/70/53)*, chap. II, resolution 28/34, adopted by the Human Rights Council on 27 March 2015.

²⁰² *Ibid.*, para. 2.

²⁰³ *Ibid.*, para. 3.

²⁰⁴ *Ibid.*, para. 4.

²⁰⁵ *Makaratzis v. Greece* [GC], Application No. 50385/99, Judgment of 20 December 2004, ECHR 2004-XI, para. 57; see *Kiliç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, ECHR 2000-III, para. 62 (finding that article 2, paragraph 1, obliged a State party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction).

¹⁹⁷ *Ibid.*, p. 221, para. 430.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*, para. 431; see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27 (draft articles on responsibility of States for internationally wrongful acts, art. 14, para. 3: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs").

recognized that the State party's obligation in this regard is limited.²⁰⁶ Likewise, although the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica" contains no express obligation to "prevent" violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States parties to "ensure" the free and full exercise of the rights recognized by the Convention,²⁰⁷ has found that this obligation implies a "duty to prevent", which in turn requires the State party to pursue certain steps. The Court has said:

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.²⁰⁸

Similar reasoning has animated the Court's approach to interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.²⁰⁹

(17) Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offences. Such an obligation usually would oblige the State at least to: (a) adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (b) continually keep those laws and policies under review and as necessary improve them; (c) pursue initiatives that educate governmental officials as to the State's obligations under the draft articles; (d) implement training programmes for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (e) once the proscribed act is committed, fulfil in good faith any other obligations to investigate

and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others.²¹⁰ Some measures, such as training programmes, may already exist in the State to help prevent wrongful acts (such as murder, torture or rape) that relate to crimes against humanity. The State is obligated to supplement those measures, as necessary, specifically to prevent crimes against humanity. Here, too, international responsibility of the State arises if the State has failed to use its best efforts to organize the governmental and administrative apparatus, as necessary and appropriate, in order to prevent as far as possible crimes against humanity.

(18) Subparagraph (a) of paragraph 1 of draft article 4 refers to a State pursuing effective legislative, administrative, judicial or other preventive measures "in any territory under its jurisdiction". Such a formulation covers the territory of a State, but also covers activities carried out in other territory under the State's jurisdiction. As the Commission has previously explained,

it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by [the International Court of Justice] in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia.²¹¹

²⁰⁶ *Mahmut Kaya v. Turkey*, Application No. 22535/93, Judgment of 28 March 2000, ECHR 2000-III, para. 86 ("Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1,] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities"); see also *Kerimova and Others v. Russia*, Applications Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, Final Judgment of 15 September 2011, para. 246; *Osman v. the United Kingdom*, Judgment of 28 October 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-VIII, para. 116.

²⁰⁷ Article 1, paragraph 1, reads: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination." It is noted that article 1 of the African Charter on Human and Peoples' Rights provides that the States parties "shall recognize the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them".

²⁰⁸ *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), Inter-American Court of Human Rights, Series C, No. 4, para. 175; see also *Gómez-Paquiayauri Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 110, para. 155; *Juan Humberto Sánchez v. Honduras*, Judgment of 7 June 2003 (Preliminary Objection, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 99, paras. 137 and 142.

²⁰⁹ *Tibi v. Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 114, para. 159; see also *Gómez-Paquiayauri Brothers v. Peru* (footnote 208 above), para. 155.

²¹⁰ For comparable measures with respect to prevention of specific types of human rights violations, see Committee on the Elimination of Discrimination against Women, general recommendation No. 6 (1988) on effective national machinery and publicity, paras. 1–2, *Official Records of the General Assembly, Forty-third Session, Supplement No. 38 (A/43/38)*, chap. V, para. 770; Committee on the Elimination of Discrimination against Women, general recommendation No. 15 (1990) on the avoidance of discrimination against women in national strategies for the prevention and control of AIDS, *ibid.*, *Forty-fifth Session, Supplement No. 38 (A/45/38)*, chap. IV, para. 438; Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 9, *ibid.*, *Forty-seventh Session, Supplement No. 38 (A/47/38)*, chap. I; Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, para. 9, *ibid.*, *Fifty-ninth Session, Supplement No. 41 (A/59/41)*, annex XI; Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *ibid.*, *Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III; Committee on the Rights of the Child, general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, paras. 50–63, *ibid.*, *Sixty-first Session, Supplement No. 41 (A/61/41)*, annex II; Committee on the Elimination of Racial Discrimination, general recommendation XXXI (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 5, *ibid.*, *Sixtieth Session, Supplement No. 18 (A/60/18)*, chap. IX, para. 460; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex, para. 3 (a) ("The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations").

²¹¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. (12) of the commentary to article 1 of the draft articles on prevention of transboundary harm from hazardous activities, p. 151 (citing to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 16, at p. 54, para. 118); see also *Yearbook ... 2006*, vol. II (Part Two), para. (25) of

(19) Fourth, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation to pursue certain forms of cooperation, not just with each other but also with organizations, such as the United Nations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies. The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations, which indicates that one of the purposes of the Charter is to “achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”. Further, in Articles 55 and 56 of the Charter, all Members of the United Nations pledge “to take joint and separate action in cooperation with the Organization for the achievement of” certain purposes, including “universal respect for, and observance of, human rights and fundamental freedoms for all”. Specifically with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized in its 1973 principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the Assembly declared that “States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose”.²¹²

(20) Consequently, subparagraph (b) of paragraph 1 of draft article 4 indicates that States shall cooperate with each other to prevent crimes against humanity and cooperate with relevant intergovernmental organizations. The term “relevant” is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization’s functions, on the relationship of the State to that organization, and on the context in which the need for cooperation arises. Further, subparagraph (b) provides that States shall cooperate, as appropriate, with other organizations. These organizations include non-governmental organizations that could play an important role in the prevention of crimes against humanity in specific countries. The term “as appropriate” is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.

(21) Draft article 4, paragraph 2, indicates that no exceptional circumstances may be invoked as a justification for the offence. This text is inspired by article 2, paragraph 2,

of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²¹³ but has been refined to fit better in the context of crimes against humanity. The expression “a state of war or a threat of war” has been replaced by the expression “armed conflict”, as was done in draft article 2. In addition, the words “such as” are used to stress that the examples given are not meant to be exhaustive.

(22) Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1, paragraph 2, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance contains similar language,²¹⁴ as does article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture.²¹⁵

(23) One advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors. At the same time, the paragraph is addressing this issue only in the context of the obligation of prevention and not, for example, in the context of possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility.

Article 5. Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Commentary

(1) Consistent with the broad objective of prevention addressed in draft article 4, draft article 5, paragraph 1, provides that no State shall send a person to territory under the jurisdiction of another State where there are substantial grounds for believing that such person would be in danger of being subjected to a crime against humanity. Thus, this provision uses the principle of *non-refoulement* to prevent persons in certain circumstances from being exposed to crimes against humanity.

²¹³ Article 2, paragraph 2, provides: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

²¹⁴ Article 1, paragraph 2, provides: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”

²¹⁵ Article 5 provides: “The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.”

the commentary to principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, p. 70; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 242, para. 29 (referring to “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control”).

²¹² Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 3.

(2) As a general matter, the principle of *non-refoulement* obligates a State not to return a person to another State where there are substantial grounds for believing that he or she will be in danger of persecution or some other specified harm. The principle was incorporated in various treaties during the twentieth century, including the 1949 Fourth Geneva Convention,²¹⁶ but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees.²¹⁷ Other conventions and instruments²¹⁸ addressing refugees have also incorporated the principle, such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.²¹⁹

(3) The principle also has been applied with respect to all aliens (not just refugees) in various instruments²²⁰ and treaties, such as the 1969 American Convention on Human Rights²²¹ and the 1981 African Charter on Human and Peoples' Rights.²²² Indeed, the principle was addressed in this broader sense in the Commission's 2014 draft articles on the expulsion of aliens.²²³ The Human Rights Committee and the European Court of Human Rights have construed the prohibition against torture or cruel, inhuman or degrading treatment, contained in article 7 of the 1966 International Covenant on Civil and Political Rights²²⁴ and article 3 of the 1950 European Convention on Human Rights²²⁵ respectively, as implicitly imposing

an obligation of *non-refoulement* even though these conventions contain no such express obligation. Further, the principle of *non-refoulement* is often reflected in extradition treaties, by stating that nothing in the treaty shall be interpreted as imposing an obligation to extradite an alleged offender if the requested State party has substantial grounds for believing the request has been made to persecute the alleged offender on specified grounds. Draft article 13, paragraph 9, of the present draft articles is a provision of this type.

(4) Of particular relevance for the present draft articles, the principle has been incorporated in treaties addressing particular crimes, such as torture and enforced disappearance. For example, article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(5) This provision was modelled on the 1951 Convention relating to the Status of Refugees, but added the additional element of extradition to cover another possible means by which a person is physically transferred to another State.²²⁶ Similarly, article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides that:

1. No State Party shall expel, return ("*refouler*"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

(6) The Commission deemed it appropriate to model draft article 5 after this latter provision. While, as in earlier conventions, the State's obligation under draft article 5, paragraph 1, is focused on avoiding exposure of a person to crimes against humanity, this provision is without prejudice to other obligations of *non-refoulement* upon the State arising from treaties or customary international law.

(7) Draft article 5, paragraph 1, provides that the State shall not send the person to another State "where there are substantial grounds for believing that he or she would be in danger" of being subjected to a crime against humanity. This standard has been addressed by various expert treaty bodies and by international courts. For example, the

²¹⁶ Geneva Convention IV, art. 45.

²¹⁷ Article 33, paragraph 1, provides: "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

²¹⁸ See, for example, Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, from 19 to 22 November 1984, conclusion 5; the text of the conclusions of the Declaration is reproduced in the annual report of the Inter-American Commission on Human Rights 1984–1985 (OAS/Ser.L/V/II.66, Doc. 10 rev.1), chap. V, and is also available from [www.acnur.org/cartagena30/en, Documents](http://www.acnur.org/cartagena30/en_Documents).

²¹⁹ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II, para. 3.

²²⁰ See, for example, Declaration on Territorial Asylum, General Assembly resolution 2312 (XXII) of 14 December 1967; "Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees", adopted by AALCO at its fortieth session, held in New Delhi on 24 June 2001, art. III (available from the AALCO website: www.aalco.int); Council of Europe, "Recommendation No. R(84)1 of the Committee of Ministers to member States on the protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees", adopted by the Committee of Ministers on 25 January 1984.

²²¹ American Convention on Human Rights, art. 22, para. 8.

²²² African Charter on Human and Peoples' Rights, art. 12, para. 3.

²²³ *Yearbook ... 2014*, vol. II (Part Two), para. 44, art. 23, para. 1 ("No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law").

²²⁴ See Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 9, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*").

²²⁵ See, for example, *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, Grand Chamber,

European Court of Human Rights, *Reports of Judgments and Decisions* 1996-V, para. 80.

²²⁶ A similar provision is included in the Charter of Fundamental Rights of the European Union, art. 19, para. 2 ("No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment").

Committee against Torture, in considering communications alleging that a State has violated article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has stated that “substantial grounds” exist whenever the risk of torture is personal, present, foreseeable and real.²²⁷ In determining whether such a risk exists, the risk of torture must be assessed on grounds that “go beyond mere theory or suspicion”, although “the risk does not have to meet the test of being highly probable”.²²⁸

(8) In guidance to States, the Human Rights Committee has indicated that States have an obligation “not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed”.²²⁹ In interpreting this standard, the Human Rights Committee has concluded that States must refrain from exposing individuals to a real risk of violations of their rights under the Covenant, as a “necessary and foreseeable consequence” of expulsion.²³⁰ It has further maintained that the existence of such a real risk must be decided “in the light of the information that was known, or ought to have been known” to the State party’s authorities at the time and does not require “proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk”.²³¹

(9) The European Court of Human Rights has found that a State’s obligation is engaged where there are substantial grounds for believing that an individual would face a real

risk of being subjected to treatment contrary to article 3 of the European Convention on Human Rights.²³² In applying this legal test, States must examine the “foreseeable consequences” of sending an individual to the receiving country.²³³ While a “mere possibility” of ill-treatment is not sufficient, it is not necessary to show that subjection to ill-treatment is “more likely than not”.²³⁴ The European Court of Human Rights has stressed that the examination of evidence of a real risk must be “rigorous”.²³⁵ Further, and similarly to the Human Rights Committee, the evidence of the risk “must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion”,²³⁶ though regard can be had to information that comes to light subsequently.²³⁷

(10) Draft article 5, paragraph 2, provides that States shall take into account “all relevant considerations” when determining whether there are substantial grounds for the purposes of paragraph 1. Such considerations include, but are not limited to, “the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law”. Indeed, various considerations may be relevant. When interpreting the International Covenant on Civil and Political Rights, the Human Rights Committee has stated that all relevant factors should be considered, and that “[t]he existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed”.²³⁸ The Committee against Torture has developed, for the purposes of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a non-exhaustive list of seven elements that need to be assessed in each individual case by a State party when determining if return is permissible.²³⁹

²²⁷ See, for example, Committee against Torture, *Dadar v. Canada*, communication No. 258/2004, decision adopted on 23 November 2005, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, annex VIII, sect. A, p. 241, para. 8.4; *N. S. v. Switzerland*, communication No. 356/2008, decision adopted on 6 May 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 44 (A/65/44)*, annex XIII, sect. A, p. 335, para. 7.3.

²²⁸ See also Committee against Torture, general comment No. 1 (1997) on the implementation of article 3, paras. 6–7, *ibid.*, *Fifty-third Session, Supplement No. 44 (A/53/44)*, annex IX, p. 52. At its fifty-fifth and fifty-eighth sessions, in 2015 and 2016 respectively, the Committee against Torture agreed to revise general comment No. 1. The draft revised text of 2 February 2017 (CAT/C/60/R.2) is available from www.ohchr.org/Documents/HRBodies/CAT/GCArticle3/CAT-C-GC-1.pdf. See also, for example, Committee against Torture, *A. R. v. Netherlands*, communication No. 203/2002, decision adopted on 14 November 2003, *ibid.*, *Fifty-ninth Session, Supplement No. 44 (A/59/44)*, annex VII, sect. A, para. 7.3.

²²⁹ Human Rights Committee, general comment No. 31 (see footnote 210 above), para. 12.

²³⁰ See, for example, Human Rights Committee, *Chitat Ng v. Canada*, communication No. 469/1991, Views adopted on 5 November 1993, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. II, annex IX, sect. CC, para. 15.1 (a); *A. R. J. v. Australia*, communication No. 692/1996, Views adopted on 28 July 1997, *ibid.*, *Fifty-second Session, Supplement No. 40 (A/52/40)*, vol. II, annex VI, sect. T, para. 6.14; *Hamida v. Canada*, communication No. 1544/2007, Views adopted on 18 March 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 40 (A/65/40)*, vol. II, annex V, sect. V, para. 8.7.

²³¹ See, for example, Human Rights Committee, *Maksudov et al. v. Kyrgyzstan*, communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, Views adopted on 16 July 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40 (A/63/40)*, vol. II, annex V, sect. W, para. 12.4.

²³² See, for example, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, European Court of Human Rights, Series A, No. 161, para. 88; *Chahal v. the United Kingdom* (footnote 225 above), para. 74.

²³³ See, for example, *Saadi v. Italy* [GC], Application No. 37201/06, Judgment of 28 February 2008, ECHR 2008, para. 130.

²³⁴ *Ibid.*, paras. 131 and 140.

²³⁵ *Ibid.*, para. 128.

²³⁶ *Ibid.*, para. 133.

²³⁷ See, for example, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], Application No. 39630/09, Judgment of 13 December 2012, ECHR 2012, para. 214.

²³⁸ See, for example, *Maksudov v. Kyrgyzstan* (footnote 231 above), para. 12.4.

²³⁹ Committee against Torture, general comment No. 1 (see footnote 228 above), para. 8. The list contains the following elements: (a) whether the State concerned is one for which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights; (b) whether the individual has been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past; (c) whether there is medical or other independent evidence to support a claim that the individual has been tortured or maltreated in the past; (d) whether the internal situation with respect to human rights in the State concerned has changed; (e) whether the individual has engaged in political or other activity within or outside the State concerned which would make him particularly vulnerable to the risk of being placed in danger of torture; (f) whether there is any evidence as to the credibility of the individual; and (g) whether there are any factual inconsistencies in the individual’s claim.

(11) The 1951 Convention relating to the Status of Refugees contains exceptions to the *non-refoulement* obligation to allow return where the person has committed a crime or presented a serious security risk.²⁴⁰ Treaties since that time, however, have not included such exceptions, treating the obligation as absolute in nature.²⁴¹ The Commission deemed it appropriate for draft article 5 to contain no such exception.

Article 6. 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 fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. 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.

7. 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.

8. 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 6 sets forth various measures that each State must take under its criminal law to ensure that crimes against humanity constitute offences, to preclude certain defences 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 Nürnberg recognized the importance of punishing individuals, *inter alia*, for crimes against humanity when it stated

²⁴⁰ Convention relating to the Status of Refugees, art. 33, para. 2.

²⁴¹ See, for example, *Maksudov v. Kyrgyzstan* (footnote 231 above), para. 12.4; *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, ECHR 2012 (extracts), para. 185; Committee against Torture, *Tapia Paez v. Sweden*, communication No. 39/1996, Views adopted on 28 April 1997, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 44 (A/52/44)*, annex V, sect. B 4, para. 14.5; *Abdussamatov et al. v. Kazakhstan*, communication No. 444/2010, decision adopted on 1 June 2012, *ibid.*, *Sixty-seventh Session, Supplement No. 44 (A/67/44)*, annex XIV, sect. A, p. 530, para. 13.7.

that “[c]rimes 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”.²⁴² 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 “[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”.²⁴³ 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”. The preamble to the 1998 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.²⁴⁴ 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.

(4) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 4, paragraph 1, that “[e]ach 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:

²⁴² Judgment of 30 September 1946, *Trial of the Major War Criminals* ... vol. XXII (see footnote 28 above), p. 466.

²⁴³ *Yearbook* ... 1950, vol. II, document A/1316, p. 374, para. 97 (principle I).

²⁴⁴ See *Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12 OA, *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”*, 27 May 2015, Appeals Chamber, International Criminal Court (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).

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.²⁴⁵

(5) To help avoid such loopholes with respect to crimes against humanity, draft article 6, 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 6, 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 6, 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 6 (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 the 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.²⁴⁶ Some

²⁴⁵ See Committee against Torture, general comment No. 2 (footnote 200 above), para. 9; see also Committee against Torture, *Official Records of the General Assembly, 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.

²⁴⁶ 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 Persons, art. III; International Convention for the Suppression of Terrorist Bombings, art. 4; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism, art. 2 (a); International Convention for the Suppression of the Financing of Terrorism, art. 4; 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 (ASEAN) Convention on Counter-Terrorism, art. IX, para. 1.

treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide²⁴⁷ and the 1949 Geneva Conventions,²⁴⁸ contain an obligation to enact “legislation”, but the Commission viewed it appropriate to model draft article 6, paragraph 1, on more recent treaties, such as the 1984 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 6, 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 Nürnberg Charter, in article 6, 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”. Likewise, the statutes of both the International Tribunal for the Former Yugoslavia²⁴⁹ and the International Criminal Tribunal for Rwanda²⁵⁰ provided 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”.²⁵¹ Similarly, the instruments regulating the Special Court for Sierra Leone,²⁵² the Special Panels for Serious Crimes in East Timor,²⁵³ the Extraordinary

Chambers in the Courts of Cambodia,²⁵⁴ the Supreme Iraqi Criminal Tribunal²⁵⁵ and the Extraordinary African Chambers within the Senegalese Judicial System²⁵⁶ 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 inevitably 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.²⁵⁷

(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 contained 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 the completion of the crime.²⁵⁸ 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”.²⁵⁹

(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,

²⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

²⁴⁸ Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV. The 2016 commentary of ICRC on article 49 (Penal sanctions) of Geneva Convention I is available from www.icrc.org.

²⁴⁹ Statute of the International Tribunal for the Former Yugoslavia, art. 7, para. 1.

²⁵⁰ Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

²⁵¹ Rome Statute, art. 25, paras. 2 and 3 (a).

²⁵² Statute of the Special Court for Sierra Leone, art. 6.

²⁵³ 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”).

²⁵⁴ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 5. See also 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.

²⁵⁵ Statute of the Iraqi Special Tribunal, ILM, vol. 43 (2004), p. 231, art. 10 (b) (hereinafter “Supreme Iraqi Criminal Tribunal Statute”). The Interim Government of Iraq 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, of 18 October 2005.

²⁵⁶ 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, ILM, vol. 52 (2013), pp. 1028–1029, arts. 4 (b) and 6 (hereinafter “Extraordinary African Chambers Statute”).

²⁵⁷ Convention on the Prevention and Punishment of the Crime of Genocide, arts. III (a) and IV.

²⁵⁸ Rome Statute, art. 25, para. 3 (f).

²⁵⁹ *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, 7 March 2011, Pre-Trial Chamber I, International Criminal Court, para. 96.

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.”²⁶⁰ The Statute of the International Criminal Tribunal for Rwanda used virtually identical language.²⁶¹ Both tribunals have convicted defendants for participation in such offences within their respective jurisdictions.²⁶² Similarly, the instruments regulating the Special Court for Sierra Leone,²⁶³ the Special Panels for Serious Crimes in East Timor,²⁶⁴ the Extraordinary Chambers in the Courts of Cambodia,²⁶⁵ the Supreme Iraqi Criminal Tribunal²⁶⁶ and the Extraordinary African Chambers within the Senegalese Judicial System²⁶⁷ all provided for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

(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 for “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.²⁶⁸ The Commission decided to use the various terms set forth in the Rome Statute as the basis for the terms used in draft article 6, 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”.²⁶⁹ The Convention on the Non-Applicability of Statutory Limitations to War Crimes

and Crimes against Humanity broadly provides that “[i]f 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”.²⁷⁰

(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.”²⁷¹ The language of draft article 6, paragraph 2, takes the same approach.

Command or other superior responsibility

(16) Draft article 6, 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.²⁷²

²⁶⁰ Statute of the International Tribunal for the Former Yugoslavia, art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Tadić*, Judgment, 15 July 1999 (footnote 46 above), p. 189, para. 220 (finding that “the notion of common design as a form of accomplice liability is firmly established in customary international law”).

²⁶¹ Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

²⁶² See, for example, *Furundžija*, Judgment, 10 December 1998 (footnote 26 above), para. 246 (finding that “[i]f 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”).

²⁶³ Statute of the Special Court for Sierra Leone, art. 6, para. 1.

²⁶⁴ East Timor Tribunal Charter, sect. 14.

²⁶⁵ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 29.

²⁶⁶ Supreme Iraqi Criminal Tribunal Statute, art. 15.

²⁶⁷ Extraordinary African Chambers Statute, art. 10.

²⁶⁸ Rome Statute, art. 25, para. 3 (a)–(d).

²⁶⁹ Convention on the Prevention and Punishment of the Crime of Genocide, art. III (b)–(e).

²⁷⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. II.

²⁷¹ International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (a).

²⁷² See, for example, *United States of America v. Wilhelm von Leeb, et al.* (“The High Command Case”), in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. XI, Washington, D.C., United States Government Printing Office, 1950, pp. 543–544.

Notably, the Nürnberg and Tokyo tribunals used command responsibility with respect to both military and civilian commanders, an approach that influenced later tribunals.²⁷³ As indicated by a Trial Chamber of the International Criminal Tribunal for Rwanda in *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.”²⁷⁴

(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.”²⁷⁵ Several defendants were convicted by the International Tribunal for the Former Yugoslavia on such a basis.²⁷⁶ The same language appears in the Statute of the International Criminal Tribunal for Rwanda,²⁷⁷ which also convicted several defendants on such a basis.²⁷⁸ Similar language appears in the instruments regulating the Special Court for Sierra Leone,²⁷⁹ the Special Tribunal for Lebanon,²⁸⁰ the Special Panels for Serious Crimes in East Timor,²⁸¹ the Extraordinary Chambers in the Courts of Cambodia,²⁸² the Supreme Iraqi Criminal Tribunal²⁸³ and the Extraordinary African Chambers within the Senegalese Judicial System.²⁸⁴

²⁷³ *Ibid.*; see also M.C. Bassiouni (ed.), *International Criminal Law*, 3rd ed., vol. III, *International Enforcement*, Leiden, Martinus Nijhoff, 2008, p. 461; and K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford, Oxford University Press, 2011, pp. 262–263.

²⁷⁴ See *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment and sentence, 27 January 2000, Trial Chamber I, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 2000*, vol. II, p. 1512, at p. 1562, para. 132.

²⁷⁵ Statute of the International Tribunal for the Former Yugoslavia, art. 7, para. 3.

²⁷⁶ See, for example, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, p. 513, at pp. 565–573, paras. 66–77; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, vol. 2, p. 951, at pp. 1201–1255 and 1385–1523, paras. 330–400 and 605–810.

²⁷⁷ Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 3.

²⁷⁸ See *Akayesu*, Judgment, 2 September 1998 (footnote 53 above); *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and sentence, 4 September 1998, Trial Chamber, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 1998*, vol. II, p. 780.

²⁷⁹ Statute of the Special Court for Sierra Leone, art. 6, para. 3.

²⁸⁰ Statute of the Special Tribunal for Lebanon, Security Council resolution 1757 (2007) of 30 May 2007 (annex and attachment included), art. 3, para. 2.

²⁸¹ East Timor Tribunal Charter, sect. 16.

²⁸² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 29.

²⁸³ Supreme Iraqi Criminal Tribunal Statute, art. 15.

²⁸⁴ Extraordinary African Chambers Statute, art. 10.

(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.²⁸⁵ 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, in both 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.²⁸⁶

(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 appropriate to elaborate a clear standard so as to encourage harmonization of national laws on this issue.²⁸⁷ To that end, draft article 6, paragraph 3, is modelled on the standard set forth in the Rome Statute.

²⁸⁵ See, for example, *Kordić*, Judgment, 26 February 2001 (footnote 46 above), para. 369.

²⁸⁶ *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), paras. 630, 638 and 734.

²⁸⁷ See the 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 of 21 April 2005 on impunity, 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”).

(22) Treaties addressing offences other than crimes against humanity also often acknowledge an offence in the form of command or other superior responsibility.²⁸⁸

Superior orders

(23) Draft article 6, 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 substantive 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 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.²⁸⁹ 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".²⁹⁰ 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."

(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,²⁹¹ the International Criminal Tribunal for Rwanda,²⁹² the Special Court for Sierra Leone,²⁹³ the Special Tribunal for Lebanon,²⁹⁴ the Special Panels for Serious Crimes in East Timor,²⁹⁵ the Extraordinary Chambers in the Courts of Cambodia,²⁹⁶ the Supreme Iraqi Criminal Tribunal²⁹⁷ and the Extraordinary African Chambers within the Senegalese Judicial System²⁹⁸ 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.²⁹⁹

(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,³⁰⁰ the 1985 Inter-American Convention to Prevent and Punish Torture,³⁰¹ the 1994 Inter-American Convention on the Forced Disappearance of Persons,³⁰² and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.³⁰³ In the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticized national legislation that

²⁹¹ Statute of the International Tribunal for the Former Yugoslavia, art. 7, para. 4.

²⁹² Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4.

²⁹³ Statute of the Special Court for Sierra Leone, art. 6, para. 4.

²⁹⁴ Statute of the Special Tribunal for Lebanon, art. 3, para. 3.

²⁹⁵ East Timor Tribunal Charter, sect. 21.

²⁹⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 29.

²⁹⁷ Supreme Iraqi Criminal Tribunal Statute, art. 15.

²⁹⁸ Extraordinary African Chambers Statute, art. 10, para. 5.

²⁹⁹ See, for example, Statute of the International Tribunal for the Former Yugoslavia, art. 7, para. 4; Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4; Statute of the Special Court for Sierra Leone, art. 6, para. 4; East Timor Tribunal Charter, sect. 21.

³⁰⁰ 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").

³⁰¹ 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").

³⁰² 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").

³⁰³ 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 (footnote 165 above), art. 6).

²⁸⁸ 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.

²⁸⁹ See Commission on Human Rights resolution 2005/81 on impunity (footnote 287 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").

²⁹⁰ Judgment of 30 September 1946, *Trial of the Major War Criminals* ... vol. XXII (see footnote 28 above), p. 466.

permits such a defence or is ambiguous on the issue.³⁰⁴ 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.³⁰⁵

Official position

(28) Draft article 6, paragraph 5, provides that the fact that the offence was committed "by a person holding an official position" does not exclude substantive criminal responsibility. The inability to assert the existence of an official position as a substantive defence to criminal responsibility before international criminal tribunals is a well-established principle of international law. The Nürnberg Charter provided: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."³⁰⁶ The Commission's 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided: "The fact that a person who committed an act which constitutes a crime under international law [i.e., crimes against humanity, crimes against peace, and war crimes] acted as Head of State or responsible Government official does not relieve him from responsibility under international law."³⁰⁷ The Tokyo Charter 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."³⁰⁸

(29) The Commission's 1954 draft Code of Offences against the Peace and Security of Mankind provided: "The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code."³⁰⁹ The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind provided: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."³¹⁰

The Rome Statute provides: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."³¹¹

(30) The inability to use official position as a substantive defence to criminal responsibility is also addressed in some treaties relating to national criminal jurisdiction. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides that individuals "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".³¹² The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid provides that "[i]nternational criminal responsibility shall apply ... to ... representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State".³¹³

(31) In the light of such precedents, the Commission deemed it appropriate to include paragraph 5, which provides that 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 by a person holding an official position is not a ground for excluding criminal responsibility". For the purposes of the present draft articles, paragraph 5 means that an alleged offender cannot raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.³¹⁴ Further, paragraph 5 is without prejudice to the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction".

(32) The Commission did not find it necessary to include language in paragraph 5 specifying that one's official position cannot be raised as a ground for mitigation

³⁰⁴ 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 submitted by States parties under article 19 of the Convention, Guatemala, para. 32 (13).

³⁰⁵ 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 submitted 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 submitted 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").

³⁰⁶ Nürnberg Charter, art. 7.

³⁰⁷ *Yearbook ... 1950*, vol. II, document A/1316, p. 375 (principle III). Although principle III is based on article 7 of the Nürnberg Charter, the Commission omitted the phrase "or mitigating punishment", because it viewed mitigation as an issue "for the competent Court to decide" (*ibid.*, para. 104).

³⁰⁸ Tokyo Charter, art. 6.

³⁰⁹ *Yearbook ... 1954*, vol. II, document A/2693, para. 54, p. 152, art. 3.

³¹⁰ *Yearbook ... 1996*, vol. II (Part Two), p. 26, art. 7.

³¹¹ Rome Statute, art. 27, para. 1.

³¹² Convention on the Prevention and Punishment of the Crime of Genocide, art. IV.

³¹³ International Convention on the Suppression and Punishment of the Crime of Apartheid, art. III.

³¹⁴ See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3, at p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law"). See also *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09, decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, Pre-Trial Chamber II, International Criminal Court, para. 109 ("[T]he Genocide Convention, unlike the [Rome] Statute in article 27 (2), does not mention immunities based on official capacity, and the majority does not see a convincing basis for a constructive interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities. Article IV of the Convention speaks of individual criminal responsibility of 'persons committing genocide'—which, as convincingly explained by the International Court of Justice, must not be confused with immunity from criminal jurisdiction").

or reduction of sentence, because the issue of punishment is addressed in draft article 6, paragraph 7. According to that paragraph, States are required, in all circumstances, to ensure that crimes against humanity are punishable by appropriate penalties that take into account their grave nature. Such language should be understood as precluding the invoking of official position as a ground for mitigation or reduction of sentence.

Statutes of limitations

(33) 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 6, paragraph 6, 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.

(34) 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 Criminal 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”.³¹⁵ Likewise, the Rome Statute expressly addresses the matter, providing that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”.³¹⁶ The drafters of the Rome Statute strongly supported this provision as applied to crimes against humanity.³¹⁷ Similarly, the Law on the Establishment of Extraordinary Chambers in 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.³¹⁸

(35) 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”.³¹⁹ The following year, States adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which requires States 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.³²⁰ 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.³²¹ 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.

(36) 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 1984 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.³²² Similarly, while the 1966 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.³²³ In contrast, the 2006 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) [i]s of long duration and is proportionate to the extreme seriousness of this offence”.³²⁴

³¹⁹ 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.

³²⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. IV.

³²¹ European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, art. 1.

³²² 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 submitted by States parties under article 19 of the Convention, Italy, para. 40 (19).

³²³ 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).

³²⁴ 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 “[c]riminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations” (art. VII).

³¹⁵ Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (see footnote 106 above), art. II, para. 5.

³¹⁶ Rome Statute, art. 29.

³¹⁷ 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...* (A/CONF.183/13 (Vol. II)) (footnote 57 above), 2nd meeting of the Committee of the Whole (A/CONF.183/C.1/SR.2), p. 138, paras. 45–74.

³¹⁸ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 5; Supreme Iraqi Criminal Tribunal Statute, art. 17 (d); East Timor Tribunal Charter, 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 jurisdiction over crimes against humanity committed decades prior to their establishment, between 1975 and 1979, when the Khmer Rouge held power.

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 there should be no statute of limitations—and all other offences under the Convention.³²⁵

Appropriate penalties

(37) Draft article 6, paragraph 7, 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.

(38) The Commission provided in its 1996 draft Code of Crimes against the Peace and Security of Mankind that “[a]n 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”.³²⁶ The commentary further explained that the “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”.³²⁷ 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”.³²⁸

(39) 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 “[t]he 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”.³²⁹ Furthermore, the International 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”.³³⁰ 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”.³³¹ 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”.³³² Similar formulations may be found

in the instruments regulating the Special Court for Sierra Leone,³³³ the Special Tribunal for Lebanon,³³⁴ the Special Panels for Serious Crimes in East Timor,³³⁵ the Extraordinary Chambers in the Courts of Cambodia,³³⁶ the Supreme Iraqi Criminal Tribunal,³³⁷ and the Extraordinary African Chambers within the Senegalese Judicial System.³³⁸ 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.

(40) 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.³³⁹ The 1948 Convention on the Prevention and Punishment of the Crime of Genocide simply calls for “effective penalties for persons guilty of genocide or of any of the other acts enumerated ...”.³⁴⁰ The 1949 Geneva Conventions 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 ...”.³⁴¹ 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 Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.³⁴² That

³³³ Statute of the Special Court for Sierra Leone, art. 19.

³³⁴ Statute of the Special Tribunal for Lebanon, art. 24.

³³⁵ East Timor Tribunal Charter, sect. 10.

³³⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 39.

³³⁷ Supreme Iraqi Criminal Tribunal Statute, art. 24.

³³⁸ Extraordinary African Chambers Statute, art. 24.

³³⁹ 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), para. 58 (indicating that “[s]everal delegations welcomed the room for manoeuvre granted to States” in this provision); see also the 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 19th meetings of the Committee), 13th meeting (15 August 1977), para. 4 (similar comments by the representative of the United States of America); and Commission on Human Rights resolution 2005/81 on impunity (footnote 287 above), para. 15 (calling upon “all States ... to ensure that penalties are appropriate and proportionate to the gravity of the crime”).

³⁴⁰ Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

³⁴¹ Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146; see 2016 ICRC Commentary on art. 49 of Geneva Convention I (footnote 248 above), paras. 2838–2846.

³⁴² 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, in 1972, see *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 312, at p. 315, art. 2, para. 2.

³²⁵ 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), paras. 43–46 and 56.

³²⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 22, art. 3.

³²⁷ *Ibid.*, para. (3) of the commentary to article 3.

³²⁸ *Ibid.*

³²⁹ Statute of the International Tribunal for the Former Yugoslavia, art. 24, para. 1.

³³⁰ *Ibid.*, art. 24, para. 2.

³³¹ Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 1.

³³² Rome Statute, art. 77, para. 1 (b).

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.³⁴³ Since 1973, this approach—that each “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 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁴⁴ In some treaties, the issue of gravity is expressed using terms such as “extreme seriousness”, “serious nature” or “extreme gravity” of the offences.³⁴⁵

Legal persons

(41) Paragraphs 1 to 7 of draft article 6 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 8, in contrast, addresses the liability of “legal persons” for the offences referred to in draft article 6.

(42) 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.³⁴⁶ In States where the concept is known, such liability sometimes exists with respect to international crimes.³⁴⁷ Acts that can lead to such liability are, of course, committed by natural persons, who act as officials, directors or 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.

(43) Criminal liability of legal persons has not featured significantly to date in the international criminal

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.³⁴⁸ 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”³⁴⁹ and, although proposals for inclusion of a provision on such responsibility were made, the Rome Statute ultimately did not contain such a provision.

(44) 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 1949 Geneva Conventions; 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 against the Peace and Security of Mankind only addressed the criminal responsibility of “an individual”.³⁵⁰

(45) 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.³⁵¹ Further, although criminal jurisdiction over 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

³⁴³ *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 316 (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), para. (12) of the commentary to article 2.

³⁴⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, para. 2; 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).

³⁴⁵ 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.

³⁴⁶ See, for example, *New TV S.A.L. and Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Decision of 2 October 2014 on interlocutory appeal concerning personal jurisdiction in contempt proceedings, Appeals Panel*, Special Tribunal for Lebanon, para. 58 (“the practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems”).

³⁴⁷ See, for example, Ecuador Código Orgánico Integral Penal, *Registro Oficial, Suplemento, Año I*, No. 180, 10 February 2014, art. 90 (Penalty for a legal person), providing, in a section addressing crimes against humanity, that: “When a legal person is responsible for any of the crimes of this Section, it will be penalized by its dissolution”.

³⁴⁸ See, for example, *United States v. Krauch and others, Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII–VIII, Washington, D.C., United States Government Printing Office, 1953 and 1952, respectively.

³⁴⁹ *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. E.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), p. 31, para. 6, footnote 71.

³⁵⁰ *Yearbook ... 1996*, vol. II (Part Two), p. 18, art. 2.

³⁵¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), annex, article 46C of the Statute of the Court as amended by the Malabo Protocol.

concluded in 2014 that the Tribunal had jurisdiction to prosecute a legal person for contempt of court.³⁵²

(46) 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;³⁵³ the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;³⁵⁴ the 1999 International Convention for the Suppression of the Financing of Terrorism;³⁵⁵ the 2000 United Nations Convention against Transnational Organized Crime;³⁵⁶ the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;³⁵⁷ the 2003 United Nations Convention against Corruption;³⁵⁸ the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;³⁵⁹ and a series of treaties concluded within the Council of Europe.³⁶⁰ Other regional instruments address the issue as well, mostly in the context of corruption.³⁶¹ Such treaties

³⁵² *New TV S.A.L. and Karma Mohamed Tahsin Al Khayat, Appeals Panel, Decision of 2 October 2014* (see footnote 346 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.) and Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ, Contempt Judge, Decision of 18 September 2015, Special Tribunal for Lebanon, para. 55; Al Jadeed [Co.] S.A.L./New T.V.S.A.L.(N.T.V.) and Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/A/AP, Appeals Panel, Decision of 8 March 2016.*

³⁵³ 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”).

³⁵⁴ 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”).

³⁵⁵ 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).

³⁵⁶ United Nations Convention against Transnational Organized Crime, art. 10.

³⁵⁷ 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.

³⁵⁸ United Nations Convention against Corruption, art. 26. For background, see United Nations Office on Drugs and Crime (UNODC), *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 revised ed., New York, 2012, pp. 88–93. 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”).

³⁵⁹ 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.

³⁶⁰ 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 European Convention on the Suppression of Terrorism, art. 10.

³⁶¹ See, for example, Inter-American Convention against Corruption, art. VIII; Southern African Development Community Protocol against Corruption, art. 4, para. 2; African Union Convention on Preventing and Combating Corruption, art. 11, para. 1.

typically do not define the term “legal person”, leaving it to national legal systems to apply whatever definition would normally operate therein.

(47) 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.

(48) Paragraph 8 of draft article 6 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 2000³⁶² and entered into force in 2002. As of July 2017, 173 States are parties 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”.

(49) Paragraph 8 of draft article 6 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 8 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 8 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.³⁶³ Likewise, the liability of 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

³⁶² General Assembly resolution 54/263 of 25 May 2000, annex II.

³⁶³ The Council of Europe Criminal Law Convention on Corruption makes explicit such exclusion (see, for example, article 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”).

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.³⁶⁴

(50) 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.

(51) For measures that are adopted, the second sentence of paragraph 8 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 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 United Nations Convention against Transnational Organized Crime³⁶⁵ and the United Nations Convention against Corruption.³⁶⁶ 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 6.

Article 7. Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles 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;

³⁶⁴ 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.) and Karma Mohamed Tahsin Al Khayat, Contempt Judge*, Decision of 18 September 2015 (footnote 352 above), paras. 63–67.

³⁶⁵ United Nations Convention against Transnational Organized Crime, 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”).

³⁶⁶ United Nations Convention against Corruption, 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 covered by the present draft articles 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 7 provides that each State must establish jurisdiction over the offences covered by the present draft articles in certain cases, such as when the crime occurs in territory under its jurisdiction or 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”.³⁶⁷ 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”.³⁶⁸ 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”.³⁶⁹ At the same time, such treaties typically only obligate a State party

³⁶⁷ *Yearbook ... 1996*, vol. II (Part Two), p. 27, art. 8.

³⁶⁸ *Ibid.*, p. 28 (para. (5) of the commentary to article 8).

³⁶⁹ 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.

to exercise its jurisdiction when an alleged offender is present in the State party's territory (see draft article 9 below), 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 a competent international tribunal (see draft article 10 below).

(4) Reflecting on the acceptance of such an obligation in treaties, and in particular within the 1984 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.³⁷⁰

(5) Provisions comparable to those appearing in draft article 7 exist in many treaties addressing crimes.³⁷¹ While no treaty yet exists relating to crimes against humanity, Judges Higgins, Kooijmans and Buergenthal indicated in their separate opinion in the case concerning the *Arrest Warrant of 11 April 2000* 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.³⁷²

(6) Draft article 7, 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, as was the case for draft article 4, is intended to encapsulate the territory *de jure* of the State, as well as other territory under its jurisdiction. 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 7, 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 1979 International Convention against the Taking of Hostages.

(8) Draft article 7, 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 7, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in 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 7, 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 offender accountable.³⁷³ In their joint separate opinion

³⁷⁰ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 25 above), p. 451, para. 75.

³⁷¹ 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.

³⁷² *Arrest Warrant of 11 April 2000* (see footnote 314 above), joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, p. 78, para. 51.

³⁷³ See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, revised draft United Nations Convention against Transnational Organized Crime, fifth session, Vienna, 4–15 October 1999 (A/AC.254/4/Rev.4), footnote 102; see also Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, para. 83, *European Treaty Series*, No. 173

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.³⁷⁴

(11) Establishment of the various types of national jurisdiction set out in draft article 7 is important for supporting an *aut dedere aut judicare* obligation, as set forth in draft article 10. 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.³⁷⁵

Article 8. 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 8 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 9, paragraph 2.

(“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”).

³⁷⁴ *Arrest Warrant of 11 April 2000* (see footnote 314 above), joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 78–79, para. 51.

³⁷⁵ *Ibid.*, separate opinion of President Guillaume, p. 39, para. 9.

(2) A comparable obligation has featured in some treaties addressing other crimes.³⁷⁶ For example, article 12 of the 1984 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.³⁷⁷ 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”.³⁷⁸

(3) The Committee against Torture has also found violations of article 12 if the State’s investigation is not “prompt and impartial”.³⁷⁹ 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 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”.³⁸⁰ The rationale underlying the promptness requirement is that physical traces that may prove torture can quickly disappear and that victims may be in danger of further torture, which a prompt investigation may be able to prevent.³⁸¹

³⁷⁶ 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.

³⁷⁷ 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.

³⁷⁸ 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.

³⁷⁹ 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.

³⁸⁰ *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.

³⁸¹ *Encarnación Blanco Abad v. Spain* (see footnote 377 above), para. 8.2.

(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”.³⁸² 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”.³⁸³ 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.³⁸⁴

(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 1966 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.³⁸⁵ Regional human rights bodies have also interpreted their legal instruments as implicitly containing a duty to conduct an investigation.³⁸⁶

Article 9. 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 covered by the present draft articles 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 7, 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 9 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 7, 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”.³⁸⁷ Similarly, 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

³⁸² 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.

³⁸³ *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).

³⁸⁴ *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.

³⁸⁵ See Human Rights Committee, general comment No. 31 (footnote 210 above), para. 15; see also *Nazriev v. Tajikistan*, communication No. 1044/2002, Views adopted on 17 March 2006, para. 8.2, *Official Records of the General Assembly, 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.

³⁸⁶ See, for example, *Ergi v. Turkey*, Judgment, 28 July 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-IV, paras. 82 and 85–86; *Bati and Others v. Turkey*, Applications Nos. 33097/96 and 57834/00, Final Judgment of 3 September 2004, ECHR 2004-IV (extracts), 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.), p. 563.

³⁸⁷ 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.

norms of international law”³⁸⁸ 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”³⁸⁹.

(5) Treaties addressing crimes typically provide for such preliminary measures,³⁹⁰ such as article 6 of the 1984 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 ...”³⁹¹ 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”³⁹² 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”³⁹³ 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”³⁹⁴.

Article 10. 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

³⁸⁸ 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.

³⁸⁹ Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

³⁹⁰ 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.

³⁹¹ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 25 above), p. 450, para. 72.

³⁹² *Ibid.*, p. 453, para. 83.

³⁹³ *Ibid.*, p. 454, para. 86.

³⁹⁴ *Ibid.*, p. 451, para. 74.

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 10 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 Commission³⁹⁵ and that is contained in numerous multilateral treaties addressing crimes.³⁹⁶ 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.”³⁹⁷

(3) Most multilateral treaties containing such an obligation³⁹⁸ use what is referred to as “the Hague formula”,

³⁹⁵ See *Yearbook ... 2014*, vol. II (Part Two), chap. VI.

³⁹⁶ See the study by the Secretariat entitled “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.

³⁹⁷ *Yearbook ... 1996*, vol. II (Part Two), p. 30, art. 9; see also Commission on Human Rights resolution 2005/81 on impunity (footnote 287 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”).

³⁹⁸ 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 (SAARC) Regional Convention on Suppression of Terrorism; Inter-American Convention on the Forced Disappearance of Persons, art. VI; 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; Criminal Law Convention on Corruption, art. 27, para. 5; Convention of the Organisation of the Islamic Conference on Combating International Terrorism, art. 6; Council of Europe, 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.

after the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.³⁹⁹ 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.⁴⁰⁰ The *travaux préparatoires* of the 1970 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”.⁴⁰¹

(4) In the case concerning *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 1984 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 ...

...

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.⁴⁰²

(5) The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;⁴⁰³ referral of the matter to a regional organization;⁴⁰⁴ or difficulties with implementation under the State’s internal law.⁴⁰⁵

(6) The first sentence of draft article 10 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.⁴⁰⁶ 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 10 is written so as not to limit the use of the terms in that way. The terminology used in national criminal systems and in international relations can vary⁴⁰⁷ and, for that reason, the

³⁹⁹ See, in particular, article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft.

⁴⁰⁰ See the study by the Secretariat entitled “Survey of multilateral conventions ...” (A/CN.4/630) (footnote 396 above), pp. 357–358, paras. 145–147.

⁴⁰¹ Statement of Chairperson Gilbert Guillaume (Chairperson of the Subcommittee of the Legal Committee on the Unlawful Seizure of Aircraft and delegate of France), International Civil Aviation Organization, *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.

⁴⁰² *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 25 above), pp. 454–456 and 460–461, paras. 90–91, 94–95, 114–115 and 120.

⁴⁰³ *Ibid.* p. 460, para. 112.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*, para. 113.

⁴⁰⁶ See *Yearbook ... 2014*, vol. II (Part Two), chap. VI, sect. C, para. (35), pp. 100–101.

⁴⁰⁷ 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 of 18 July 2002, p. 1. Article 1, paragraph 1, of the framework decision provides: “The European arrest warrant is a

Commission considered that a more general formulation is preferable. Further, while draft article 10 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,⁴⁰⁸ such a qualification was viewed as unnecessary.

(7) The second sentence of draft article 10 provides that, when a State submits the matter to prosecution, 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.

(8) The obligation upon a State to submit the case to the competent authorities may conflict with the ability of the State to implement an amnesty, meaning legal measures that have the effect of prospectively barring criminal prosecution of certain individuals (or categories of individuals) in respect of specified criminal conduct alleged to have been committed before the amnesty’s adoption, or legal measures that retroactively nullify legal liability previously established.⁴⁰⁹ An amnesty granted by a State in which crimes have occurred may arise pursuant to its constitutional, statutory, or other law, and might be the product of a peace agreement ending an armed conflict. Such an amnesty might be general in nature or might be conditioned by certain requirements, such as disarmament of a non-State actor group, a willingness of an alleged offender to testify in public to the crimes committed, or an expression of apology to the victims or their families by the alleged offender.

(9) With respect to prosecution before international criminal tribunals, the possibility of including a provision on amnesty was debated during the negotiation of the 1998 Rome Statute of the International Criminal Court, but no such provision was included. Nor was such a provision included in the statutes of the international criminal tribunals for the former Yugoslavia or Rwanda. The former, however, held that an amnesty adopted in national law in relation to the offence of torture “would not be accorded international legal recognition”.⁴¹⁰ The instruments establishing the Special Court for Sierra Leone⁴¹¹ and the Extraordinary Chambers in the Courts of Cambodia⁴¹² provided that an amnesty adopted in national law

is not a bar to their respective jurisdictions. In addition, these courts recognized that there is a “crystallising international norm”⁴¹³ or “emerging consensus”⁴¹⁴ prohibiting amnesties in relation to serious international crimes, particularly in relation to blanket or general amnesties, based on a duty to investigate and prosecute those crimes and punish their perpetrators.

(10) With respect to prosecution before national courts, recently negotiated treaties addressing crimes in national law, including treaties addressing serious crimes, have not expressly precluded amnesties. For example, the possibility of including a provision on amnesty was raised during the negotiation of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, but no such provision was included.⁴¹⁵ Regional human rights courts and bodies, including the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples’ Rights, however, have found amnesties to be impermissible or as not precluding accountability under regional human rights treaties.⁴¹⁶ Expert treaty bodies have interpreted their respective treaties as precluding a State party from passing, applying or not revoking amnesty laws.⁴¹⁷ Further, the position of the Secretariat of

been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers”).

⁴¹³ See *Prosecutor v. Kallon and Kamara*, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004, Appeals Chamber, Special Court for Sierra Leone, paras. 66–74 and 82–84.

⁴¹⁴ See *Decision on Ieng Sary’s Rule 89 Preliminary Objections* (Ne bis in idem and Amnesty and Pardon), Case No. 002/19-09-2007/ECCC/TC, Judgment of 3 November 2011, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, paras. 40–53.

⁴¹⁵ 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), paras. 73–80.

⁴¹⁶ See, for example, *Barrios Altos v. Peru*, Judgment of 14 March 2001 (Merits), Inter-American Court of Human Rights, Series C, No. 75, paras. 41–44; *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (footnote 26 above), para. 114; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication No. 245/02, Decision of 15 May 2006, African Commission on Human and Peoples’ Rights, paras. 211–212. The European Court of Human Rights has taken a more cautious approach, recognizing the “growing tendency in international law” to regard amnesties for grave breaches of fundamental human rights as unacceptable, as they are incompatible with the unanimously recognized obligation of States to prosecute and punish such crimes. See *Marguš v. Croatia* [GC], Application No. 4455/10, Judgment of 27 May 2014, ECHR 2014 (extracts), para. 139.

⁴¹⁷ See, for example, Human Rights Committee, general comment No. 20 (footnote 224 above), para. 15; Human Rights Committee, general comment No. 31 (footnote 210 above), para. 18; Human Rights Committee, *Hugo Rodríguez v. Uruguay*, communication No. 322/1988, Views adopted on 19 July 1994, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. II, annex IX, sect. B, para. 12.4. The Committee against Torture has held that amnesties against torture are incompatible with the obligations of States parties under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See, for example, general comment No. 3 (2012) on the implementation of article 14, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X, para. 41. The Committee on the Elimination of Discrimination against Women has also recommended that States parties ensure that substantive aspects of transitional justice mechanisms guarantee women’s access to justice by, *inter alia*, rejecting amnesties for gender-based violations. See Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, *ibid.*, *Sixty-ninth Session, Supplement No. 38* (A/69/38), Part Two, chap. VII, para. 44, and CEDAW/C/GC/30, para. 81 (b).

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.”

⁴⁰⁸ See International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 1.

⁴⁰⁹ *Rule-of-Law Tools for Post-Conflict States: Amnesties* (United Nations publication, Sales No. E.09.XIV.1), p. 5.

⁴¹⁰ *Furundžija*, Judgment, 10 December 1998 (see footnote 26 above), para. 155.

⁴¹¹ Statute of the Special Court for Sierra Leone, art. 10 (“An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution”).

⁴¹² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 40 (“The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have

the United Nations is not to recognize or condone amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights for United Nations-endorsed peace agreements.⁴¹⁸ Since the entry into force of the Rome Statute, several States have adopted national laws that prohibited amnesties and similar measures with respect to crimes against humanity.⁴¹⁹

(11) With respect to the present draft articles, it is noted that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence.⁴²⁰ Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others.

Article 11. Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles 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.

⁴¹⁸ See, for example, the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, of 23 August 2004 (S/2004/616), paras. 10, 32 and 64 (c). This practice was first manifested when the Special Representative of the Secretary-General of the United Nations attached a disclaimer to the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999 (S/1999/777, annex)) stating that "the amnesty provision contained in article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law" (report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, para. 23). For additional views, see *Rule-of-Law Tools for Post-Conflict States* ... (footnote 409 above), p. 11 ("Under various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) [p]revent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) [i]nterfere with victims' right to an effective remedy, including reparation; or (c) [r]estrict victims' and societies' right to know the truth about violations of human rights and humanitarian law. Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations"); report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), para. 33.

⁴¹⁹ See, for example, Argentina, Ley 27.156, 31 July 2015, art. 1; Burkina Faso, Loi 052/2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabé, 3 December 2009, art. 14; Burundi, Loi n°1/05 du 22 avril 2009 portant révision du Code pénal, art. 171; Central African Republic, Loi No. 08-020 portant amnistie générale à l'endroit des personnalités, des militaires, des éléments et responsables civils des groupes rebelles, 13 October 2008, art. 2; Colombia, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (Bogotá, 24 November 2016), 5.1.2, number 40; Comoros, Loi 11-022 du 13 décembre 2011, portant mise en œuvre du Statut de Rome, art. 14; Democratic Republic of the Congo, Loi n°014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques, art. 4; Panama, Código Penal, art. 116; Uruguay, Ley N° 18.026, 4 October 2006, art. 8.

⁴²⁰ See, for example, *Ould Dah v. France* (dec.), Application No. 13113/03, Decision on admissibility of 17 March 2009, ECHR 2009, para. 49.

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.

Commentary

(1) Draft article 11 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 11 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,⁴²¹ while more specific standards binding upon States are set forth in article 14 of the 1966 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

⁴²¹ Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948.

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.⁴²²

(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 1966 International Covenant on Civil and Political Rights. Thus, when 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 “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 an “example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights”.⁴²³ Further, the Commission noted that the “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”.⁴²⁴ Finally, the Commission also explained that the formulation “all stages of the proceedings” is “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”.⁴²⁵

(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”.⁴²⁶ Consequently, draft article 11, 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 treaties⁴²⁷ or in other applicable instruments.⁴²⁸ Consequently, draft article 11, 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 11 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 the State of nationality⁴²⁹ and in customary international law. Recent treaties addressing crimes typically do not seek to go into such detail but, like draft article 11, 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, with a representative of the State where he or she usually resides or that is otherwise willing to protect that person’s rights).⁴³⁰

⁴²² 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.

⁴²³ *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 320, commentary to article 8.

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

⁴²⁶ Human Rights Committee, general comment No. 32 (2007) on article 14 (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.

⁴²⁷ See, for example, American Convention on Human Rights, art. 8; African Charter on Human and Peoples’ Rights, art. 7; European Convention on Human Rights, art. 6.

⁴²⁸ See, for example, Universal Declaration of Human Rights (footnote 421 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/en/iachr/mandate/Basics/declaration.asp); Cairo Declaration on Human Rights in Islam, Organisation of Islamic Cooperation Resolution No. 49/19-P, annex (available from www.oic-oci.org/Media_Center/); Charter of Fundamental Rights of the European Union.

⁴²⁹ 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, at p. 494, para. 77 (“Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights”).

⁴³⁰ See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful

(9) Paragraph 3 of draft article 11 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 from 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 1963 Vienna Convention on Consular Relations and has been included as well in many treaties addressing crimes.⁴³¹ 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.⁴³²

(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”.⁴³³

(Footnote 430 continued.)

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.

⁴³¹ 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.

⁴³² *Yearbook ... 1961*, vol. II, document A/4843, p. 113, draft articles on consular relations and commentary, paras. (5) and (7) to commentary to article 36.

⁴³³ *LaGrand* (see footnote 429 above), p. 497, para. 89.

Article 12. Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Commentary

(1) Draft article 12 addresses the rights of victims, witnesses and other persons affected by the commission of a crime against humanity.

(2) Many treaties addressing crimes under national law prior to the 1980s did not contain provisions with respect to victims or witnesses⁴³⁴ and, even after the 1980s, most global treaties concerned with terrorism did not address the rights of victims and witnesses.⁴³⁵ Since the 1980s, however, many treaties concerning crimes have included provisions similar to those appearing in draft article 12,⁴³⁶

⁴³⁴ See, for example, Convention on the Prevention and Punishment of the Crime of Genocide; Convention for the Suppression of Unlawful Seizure of Aircraft; International Convention on the Suppression and Punishment of the Crime of Apartheid; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages.

⁴³⁵ See, for example, International Convention for the Suppression of Terrorist Bombings; Organization of African Unity Convention on the Prevention and Combating of Terrorism; International Convention for the Suppression of Acts of Nuclear Terrorism; Association of Southeast Asian Nations Convention on Counter-Terrorism.

⁴³⁶ See, for example, United Nations Convention against Transnational Organized Crime, arts. 24–25; United Nations Convention against Corruption, arts. 32–33.

including treaties addressing acts that may constitute crimes against humanity in certain circumstances, such as torture and enforced disappearance.⁴³⁷ Some of the statutes of international courts and tribunals that have jurisdiction over crimes against humanity, notably the Rome Statute, have addressed the rights of victims and witnesses,⁴³⁸ and the General Assembly of the United Nations has provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity.⁴³⁹

(3) Most treaties that address the rights of victims within national law do not define the term “victims”,⁴⁴⁰ allowing States instead to apply their existing law and practice.⁴⁴¹ At the same time, practice associated with those treaties and under customary international law provides guidance as to how the term may be viewed. For example, while the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not define what is meant in article 14 by “victim”, the Committee against Torture has provided detailed guidance as to its meaning.⁴⁴² At the regional level, the 1950 European Convention on Human Rights allows applications to be filed by “any person, non-governmental

organisation or group of individuals” claiming to be a “victim” of a violation of the Convention.⁴⁴³ The European Court of Human Rights has found that such “victims” may be harmed either directly or indirectly,⁴⁴⁴ and that family members of a victim of a serious human rights violation may themselves be “victims”.⁴⁴⁵ While the guarantees contained in the 1969 American Convention on Human Rights are restricted to natural persons,⁴⁴⁶ the Inter-American Court of Human Rights has also recognized both direct and indirect individual victims, including family members,⁴⁴⁷ as well as victim groups.⁴⁴⁸ Under such treaties, the term “victim” is not construed narrowly or in a discriminatory manner.

(4) Likewise, while the statutes of international criminal tribunals do not define the term “victim”, guidance may exist in the rules or jurisprudence of the tribunals. Thus, rule 85 (a) of the Rules of Procedure and Evidence of the International Criminal Court defines “victims” as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”,⁴⁴⁹ which is understood as including both direct and indirect victims,⁴⁵⁰ while rule 85 (b) extends

⁴³⁷ See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 13–14; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 12 and 24.

⁴³⁸ See, for example, Rome Statute, art. 68; Rules of Procedure and Evidence of the International Criminal Court, chap. 4, sect. III.1, rule 86, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (ICC-ASP/1/3 and Corr.1, United Nations publication, Sales No. E.03.V.2), p. 10, at p. 52. For other tribunals, see Statute of the International Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 33; statute of the Special Court for Sierra Leone, art. 16; statute of the Special Tribunal for Lebanon, art. 12.

⁴³⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985, annex; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (see footnote 210 above).

⁴⁴⁰ Exceptions include: International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 1 (“For the purposes of this Convention, ‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”); Convention on Cluster Munitions, art. 2, para. 1 (“‘Cluster munition victims’ means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalization or substantial impairment of the realization of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities”).

⁴⁴¹ See, for example, the General Victims’ Law of Mexico (*Ley General de Víctimas, Diario Oficial de la Federación*, 9 de enero de 2013), which has detailed provisions on the rights of victims, but does not contain restrictions on who may claim to be a victim.

⁴⁴² Committee against Torture, general comment No. 3 (see footnote 417 above), para. 3 (“Victims are persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term ‘victim’ also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization”).

⁴⁴³ European Convention on Human Rights, art. 34.

⁴⁴⁴ See, for example, *Vallianatos and Others v. Greece* [GC], Applications Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, ECHR 2013 (extracts), para. 47.

⁴⁴⁵ The European Court of Human Rights has stressed that whether a family member is a victim depends on the existence of special factors that gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements include the closeness of the familial bond and the way the authorities responded to the relative’s enquiries. See, for example, *Çakici v. Turkey* [GC], Application No. 23657/94, Judgment of 8 July 1999, ECHR 1999-IV, para. 98; *Elberte v. Latvia*, Application No. 61243/08, Judgment of 13 January 2015, ECHR 2015, para. 137.

⁴⁴⁶ American Convention on Human Rights, art. 1.

⁴⁴⁷ See, for example, “*Street Children*” (*Villagrán-Morales et al.*) *v. Guatemala*, Judgment of 19 November 1999 (Merits), Inter-American Court of Human Rights, Series C, No. 63, paras. 174–177 and 238; *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000 (Merits), Inter-American Court of Human Rights, Series C, No. 70, paras. 159–166.

⁴⁴⁸ See, for example, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 125, para. 176.

⁴⁴⁹ Rules of Procedure and Evidence of the International Criminal Court (see footnote 438 above), rule 85 (a). The Court has found that rule 85 (a) “establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered” (*Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, public redacted version of decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, Pre-Trial Chamber I, International Criminal Court, para. 79). Further, the harm suffered by a victim for the purposes of rule 85 (a) must be “personal” harm, though it does not necessarily have to be “direct” harm (*Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, Appeals Chamber, International Criminal Court, paras. 32–39).

⁴⁵⁰ See *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, redacted version of decision on indirect victims, 8 April 2009, Trial Chamber I, International Criminal Court, paras. 44–52.

the definition to legal persons provided such persons have suffered direct harm.⁴⁵¹

(5) Draft article 12, paragraph 1, provides that each State shall take the necessary measures to ensure that any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities, and further obliges States to protect from ill-treatment or intimidation those who complain or otherwise participate in proceedings within the scope of the draft articles. A similar provision is included in other international treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁵² and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.⁴⁵³

(6) Subparagraph (a) of paragraph 1 extends the right to complain to “any person” who alleges that acts constituting crimes against humanity have been or are being committed. The term “any person” includes but is not limited to a victim or witness of a crime against humanity, and may include legal persons such as religious bodies or non-governmental organizations.

(7) Such persons have a right to complain to “competent authorities”, which, to be effective, in some circumstances may need to be judicial authorities. Following a complaint, State authorities have a duty to proceed to a prompt and impartial investigation whenever there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed in any territory under the State’s jurisdiction, in accordance with draft article 8.

(8) Subparagraph (b) of paragraph 1 obliges States to protect “complainants” as well as the other categories of persons listed even if they did not file a complaint; those other categories are “victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles”. Recent international treaties have similarly expanded the category of persons to whom protection

shall be granted, including the 2000 United Nations Convention against Transnational Organized Crime,⁴⁵⁴ the 2003 United Nations Convention against Corruption,⁴⁵⁵ and the International Convention for the Protection of All Persons from Enforced Disappearance.⁴⁵⁶ Protective measures for these persons are required not just under treaties addressing crimes in national law, but also in the statutes of international criminal tribunals.⁴⁵⁷

(9) Subparagraph (b) of paragraph 1 requires that the listed persons be protected from “ill-treatment or intimidation” as a consequence of any complaint, information, testimony or other evidence given. The term “ill-treatment” relates not just to the person’s physical well-being, but also includes the person’s psychological well-being, dignity or privacy.⁴⁵⁸

(10) Subparagraph (b) does not provide a list of protective measures to be taken by States, as the measures will inevitably vary according to the circumstances at issue, the capabilities of the relevant State, and the preferences of the persons concerned. Such measures, however, might include: the presentation of evidence by electronic or other special means rather than in person;⁴⁵⁹ measures designed to protect the privacy and identity of witnesses and victims;⁴⁶⁰ *in camera* proceedings;⁴⁶¹ withholding evidence or information if disclosure may lead to the grave endangerment of the security of a witness or his or her family;⁴⁶² and the relocation of victims and witnesses.⁴⁶³

(11) At the same time, States must be mindful that some protective measures may have implications with respect to the rights of an alleged offender, such as the right to confront witnesses against him or her. As a result, subparagraph (b) of paragraph 1 stipulates that protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.⁴⁶⁴

⁴⁵⁴ United Nations Convention against Transnational Organized Crime, art. 24, para. 1.

⁴⁵⁵ United Nations Convention against Corruption, art. 32, para. 1.

⁴⁵⁶ International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 1.

⁴⁵⁷ See, for example, Rome Statute, art. 68, para. 1; Statute of the International Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 33; statute of the Special Court for Sierra Leone, art. 16; statute of the Special Tribunal for Lebanon, art. 12.

⁴⁵⁸ See, for example, Rome Statute, art. 68, para. 1.

⁴⁵⁹ See, for example, Rome Statute, art. 68, para. 2; United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (b); United Nations Convention against Corruption, art. 32, para. 2 (b).

⁴⁶⁰ See, for example, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 1 (e); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 33.

⁴⁶¹ See, for example, Rome Statute, art. 68, para. 2; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, art. 33.

⁴⁶² See, for example, Rome Statute, art. 68, para. 5.

⁴⁶³ See, for example, United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (a); United Nations Convention against Corruption, art. 32, para. 2 (a).

⁴⁶⁴ Other relevant international treaties provide a similar protection, including the Rome Statute, art. 68, para. 1; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 6; United Nations Convention against Transnational Organized Crime, art. 24, para. 2; United Nations Convention against Corruption, art. 32, para. 2.

⁴⁵¹ Rules of Procedure and Evidence of the International Criminal Court (see footnote 438 above), rule 85 (b) (“Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (see footnote 210 above) provide: “For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” (para. 8). For a similar definition, see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (footnote 439 above), paras. 1–2.

⁴⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 13.

⁴⁵³ International Convention for the Protection of All Persons from Enforced Disappearance, art. 12.

(12) Draft article 12, paragraph 2, provides that each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings. While expressing a firm obligation, the clause “in accordance with its national law” provides flexibility to the State as to implementation of the obligation, allowing the State to tailor the requirement to the unique characteristics of its criminal law system. Although the phrase is addressed only to “victims”, it may also be appropriate for States to permit others (such as family members or representatives) to present their views and concerns, especially in circumstances where a victim of a crime against humanity has died or disappeared. Paragraph 2 is without prejudice to other obligations of States that exist under international law.

(13) Examples of a provision such as paragraph 2 may be found in various treaties, such as: the Rome Statute of the International Criminal Court;⁴⁶⁵ the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;⁴⁶⁶ the United Nations Convention against Transnational Organized Crime;⁴⁶⁷ the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;⁴⁶⁸ and the United Nations Convention against Corruption.⁴⁶⁹

(14) Draft article 12, paragraph 3, addresses the right of a victim of a crime against humanity to obtain reparation. The opening clause—“Each State shall take the necessary measures to ensure in its legal system”—obliges States to have or enact necessary laws, regulations, procedures or mechanisms to enable victims to pursue claims against and secure redress for the harm they have suffered from those who are responsible for the harm, be it the State itself or some other actor.⁴⁷⁰

(15) Paragraph 3 refers to the victim’s “right to obtain reparation”. Treaties and instruments addressing this issue have used different terminology, sometimes referring to the right to a “remedy” or “redress”, sometimes using the term “reparation”, and sometimes referring only to a specific form of reparation, such as “compensation”.⁴⁷¹

Thus, the right to an “effective remedy” may be found in the 1948 Universal Declaration of Human Rights,⁴⁷² the 1966 International Covenant on Civil and Political Rights,⁴⁷³ and some regional human rights treaties.⁴⁷⁴ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in article 14, refers to the victim’s ability to obtain “redress” and to a right to “compensation”, including “rehabilitation”.⁴⁷⁵ The International Convention for the Protection of All Persons from Enforced Disappearance, in article 24, refers to a “right to obtain reparation and prompt, fair and adequate compensation”.⁴⁷⁶

(16) The Commission decided to refer to a “right to obtain reparation” as a means of capturing redress in a comprehensive sense, an approach that appears to have taken root in various treaty regimes. Thus, while the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment quoted above refers to the terms “redress”, “compensation” and “rehabilitation”, the Committee against Torture considers that the provision as a whole embodies a “comprehensive reparative concept”,⁴⁷⁷ according to which:

The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.⁴⁷⁸

(17) This movement towards a more comprehensive concept of reparation has led to some treaty provisions that list various forms of reparation. For example, the International Convention for the Protection of All Persons from Enforced Disappearance indicates that the “right to obtain reparation”, which covers “material and moral damages”, may consist of not just compensation, but also, “where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition”.⁴⁷⁹

⁴⁶⁵ Rome Statute, art. 68, para. 3.

⁴⁶⁶ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8.

⁴⁶⁷ United Nations Convention against Transnational Organized Crime, art. 25, para. 3.

⁴⁶⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 6, para. 2.

⁴⁶⁹ United Nations Convention against Corruption, art. 32, para. 5.

⁴⁷⁰ See the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (footnote 210 above), paras. 12–23.

⁴⁷¹ See, for example, International Convention for the Suppression of the Financing of Terrorism, art. 8, para. 4; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 9, para. 4; United Nations Convention against Transnational Organized Crime, arts. 14, para. 2, and 25, para. 2; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 6, para. 6; United Nations Convention against Corruption, art. 35.

⁴⁷² Universal Declaration of Human Rights (see footnote 421 above), art. 8.

⁴⁷³ International Covenant on Civil and Political Rights, art. 2, para. 3. See also Human Rights Committee, general comment No. 31 (footnote 210 above), paras. 16–17.

⁴⁷⁴ See, for example, European Convention on Human Rights, art. 13; American Convention on Human Rights, arts. 25 and 63. See also Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, art. 27.

⁴⁷⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, para. 1.

⁴⁷⁶ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 4.

⁴⁷⁷ Committee against Torture, general comment No. 3 (see footnote 417 above), para. 2; *Kepa Urria Guridi v. Spain*, communication No. 212/2002, decision adopted on 17 May 2005, para. 6.8, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 44* (A/60/44), annex VIII, sect. A, p. 152.

⁴⁷⁸ Committee against Torture, general comment No. 3 (see footnote 417 above), para. 5.

⁴⁷⁹ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, paras. 4–5.

(18) Draft article 12, paragraph 3, follows this approach by setting forth a list of forms of reparation, which include, but are not limited to, restitution, compensation, satisfaction, rehabilitation, cessation and guarantees of non-repetition. In the context of crimes against humanity, all traditional forms of reparation are potentially relevant. Restitution, or the return to the *status quo ex ante*, may be an appropriate form of reparation and includes the ability for a victim to return to his or her home, the return of movable property, or the reconstruction of public or private buildings, including schools, hospitals and places of religious worship. Compensation may be appropriate with respect to both material and moral damages. Rehabilitation programmes for large numbers of persons in certain circumstances may be required, such as programmes for medical treatment, provision of prosthetic limbs, or trauma-focused therapy. Satisfaction, such as issuance of a statement of apology or regret, may also be a desirable form of reparation. Likewise, reparation for a crime against humanity might consist of assurances or guarantees of non-repetition.

(19) The illustrative list of forms of reparation, however, is preceded by the words “as appropriate”. Such wording acknowledges that States must have some flexibility and discretion to determine the appropriate form of reparation, recognizing that, in the aftermath of crimes against humanity, various scenarios may arise, including those of transitional justice, and reparations must be tailored to the specific context. For example, in some situations, a State may be responsible for crimes against humanity while, in other situations, non-State actors may be responsible. The crimes may have involved mass atrocities in circumstances where, in their wake, a State may be struggling to rebuild itself, leaving it with limited resources or any capacity to provide material redress to victims. The ability of any given perpetrator to make reparation will also vary. Paragraph 3 is without prejudice to other obligations of States that exist under international law.

(20) Paragraph 3 provides that such reparation may be “on an individual or collective basis”. While reparation specific to each of the victims may be warranted, such as through the use of regular civil claims processes in national courts or through a specially designed process of mass claims compensation, in some situations only collective forms of reparation may be feasible or preferable, such as the building of monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship. In still other situations, a combination of individual and collective reparations may be appropriate.

(21) Support for this approach may be seen in the approach to reparations taken by international criminal tribunals. The statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda contained provisions exclusively addressing the possibility of restitution of property, not compensation or other forms of reparation.⁴⁸⁰ Yet, when establishing other international criminal tribunals, States appear to have recognized that focusing solely on restitution is inadequate (instead the more general term “reparation” is used) and that establishing only an individual right to reparation for each

victim may be problematic in the context of a mass atrocity. Instead, allowance is made for the possibility of reparation for individual victims or for reparation on a collective basis.⁴⁸¹ For example, the Rules of Procedure and Evidence of the International Criminal Court provide that, in awarding reparation to victims pursuant to article 75, “the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”, taking into account the scope and extent of any damage, loss or injury.⁴⁸² In the context of the atrocities in Cambodia under the Khmer Rouge, only “collective and moral reparations” are envisaged under the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia.⁴⁸³

Article 13. Extradition

1. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

4. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

⁴⁸¹ See, for example, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (footnote 210 above), para. 13.

⁴⁸² Rules of Procedure and Evidence of the International Criminal Court (see footnote 438 above), rule 97, para. 1.

⁴⁸³ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev.9) as revised on 16 January 2015, rules 23 and 23 *quinquies*.

⁴⁸⁰ Statute of the International Tribunal for the Former Yugoslavia, art. 24, para. 3; Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 3.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

7. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

8. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

9. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

10. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Commentary

(1) Draft article 13 addresses the rights, obligations and procedures applicable to the extradition of an alleged offender under the present draft articles. Extradition normally refers to the process whereby one State (the requesting State) asks another State (the requested State) to send to the requesting State someone present in the requested State in order that he or she may be brought to trial on criminal charges in the requesting State. The process also may arise where an offender has escaped from lawful custody following conviction in the requesting State and is found in the requested State. Often extradition between two States is regulated by a multilateral⁴⁸⁴ or bilateral treaty,⁴⁸⁵ although not all States require the existence of a treaty for an extradition to occur.

⁴⁸⁴ See, for example, European Convention on Extradition; Inter-American Convention on Extradition. See also Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (footnote 407 above).

⁴⁸⁵ The 1990 Model Treaty on Extradition is one effort to help States in developing bilateral extradition agreements capable of addressing a wide range of crimes. See General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997).

(2) In 1973, the General Assembly of the United Nations in resolution 3074 (XXVIII) highlighted the importance of international cooperation in the extradition of persons who have allegedly committed crimes against humanity, where necessary to ensure their prosecution and punishment.⁴⁸⁶ In 2001, the Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights reaffirmed the principles set forth in General Assembly resolution 3074 (XXVIII)⁴⁸⁷ and urged "all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity".⁴⁸⁸

(3) Draft article 13 should be considered in the overall context of the present draft articles. Draft article 7, paragraph 2, provides that each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction, and the State does not extradite or surrender the person. When an alleged offender is present and has been taken into custody, the State is obliged under draft article 9, paragraph 3, to notify other States that have jurisdiction to prosecute the alleged offender, which may result in those States seeking the alleged offender's extradition. Further, draft article 10 obligates the State to submit the case to its competent authorities for prosecution, unless the State extradites or surrenders the person to another State or competent international criminal tribunal.

(4) Thus, under the present draft articles, a State may satisfy the *aut dedere aut judicare* obligation set forth in draft article 10 by extraditing (or surrendering) the alleged offender to another State for prosecution. There is no obligation to extradite the alleged offender; the primary obligation is for the State in the territory under whose jurisdiction the alleged offender is present to submit the case to its competent authorities for the purpose of prosecution. Yet that obligation may be satisfied, in the alternative, by extraditing the alleged offender to another State. To facilitate such extradition, it is useful to have in place clearly stated rights, obligations and procedures with respect to the extradition process.

(5) The Commission decided to model draft article 13 on article 44 of the 2003 United Nations Convention against Corruption, which in turn was modelled on article 16 of the 2000 United Nations Convention against Transnational Organized Crime. Although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of extradition are largely the same regardless of the nature of the underlying crime, and the Commission was of the view that article 44 provides ample guidance as to all relevant rights, obligations and procedures for extradition in the context

⁴⁸⁶ General Assembly resolution 3074 (XXVIII) of 3 December 1973.

⁴⁸⁷ International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, resolution 2001/22 of 16 August 2001, para. 3, in report of the Sub-Commission on the Promotion and Protection of Human Rights on its fifty-third session (E/CN.4/2002/2-E/CN.4/Sub.2/2001/40). The Sub-Commission largely replicated in its resolution the principles of the General Assembly, but with some modifications.

⁴⁸⁸ *Ibid.*, para. 2.

of crimes against humanity. Moreover, the provisions of article 44 are well understood by the 181 States parties to the United Nations Convention against Corruption, especially through the detailed guides and other resources developed by the United Nations Office on Drugs and Crime (UNODC).⁴⁸⁹

Inclusion as an extraditable offence in existing and future extradition treaties

(6) Draft article 13, paragraph 1, is modelled on article 44, paragraph 4, of the United Nations Convention against Corruption. It obligates a requested State to regard the offences identified in the present draft articles as extraditable offences in any existing extradition treaty between it and the requesting State, as well as any such treaties concluded by those States in the future.⁴⁹⁰ This provision is commonly included in other conventions.⁴⁹¹

Exclusion of the “political offence” exception to extradition

(7) Paragraph 2 of draft article 13 excludes the “political offence” exception as a ground for not proceeding with an extradition process.

(8) Under some extradition treaties, the requested State may decline to extradite if it regards the offence for which extradition is requested as political in nature. Yet there is

support for the proposition that crimes such as genocide, crimes against humanity and war crimes should not be regarded as “political offences”. For example, article VII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides that genocide and other enumerated acts “shall not be considered as political crimes for the purpose of extradition”. There are similar reasons not to regard alleged crimes against humanity as “political offences” so as to preclude extradition.⁴⁹² The Revised Manual on the Model Treaty on Extradition provides that “certain crimes, such as genocide, crimes against humanity and war crimes, are regarded by the international community as so heinous that the perpetrators cannot rely on this restriction on extradition”.⁴⁹³ The Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights declared that persons “charged with war crimes and crimes against humanity shall not be allowed to claim that the actions fall within the ‘political offence’ exception to extradition”.⁴⁹⁴

(9) Contemporary bilateral extradition treaties often specify particular offences that should not be regarded as “political offences” so as to preclude extradition.⁴⁹⁵ Although some treaties addressing specific crimes do not address the issue,⁴⁹⁶ many contemporary multilateral treaties addressing specific crimes contain a provision barring the political offence exception to extradition.⁴⁹⁷ For example, article 13, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides:

⁴⁸⁹ See, for example, UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 358 above); *Technical Guide to the United Nations Convention against Corruption*, New York, 2009; and *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (footnote 358 above). UNODC has developed similar resources for the United Nations Convention against Transnational Organized Crime, which contains many of the same provisions as the United Nations Convention against Corruption in its article on extradition. See, for example, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2); see also report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, addendum on interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).

⁴⁹⁰ See article 7 of the 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, p. 319; and article 10 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 32.

⁴⁹¹ Similar provisions appear in: Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 1; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 1; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 8, para. 1; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 1; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 1; United Nations Convention against Transnational Organized Crime, art. 16, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, paras. 2–3. The Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind provides, in article 10, paragraph 1, that, “[t]o the extent that [genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes] are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them”.

⁴⁹² See, for example, *In the Matter of the Extradition of Mousa Mohammed Abu Marzook*, United States District Court, S. D. New York, 924 F. Supp. 565 (1996), p. 577 (“if the act complained of is of such heinous nature that it is a crime against humanity, it is necessarily outside the political offense exception”).

⁴⁹³ UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Extradition*, p. 17, para. 45.

⁴⁹⁴ Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/22 (see footnote 487 above).

⁴⁹⁵ See, for example, the Extradition Treaty between the Government of the United States of America and the Government of South Africa (Washington, D.C., 16 September 1999), United Nations, *Treaty Series*, vol. 2917, No. 50792, p. 171, at p. 177, art. 4, para. 2 (“For the purposes of this Treaty, the following offences shall not be considered political offences: ... (b) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution; ...”); the Treaty on Extradition between Australia and the Republic of Korea (Seoul, 5 September 1990), *ibid.*, vol. 1642, No. 28218, p. 141, at p. 145, art. 4, para. 1 (a) (“Reference to a political offence shall not include ... (ii) an offence in respect of which the Contracting Parties have the obligation to establish jurisdiction or extradite by reason of a multilateral international agreement to which they are both parties; and (iii) an offence against the law relating to genocide”); and the Treaty of Extradition between the Government of the United Mexican States and the Government of Canada (Mexico City, 16 March 1990), *ibid.*, vol. 1589, No. 27824, p. 267, at p. 292, art. IV (a) (“For the purpose of this paragraph, political offence shall not include an offence for which each Party has the obligation, pursuant to a multilateral international agreement, to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution”).

⁴⁹⁶ See, for example, International Convention against the Taking of Hostages; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁴⁹⁷ See, for example, International Convention for the Suppression of Terrorist Bombings, art. 11; International Convention for the Suppression of the Financing of Terrorism, art. 14; United Nations Convention against Corruption, art. 44, para. 4.

For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

(10) The Commission viewed the text of article 13, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance as an appropriate model for draft article 13, paragraph 2. Paragraph 2 clarifies that the *act* of committing a crime against humanity cannot be regarded as a “political offence”. This issue differs, however, from whether a requesting State is pursuing the extradition because of the individual’s political opinions; in other words, it differs from whether the State is alleging a crime against humanity and making its request for extradition as a means of persecuting an individual for his or her political views. The latter issue of persecution is addressed separately in draft article 13, paragraph 9. The final clause of paragraph 2, “on these grounds alone”, signals that there may be other grounds that the State may invoke to refuse extradition (see paragraphs (16) to (18) and (24) to (26) below), provided such other grounds in fact exist.

States requiring a treaty to extradite

(11) Draft article 13, paragraphs 3 and 4, address the situation where a requested State requires the existence of a treaty before it can extradite an individual to the requesting State.

(12) Paragraph 3 provides that, in such a situation, the requested State “may” use the present draft articles as the legal basis for extradition in respect of crimes against humanity. As such, a State is not obliged to use the present draft articles for such purpose, but may elect to do so. This paragraph is modelled on article 44, paragraph 5, of the 2003 United Nations Convention against Corruption, which reads: “If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.” The same or a similar provision may be found in numerous other treaties,⁴⁹⁸ and the Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.⁴⁹⁹

(13) Paragraph 4 obligates each State that makes extradition conditional on the existence of a treaty to inform the

Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for extradition in relation to crimes against humanity. Further, if it does not intend to use the present draft articles for that purpose, the State shall seek, where appropriate, to conclude treaties to that end. This paragraph is modelled on article 16, paragraph 5, of the United Nations Convention against Transnational Organized Crime and on article 44, paragraph 6, of the United Nations Convention against Corruption, the latter of which reads:

A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

(14) Draft article 13, paragraph 4 (b), obliges a State party that does not use the draft articles as the legal basis for extradition to “seek, where appropriate, to conclude” extradition treaties with other States. As such, States are not obliged under the present draft articles to conclude extradition treaties with every other State with respect to crimes against humanity but, rather, are encouraged to pursue appropriate efforts in that regard.⁵⁰⁰

States not requiring a treaty to extradite

(15) Draft article 13, paragraph 5, applies to States that do not make extradition conditional on the existence of a treaty. With respect to those States, paragraph 5 obliges them to “recognize the offences covered by the present draft articles as extraditable offences between themselves”. This paragraph is modelled on article 44, paragraph 7, of the United Nations Convention against Corruption.⁵⁰¹ Similar provisions may be found in many other treaties addressing crimes.⁵⁰² The Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.⁵⁰³

⁵⁰⁰ See Conference of the Parties to the United Nations Convention against Transnational Organized Crime, analytical report of the Secretariat on the implementation of the United Nations Convention against Transnational Organized Crime: updated information based on additional responses received from States for the first reporting cycle (CTOC/COP/2005/2/Rev.1), para. 69.

⁵⁰¹ United Nations Convention against Corruption, art. 44, para. 7 (“States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves”).

⁵⁰² Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 3; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 3; International Convention against the Taking of Hostages, art. 10, para. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 8, para. 3; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 5.

⁵⁰³ *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 3 (“States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State”).

⁴⁹⁸ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 2; International Convention against the Taking of Hostages, art. 10, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 8, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 11, para. 2; United Nations Convention against Transnational Organized Crime, art. 16, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 4.

⁴⁹⁹ *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 2 (“If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State”).

Requirements of the requested State's national law

(16) Draft article 13, paragraph 6, provides that extradition “shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition”. Similar provisions may be found in various global⁵⁰⁴ and regional⁵⁰⁵ treaties. This paragraph is modelled on article 44, paragraph 8, of the United Nations Convention against Corruption, but does not retain language after the word “including” that reads “*inter alia*, conditions in relation to the minimum penalty requirement for extradition and”.⁵⁰⁶ The Commission was of the view that reference to minimum penalty requirements was inappropriate in the context of allegations of crimes against humanity.

(17) This paragraph states the general rule that, while the extradition is to proceed in accordance with the rights, obligations and procedures set forth in the present draft articles, it remains subject to conditions set forth in the requested State's national law or in extradition treaties. Such conditions may relate to procedural steps, such as the need for a decision by a national court or a certification by a minister prior to the extradition, or may relate to situations where extradition is prohibited, such as: a prohibition on the extradition of the State's nationals or permanent residents; a prohibition on extradition where the offence at issue is punishable by the death penalty; a prohibition on extradition to serve a sentence that is based upon a trial *in absentia*; or a prohibition on extradition based on the rule of speciality.⁵⁰⁷ At the same time, some grounds for refusal found in national law would be impermissible under the present draft articles, such as the invocation of a statute of limitation in contravention of draft article 6, paragraph 6, or may be impermissible under other rules of international law.

(18) Whatever the reason for refusing extradition, in the context of the present draft articles, the requested State in which the offender is present remains obliged to submit the matter to its prosecuting authorities under draft article 10. Thus, while the requested State's national law may preclude extradition to a requesting State in certain

circumstances, the requested State remains obliged to submit the case to its competent authorities for the purpose of prosecution.

Deeming the offence to have occurred in the requesting State

(19) Draft article 13, paragraph 7, addresses the situation where a requested State, under its national law, may only extradite a person to a State where the crime occurred.⁵⁰⁸ To facilitate extradition to a broader range of States, paragraph 7 provides that, “[i]f necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1”. This text is modelled on article 11, paragraph 4, of the 1999 International Convention for the Suppression of the Financing of Terrorism and has been used in many treaties addressing crimes.⁵⁰⁹

(20) Treaty provisions of this kind refer to “States that have established jurisdiction” under the treaty on the basis of connections such as the nationality of the alleged offender or of the victims of the crime (hence, draft article 13, paragraph 7, contains a cross reference to draft article 7, paragraph 1). Such provisions do not refer to States that have established jurisdiction based on the presence of the offender (draft article 7, paragraph 2), because the State requesting extradition is never the State in which the alleged offender is already present. In this instance, there is also no cross reference to draft article 7, paragraph 3, which does not require States to establish jurisdiction but, rather, preserves the right of States to establish national jurisdiction beyond the scope of the present draft articles.

(21) In its commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, which contains a similar provision in article 10, paragraph 4,⁵¹⁰ the Commission stated that “[p]aragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State party ... with respect to the crimes” established in the draft Code, and that “[t]his

⁵⁰⁴ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 2; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 8, para. 2; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 11, para. 2; United Nations Convention against Transnational Organized Crime, art. 16, para. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 6.

⁵⁰⁵ See, for example, Inter-American Convention to Prevent and Punish Torture, art. 13; Inter-American Convention on the Forced Disappearance of Persons, art. V; Criminal Law Convention on Corruption, art. 27, para. 4.

⁵⁰⁶ United Nations Convention against Corruption, art. 44, para. 8 (“Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition”).

⁵⁰⁷ See, for example, the United Kingdom Extradition Act, sect. 17.

⁵⁰⁸ See *Yearbook ... 1996*, vol. II (Part Two), p. 33, draft Code of Crimes against the Peace and Security of Mankind, para. (3) of the commentary to article 10 (“Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred”).

⁵⁰⁹ Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 4; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 4; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 4; International Convention against the Taking of Hostages, art. 10, para. 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 8, para. 4; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 4; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 4. Some recent treaties, however, have not contained such a provision. See, for example, United Nations Convention against Transnational Organized Crime, United Nations Convention against Corruption and International Convention for the Protection of All Persons from Enforced Disappearance.

⁵¹⁰ *Yearbook ... 1996*, vol. II (Part Two), p. 32 (“Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party”).

broad approach is consistent with the general obligation of every State party to establish its jurisdiction over [those] crimes".⁵¹¹ Such an approach also "finds further justification in the fact that the Code does not confer primary jurisdiction on any particular States nor establish an order of priority among extradition requests".⁵¹²

Enforcement of a sentence imposed upon a State's own nationals

(22) Draft article 13, paragraph 8, concerns situations where the national of a requested State is convicted and sentenced in a foreign State, and then flees to the requested State, but the requested State is unable under its law to extradite its nationals. In such a situation, paragraph 8 provides that "the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof". Similar provisions are found in the United Nations Convention against Transnational Organized Crime⁵¹³ and the United Nations Convention against Corruption.⁵¹⁴

(23) The Commission also considered inclusion of a paragraph in draft article 13 that would expressly address the situation where the requested State can extradite one of its nationals, but only if the alleged offender will be returned to the requested State to serve out any sentence imposed by the requesting State. Such a provision may be found in the United Nations Convention against Transnational Organized Crime⁵¹⁵ and the United Nations Convention against Corruption.⁵¹⁶ The Commission deemed such a situation as falling within the scope of conditions that may be applied under draft article 13, paragraph 6, of the present draft articles and therefore decided that an express provision on this issue was not necessary.

Refusal to extradite

(24) Draft article 13, paragraph 9, makes clear that nothing in draft article 13 requires a State to extradite an individual to a State where there are substantial grounds for believing that the extradition request is being made on grounds that are universally recognized as impermissible under international law. Such a provision appears in various multilateral⁵¹⁷ and bilateral treaties,⁵¹⁸ and in national

laws,⁵¹⁹ that address extradition generally, and appears in treaties addressing extradition with respect to specific crimes.⁵²⁰

(25) Paragraph 9 is modelled on article 16, paragraph 14, of the United Nations Convention against Transnational Organized Crime and article 44, paragraph 15, of the United Nations Convention against Corruption, which both read as follows:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

While modelled on this provision, the term "sex" in English was replaced by "gender", and the term "culture" was added to the list of factors, in line with the language used in draft article 3, paragraph 1 (*h*). Further, the term "membership of a particular social group" was added to the list, as in the International Convention for the Protection of All Persons from Enforced Disappearance.⁵²¹

(26) Given that the present draft articles contain no obligation to extradite any individual, this provision, strictly speaking, is not necessary. Under the present draft articles, a State may decline to extradite, so long as it submits the case to its own competent authorities for the purpose of prosecution. Nevertheless, paragraph 9 serves three purposes. First, it helps ensure that individuals will not be extradited when there is a danger that their rights, in particular their basic rights, will be violated. Second, States

Mexican States and the Government of Canada (footnote 495 above), art. IV. The Model Treaty on Extradition (see footnote 485 above), at article 3 (*b*), contains such a provision. The Revised Manual on the Model Treaty on Extradition states, at paragraph 47, that: "Subparagraph (*b*) ... is a non-controversial paragraph, one that has been used (sometimes in a modified form) in extradition treaties throughout the world" (UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters...* (see footnote 493 above), p. 17.

⁵¹⁹ See, for example, Extradition Law of the People's Republic of China: Order of the President of the People's Republic of China, No. 42, adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on 28 December 2000, art. 8, para. 4 ("The request for extradition made by a foreign State to the People's Republic of China shall be rejected if ... the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings"); United Kingdom Extradition Act, sect. 13 ("A person's extradition ... is barred by reason of extraneous considerations if (and only if) it appears that (*a*) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (*b*) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions").

⁵²⁰ See, for example, International Convention against the Taking of Hostages, art. 9; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6, para. 6; International Convention for the Suppression of Terrorist Bombings, art. 12; International Convention for the Suppression of the Financing of Terrorism, art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 7.

⁵²¹ International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 7.

⁵¹¹ *Ibid.*, p. 33 (para. (3) of the commentary to article 10).

⁵¹² *Ibid.*

⁵¹³ United Nations Convention against Transnational Organized Crime, art. 16, para. 10.

⁵¹⁴ United Nations Convention against Corruption, art. 44, para. 13.

⁵¹⁵ United Nations Convention against Transnational Organized Crime, art. 16, para. 11.

⁵¹⁶ United Nations Convention against Corruption, art. 44, para. 12.

⁵¹⁷ See, for example, European Convention on Extradition, art. 3, para. 2; Inter-American Convention on Extradition, art. 4, para. 5.

⁵¹⁸ See, for example, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic (Paris, 24 January 2003), *The Gazette of India, Extraordinary* (New Delhi), No. 254 (1 June 2007), part II, section 3, sub-section (i), art. 3, para. 3; Extradition Treaty between the Government of the United States of America and the Government of the Republic of South Africa (footnote 495 above), art. 4, para. 3; Treaty on Extradition between Australia and the Republic of Korea (footnote 495 above), art. 4, para. 1 (*b*); Treaty of Extradition between the Government of the United

that already insert a similar provision into their extradition treaties or national laws are assured that substantial grounds for believing that a person will be subjected to persecution will remain a basis of refusal for extradition. Third, States that do not have such a provision explicitly in their bilateral arrangements will have a textual basis for refusal if such a case arises. As such, the Commission considered it appropriate to include such a provision in the present draft articles.

(27) Draft article 13, paragraph 10, provides that, before the requested State refuses extradition, it “shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation”. Such consultation may allow the requesting State to modify its request in a manner that addresses the concerns of the requested State. The phrase “where appropriate”, however, acknowledges that there may be times where the requested State is refusing extradition but consultation is not appropriate, for example due to reasons of confidentiality. Even so, it is stressed that, in the context of the present draft articles, draft article 10 requires the requested State, if it does not extradite, to submit the matter to its own prosecutorial authorities.

(28) Paragraph 10 is modelled on the United Nations Convention against Transnational Organized Crime⁵²² and the United Nations Convention against Corruption,⁵²³ which both provide that, “[b]efore refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation”. The qualification “where appropriate” recognizes that there will be situations where such consultations are not appropriate, such as when the requested State has decided to submit the case to its own competent authorities for the purpose of prosecution.

Multiple requests for extradition

(29) Treaties addressing extradition generally or in the context of specific crimes typically do not seek to regulate which requesting State should have priority if there are multiple requests for extradition. At the most, such instruments might acknowledge the discretion of the requested State to determine whether to extradite and, if so, to which requesting State. For example, the 1990 United Nations Model Treaty on Extradition, in article 16, simply provides: “If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited.”⁵²⁴

(30) Consequently, in line with existing treaties, the Commission decided not to include a provision in the present draft articles specifying a preferred outcome if there are multiple requests. Even so, when such a situation occurs, a State may benefit from considering various factors in exercising its discretion, which may be

identified in the State’s national law. For example, the Código Orgánico Integral Penal (2014) of Ecuador provides in section 405 that “la o el juzgador ecuatoriano podrá determinar la jurisdicción que garantice mejores condiciones para juzgar la infracción penal, la protección y reparación integral de la víctima” (“the judge may determine the jurisdiction which guarantees better conditions to prosecute the criminal offence, the protection and the integral reparation of the victim”).⁵²⁵ In the context of the European Union, relevant factors include “the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order”.⁵²⁶

Dual criminality

(31) Extradition treaties typically contain a “dual criminality” requirement, whereby obligations with respect to extradition only arise in circumstances where, for a specific request, the conduct at issue is criminal in both the requesting State and the requested State.⁵²⁷ Such a requirement is also sometimes included in treaties on a particular type of crime, if that treaty contains a combination of mandatory and non-mandatory offences, with the result that the offences existing in any two States parties may differ. For example, the United Nations Convention against Corruption establishes both mandatory⁵²⁸ and non-mandatory⁵²⁹ offences relating to corruption.

(32) By contrast, treaties focused on a particular type of crime that only establish mandatory offences typically do not contain a dual criminality requirement. Thus, treaties such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which define specific offences and obligate States parties to take the necessary measures to ensure that they constitute offences under national criminal law, contain no dual criminality requirement in their respective extradition provisions. The rationale for not doing so is that when an extradition request arises under either convention, the offence should already be criminalized under the laws of both States parties, such that there is no need to satisfy a dual criminality requirement. A further rationale is that such treaties typically do not contain an absolute obligation to extradite; rather, they contain an *aut dedere aut judicare* obligation, whereby the requested State may always choose not to extradite, so long as it submits the case to its competent authorities for prosecution.

⁵²⁵ Código Orgánico Integral Penal (see footnote 347 above), section 405.

⁵²⁶ See, for example, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (footnote 407 above), art. 16, para. 1.

⁵²⁷ See, for example, UNODC, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters...* (footnote 493 above), p. 10, para. 20 (“The requirement of double criminality under the laws of both the requesting and requested States of the offence for which extradition is to be granted is a deeply ingrained principle of extradition law”).

⁵²⁸ United Nations Convention against Corruption, arts. 15; 16, para. 1; 17; 23; and 25.

⁵²⁹ *Ibid.*, arts. 16, para. 2; 18–22; and 24.

⁵²² United Nations Convention against Transnational Organized Crime, art. 16, para. 16.

⁵²³ United Nations Convention against Corruption, art. 44, para. 17.

⁵²⁴ Model Treaty on Extradition (see footnote 485 above), art. 16.

(33) The present draft articles on crimes against humanity define crimes against humanity in draft article 3 and, based on that definition, mandate in draft article 6, paragraphs 1 to 3, that the “offences” of “crimes against humanity” exist under the national criminal law of each State.⁵³⁰ As such, when an extradition request from one State is sent to another State for an offence covered by the present draft articles, the offence should be criminal in both States, and therefore dual criminality is automatically satisfied. Moreover, the *aut dedere aut judicare* obligation set forth in draft article 10 does not obligate States to extradite; rather, the State can satisfy its obligation under draft article 10 by submitting the case to its competent authorities for the purpose of prosecution. Consequently, the Commission decided that there was no need to include in draft article 13 a dual criminality requirement, such as appears in the first three paragraphs of article 44 of the United Nations Convention against Corruption.

Article 14. Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;

(b) taking evidence or statements from persons, including by videoconference;

(c) effecting service of judicial documents;

(d) executing searches and seizures;

(e) examining objects and sites, including obtaining forensic evidence;

(f) providing information, evidentiary items and expert evaluations;

(g) providing originals or certified copies of relevant documents and records;

(h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;

(i) facilitating the voluntary appearance of persons in the requesting State; or

(j) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

Commentary

(1) A State investigating or prosecuting an offence covered by the present draft articles may wish to seek assistance from another State in gathering information and evidence, including through documents, sworn declarations and oral testimony by victims, witnesses or others. Cooperation on such matters, which is typically undertaken on a basis of reciprocity, is referred to as “mutual legal assistance”. Having a legal framework regulating such assistance is useful for providing a predictable means for cooperation between the requesting and requested States.

(2) At present, there is no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Rather, to the extent that cooperation of this kind occurs, it does so through voluntary cooperation by States as a matter of comity or, if they exist, bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally (referred to as mutual legal assistance treaties).

⁵³⁰ Draft article 3, paragraph 4, provides that the draft article is without prejudice to a broader definition of crimes against humanity provided for in any national law. An extradition request based on a broader definition than is contained in draft article 3, paragraphs 1–3, however, would not be based on an offence covered by the present draft articles.

While mutual legal assistance relating to crimes against humanity can occur through existing mutual legal assistance treaties, in many instances there will be no such treaty between the requesting and requested States.⁵³¹ As is the case for extradition, any given State often has no treaty relationship with a large number of other States on mutual legal assistance with respect to crimes generally, so that when cooperation is needed with respect to crimes against humanity, there is no legal framework in place to facilitate such cooperation.

(3) Draft article 14 seeks to provide that legal framework. Its eight paragraphs are designed to address various important elements of mutual legal assistance that will apply between the requesting and requested States, bearing in mind that in some instances there may exist a mutual legal assistance treaty between those States, while in other instances there may not. As discussed further below, draft article 14 always applies to the requesting and requested States (regardless of whether there exists a mutual legal assistance treaty between them), while the draft annex additionally applies to the requesting and requested States when there is no mutual legal assistance treaty between them, or when such a treaty does exist but the two States nevertheless agree to use the draft annex to facilitate cooperation.

(4) The detailed provisions on mutual legal assistance appearing in draft article 14 and in the draft annex also appear in several contemporary conventions addressing specific crimes. While there is also precedent for less detailed provisions,⁵³² States appear attracted to the more detailed provisions, as may be seen in the drafting history of the 2000 United Nations Convention against Transnational Organized Crime. During the initial drafting, the article on mutual legal assistance was a two-paragraph provision.⁵³³ The negotiating States decided early on,⁵³⁴ however, that this less detailed approach should be replaced with a more detailed article based on article 7 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The result was the detailed provisions of article 18 of the United Nations Convention against Transnational Organized Crime, which were reproduced almost in their entirety in article 46 of the 2003 United Nations Convention against Corruption. Comparable provisions may also be seen in the 1999 International Convention for the Suppression of the Financing of Terrorism.⁵³⁵

⁵³¹ See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (United Nations publication, Sales No. E.98.XI.5), p. 185, para. 7.22 (finding that “[t]here are still...many States that are not parties to general mutual legal assistance treaties and many circumstances in which no bilateral treaty governs the relationship between the pair of States concerned in a particular matter”).

⁵³² See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 9; International Convention for the Suppression of Terrorist Bombings, art. 10; International Convention for the Protection of All Persons from Enforced Disappearance, art. 14.

⁵³³ See Commission on Crime Prevention and Criminal Justice, report of the Secretary-General on the question of the elaboration of an international convention against organized transnational crime (E/CN.15/1997/7/Add.1), p. 15.

⁵³⁴ *Ibid.* (suggestions of Australia and Austria).

⁵³⁵ The mutual legal assistance provisions in the International Convention for the Suppression of the Financing of Terrorism are scattered

(5) The Commission decided that the more detailed provisions were best suited for draft articles on crimes against humanity. Such provisions provide extensive guidance to States, which is especially useful when there exists no mutual legal assistance treaty between the requesting and requested States.⁵³⁶ Moreover, as was the case for the detailed provisions on extradition contained in draft article 13, such provisions on mutual legal assistance have proven acceptable to States. For example, as of July 2017, the United Nations Convention against Transnational Organized Crime has 187 States parties and the United Nations Convention against Corruption has 181 States parties. No State party has filed a reservation objecting to the language or content of the mutual legal assistance article in either convention. Additionally, such provisions are applied on a regular basis by national law enforcement authorities, and have been explained in numerous guides and other resources, such as those issued by UNODC.⁵³⁷

(6) Draft article 14 and the draft annex are modelled on article 46 of the United Nations Convention against Corruption, but with some modifications. As a structural matter, the Commission viewed it as useful to include in the body of the draft articles provisions applicable in all circumstances, while placing in the draft annex provisions that only apply when there is no mutual legal assistance treaty between the requesting and requested States or when application of the draft annex is otherwise deemed useful to facilitate cooperation. Doing so helps to preserve a sense of balance in the draft articles, while grouping together in a single place (the draft annex) provisions applicable only in certain situations. In addition, as explained below, some of the provisions of article 46 have been revised, relocated, or deleted.

(7) Draft article 14, paragraph 1, establishes a general obligation for States parties to “afford one another the widest measure of mutual legal assistance” with respect to offences arising under the present draft articles. The text is verbatim from article 46, paragraph 1, of the United Nations Convention against Corruption,⁵³⁸ except for the reference to “offences covered by the present draft articles”. Importantly, States are obliged to afford each other such assistance not just in “investigations” but also in “prosecutions” and “judicial proceedings”. As such, the obligation is intended to ensure that the broad goals of the present draft articles are furthered by comprehensive cooperation among States at all stages of the law enforcement process.

among several articles, many of which concern both mutual assistance and extradition. See International Convention for the Suppression of the Financing of Terrorism, arts. 7, para. 5, and 12–16. More commonly, mutual legal assistance provisions are aggregated in a single article.

⁵³⁶ See UNODC, *State of implementation of the United Nations Convention against Corruption: Criminalization, law enforcement and international cooperation*, New York, 2015, pp. 190 and 206–207.

⁵³⁷ See footnote 489 above.

⁵³⁸ United Nations Convention against Corruption, art. 46, para. 1 (“States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention”). See also United Nations Convention against Transnational Organized Crime, art. 18, para. 1; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 1; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 1.

(8) Draft article 14, paragraph 2, addresses such cooperation in the specific context of the liability of legal persons, using a different standard than exists in paragraph 1. Such cooperation is to occur only “to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State”. This standard is a recognition that national legal systems differ considerably in their treatment of legal persons in relation to crimes, differences that also led to the language set forth in draft article 6, paragraph 8. Given those differences, mutual legal assistance in this context must be contingent on the extent to which such cooperation is possible.

(9) The text of draft article 14, paragraph 2, is almost verbatim from article 46, paragraph 2, of the United Nations Convention against Corruption,⁵³⁹ but for the addition of “and other” in “investigations, prosecutions, and judicial *and other* proceedings” in relation to offences for which a legal person may be held liable. This change was regarded as useful given that, under some national legal systems, other types of proceedings might be relevant with respect to legal persons, such as administrative proceedings.

(10) Draft article 14, paragraph 3, lists types of assistance that may be requested. These types of assistance are drafted in broad terms and, in most respects, replicate the types of assistance listed in many multilateral⁵⁴⁰ and bilateral⁵⁴¹ extradition treaties. Indeed, such terms are broad enough to encompass the range of assistance that might be relevant for the investigation and prosecution of a crime against humanity, including the seeking of: police and security agency records; court files; citizenship, immigration, birth, marriage, and death records; health records; forensic material; and biometric data. The list is not exhaustive, as it provides in

subparagraph (j) a catch-all provision relating to “any other type of assistance that is not contrary to the national law of the requested State”.

(11) Paragraph 3 is modelled on article 46, paragraph 3, of the United Nations Convention against Corruption. Under that Convention, any existing bilateral mutual legal assistance treaties between States parties that lack the forms of cooperation listed in paragraph 3 are generally considered “as being automatically supplemented by those forms of cooperation”.⁵⁴² The Commission made some modifications to the text of article 46, paragraph 3, for the purposes of draft article 14, paragraph 3, given that the focus of the present draft articles is on crimes against humanity, rather than on corruption.

(12) A new subparagraph (a) was added to highlight mutual legal assistance for the purpose of “identifying and locating alleged offenders and, as appropriate, victims, witnesses or others”. The phrase “as appropriate” recognizes that privacy concerns should be considered with respect to victims, witnesses and others, while the phrase “or others” should be understood as including experts or other individuals helpful to the investigation or prosecution of an alleged offender. Subparagraph (b) was also modified to include the possibility of a State providing mutual legal assistance through videoconferencing for purposes of obtaining testimony or other evidence from persons. This was considered appropriate given the growing use of such testimony and its particular advantages for transnational law enforcement, as is also recognized in paragraph 16 of the draft annex.⁵⁴³ Subparagraph (e), which allows a State to request mutual legal assistance in “examining objects and sites”, was modified to emphasize the ability to collect forensic evidence relating to crimes against humanity, given the importance of such evidence (such as exhumation and examination of gravesites) in investigating fully such crimes.

(13) Subparagraph (g), which allows a State to request assistance in obtaining “originals or certified copies of relevant documents and records”, was modified to delete the illustrative listing contained in the United Nations Convention against Corruption,⁵⁴⁴ which was viewed as unduly focused on financial records. While such records may be relevant with respect to crimes against humanity, other types of records (such as death certificates and police reports) are likely to be just as, if not more, relevant. Similarly, two types of assistance listed in the United Nations Convention against Corruption—at

⁵³⁹ United Nations Convention against Corruption, art. 46, para. 2 (“Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party”). During the negotiations for the United Nations Convention against Transnational Organized Crime, the issue of the variety of national practice on the question of liability of legal persons, particularly in criminal cases, led several delegations to propose a specific mutual legal assistance provision on legal persons, which was ultimately adopted as paragraph 2 of article 18. During the later negotiation of the United Nations Convention against Corruption, three proposals were put forward for the provision on mutual legal assistance, one of which failed to include an express provision on mutual legal assistance regarding legal persons (see *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (footnote 358 above), option 3, pp. 374–377). At the second negotiating session, that proposal was dropped from consideration (*ibid.*, p. 378, footnote 7), leading ultimately to the adoption of paragraph 2 of article 46.

⁵⁴⁰ See, for example, Inter-American Convention on Mutual Assistance in Criminal Matters, art. 7; 2004 [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters, art. 1, para. 2; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 2; United Nations Convention against Transnational Organized Crime, art. 18, para. 3.

⁵⁴¹ See, for example, 1990 Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex, art. 1, para. 2; Treaty between the United States of America and the Russian Federation on Mutual Legal Assistance in Criminal Matters (Moscow, 17 June 1999), United Nations, *Treaty Series*, vol. 2916, No. 50780, art. 2.

⁵⁴² UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (see footnote 358 above), p. 170, para. 605 (advising also that under some national legal systems, amending legislation may be required to incorporate additional bases of cooperation).

⁵⁴³ This provision permits a State to allow a “hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State”. This paragraph is based on paragraph 18 of article 46 of the United Nations Convention against Corruption.

⁵⁴⁴ United Nations Convention against Corruption, art. 46, para. 3 (f) (“Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records”).

article 46, paragraph 3, subparagraphs (j) and (k)⁵⁴⁵—were not included, as they refer to that Convention’s detailed provisions on asset recovery, which are not included in the present draft articles.

(14) Although the United Nations Convention against Corruption lists together “[e]xecuting searches and seizures, and freezing”,⁵⁴⁶ the Commission deemed it appropriate to move the word “freezing” to subparagraph (h), which deals with proceeds of crime, so as to read “identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes”. The words “or other purposes” were added so as to capture purposes that are not evidentiary in nature, such as restitution of property to victims.

(15) Draft article 14, paragraph 4, provides that States “shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy”. This same language is used in article 46, paragraph 8, of the United Nations Convention against Corruption⁵⁴⁷ and similar language appears in other multilateral and bilateral treaties on mutual legal assistance.⁵⁴⁸ While such a provision may not be commonly needed for the present draft articles, given that the offences at issue are not likely to be financial in nature, a crime against humanity can entail a situation where assets are stolen, and where mutual legal assistance regarding those assets might be valuable, not just for proving the crime but also for the recovery and return of those assets to the victims. While the reference is to “bank” secrecy, the provision is intended to cover any financial institution whether or not technically regarded as a bank.⁵⁴⁹

(16) Draft article 14, paragraph 5, provides that “States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft

article”. While this provision, which is based on article 46, paragraph 30, of the United Nations Convention against Corruption,⁵⁵⁰ does not obligate States to take any particular action in this regard, it encourages States to consider concluding additional multilateral or bilateral treaties to improve the implementation of article 14.

(17) Draft article 14, paragraph 6, acknowledges that a State may transmit information to another State, even in the absence of a formal request, if it is believed that doing so could assist the latter in undertaking or successfully concluding investigations, prosecutions and judicial proceedings, or might lead to a formal request by the latter State. Though innovative when first used in the 2000 United Nations Convention against Transnational Organized Crime,⁵⁵¹ this provision was replicated in article 46, paragraph 4, of the 2003 United Nations Convention against Corruption. The provision is stated in discretionary terms, providing that a State “may” transmit information, and is further conditioned by the clause “[w]ithout prejudice to its national law”. In practice, States frequently engage in such informal exchanges of information.⁵⁵²

(18) In both the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, there is a further provision providing more detail as to the treatment of transmitted information.⁵⁵³ While such details may be useful in some circumstances, for the purposes of the present draft articles the Commission deemed draft article 14, paragraph 6, to be sufficient in providing a basis for such cooperation.

(19) Draft article 14, paragraph 7, addresses the relationship of draft article 14 to any mutual legal assistance treaty existing between the requesting and requested States. Paragraph 7 makes clear that the “provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance”. In other words, any other mutual legal assistance treaty in place between the two States continues to

⁵⁴⁵ United Nations Convention against Corruption, art. 46, para. 3 (“(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention”). These provisions also do not appear in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances or the United Nations Convention against Transnational Organized Crime.

⁵⁴⁶ United Nations Convention against Corruption, art. 46, para. 3 (c).

⁵⁴⁷ See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 358 above), p. 171, paras. 611–612; *State of implementation of the United Nations Convention against Corruption ...* (footnote 536 above), pp. 160, 190 and 195.

⁵⁴⁸ See, for example, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 5; United Nations Convention against Transnational Organized Crime, art. 18, para. 8; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 2; Model Treaty on Mutual Assistance in Criminal Matters (footnote 541 above), art. 4, para. 2; [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters, art. 3, para. 5.

⁵⁴⁹ The 1990 Model Treaty on Mutual Assistance in Criminal Matters refers to not refusing assistance on the ground of secrecy of “banks and similar financial institutions” (Model Treaty on Mutual Assistance in Criminal Matters (see footnote 541 above), art. 4, para. 2). Most treaties, however, refer solely to “bank secrecy”, which is interpreted as covering other financial institutions as well. See, for example, UNODC, *State of implementation of the United Nations Convention against Corruption ...* (footnote 536 above), pp. 120–121.

⁵⁵⁰ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 30; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 20.

⁵⁵¹ United Nations Convention against Transnational Organized Crime, art. 18, para. 4.

⁵⁵² See UNODC, *State of implementation of the United Nations Convention against Corruption ...* (footnote 536 above), pp. 194–195.

⁵⁵³ United Nations Convention against Transnational Organized Crime, art. 18, para. 5; United Nations Convention against Corruption, art. 46, para. 5. During the adoption of the United Nations Convention against Transnational Organized Crime, an official interpretative note indicated that: “(a) when a State Party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State Party concerned to consult with the potential receiving State beforehand; (b) when a State Party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State” (report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (A/55/383/Add.1) (see footnote 489 above), para. 37).

apply,⁵⁵⁴ but is supplemented by the provisions of draft article 14 if such provisions provide for a higher level of mutual legal assistance. This provision draws upon the language of article 46, paragraph 6, of the United Nations Convention against Corruption,⁵⁵⁵ but adds the “except” clause, expressly to indicate what is regarded as implicit in article 46, paragraph 6, and comparable provisions.⁵⁵⁶

(20) Draft article 14, paragraph 8, addresses the application of the draft annex, which is an integral part of the present draft articles. Paragraph 8, which is based on article 46, paragraph 7, of the United Nations Convention against Corruption,⁵⁵⁷ provides that the draft annex applies when there exists no mutual legal assistance treaty between the requesting and requested States. As such, the draft annex does not apply when there exists a mutual legal assistance treaty between the requesting and requested States. Even so, paragraph 8 notes that the two States could agree to apply the provisions of the draft annex if they wish to do so, and are so encouraged if doing so facilitates cooperation.

(21) As was the case with respect to draft article 13 on extradition, the Commission decided that there was no need to include in draft article 14 a dual criminality requirement, such as appears in article 46, paragraph 9, of the United Nations Convention against Corruption.⁵⁵⁸ As previously noted, the present draft articles on crimes against humanity define crimes against humanity in draft article 3 and, based on that definition, mandate in draft article 6, paragraphs 1 to 3, that the “offences” of “crimes against humanity” exist under national criminal laws of

each State. As such, dual criminality should automatically be satisfied in the case of a request for mutual legal assistance under the present draft articles.

Article 15. Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Commentary

(1) Draft article 15 addresses the settlement of disputes concerning the interpretation or application of the present draft articles. There is currently no obligation upon States to resolve disputes arising between them specifically in relation to the prevention and punishment of crimes against humanity. To the extent that such disputes are addressed, it occurs in the context of an obligation relating to dispute settlement that is not specific to such crimes.⁵⁵⁹ Crimes against humanity also have been mentioned in the European Court of Human Rights and the Inter-American Court of Human Rights when evaluating issues such as fair trial rights,⁵⁶⁰ *ne bis in idem*,⁵⁶¹ *nullum crimen, nulla poena sine praevia lege poenali*⁵⁶² and the legality of amnesty provisions.⁵⁶³

⁵⁵⁴ See *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 321, para. (1) of the commentary to article 10 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (asserting that, with respect to a similar provision in the draft articles: “Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article”).

⁵⁵⁵ United Nations Convention against Corruption, art. 46, para. 6 (“The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance”). See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 6; United Nations Convention against Transnational Organized Crime, art. 18, para. 6.

⁵⁵⁶ See, for example, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988 (footnote 531 above), p. 184, para. 7.20 (“This means that where the Convention requires the provision of a higher level of assistance in the context of illicit trafficking than is provided for under the terms of an applicable bilateral or multilateral mutual legal assistance treaty, the provisions of the Convention will prevail”).

⁵⁵⁷ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 7; United Nations Convention against Transnational Organized Crime, art. 18, para. 7. See also *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988 (footnote 531 above), p. 185, para. 7.23; *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 358 above), p. 171, para. 608.

⁵⁵⁸ See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 358 above), p. 172, para. 616 (“States parties still have the option to refuse such requests on the basis of lack of dual criminality. At the same time, to the extent this is consistent with the basic concepts of their legal system, States parties are required to render assistance involving non-coercive action”).

⁵⁵⁹ For example, crimes against humanity arose before the International Court of Justice in the context of counterclaims filed by Italy in the case brought by Germany under the 1957 European Convention for the Peaceful Settlement of Disputes (*Jurisdictional Immunities of the State* (*Germany v. Italy*), *Counter-Claim, Order of 6 July 2010*, I.C.J. Reports 2010, p. 310, at pp. 311–312, para. 3). In that instance, however, the Court found that, since the counterclaim by Italy related to facts and situations existing prior to the entry into force of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, it fell outside the scope of the Court’s jurisdiction (*ibid.*, at pp. 320–321, para. 30).

⁵⁶⁰ *Streletz, Kessler and Krenz v. Germany* [GC], Application Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, ECHR 2001-II (concurring opinion of Judge Loucaides); and *K.-H.W. v. Germany* [GC], Application No. 37201/97, Judgment of 22 March 2001, ECHR 2001-II (extracts) (concurring opinion of Judge Loucaides).

⁵⁶¹ *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (see footnote 26 above), para. 154.

⁵⁶² *Kolk and Kislyiy v. Estonia* (dec.), Application Nos. 23052/04 and 24018/04, Decision on admissibility of 17 January 2006, ECHR 2006-I.

⁵⁶³ *Barrios Altos v. Peru*, Judgment of 14 March 2001 (see footnote 416 above) (concurring opinion of Judge Sergio García-Ramírez), para. 13; *Gelman v. Uruguay*, Judgment of 24 February 2011 (Merits and Reparations), Inter-American Court of Human Rights, Series C, No. 221, paras. 198 and 210; and *Marguš v. Croatia* (see footnote 416 above), paras. 130–136.

(2) Draft article 15, paragraph 1, provides that “States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations”. This text is modelled on article 66, paragraph 1, of the 2003 United Nations Convention against Corruption.⁵⁶⁴ The *travaux préparatoires* relating to the comparable provision of the 2000 United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime indicate that such a provision “is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies”.⁵⁶⁵

(3) Draft article 15, paragraph 2, provides that a dispute concerning the interpretation or application of the present draft articles that “is not settled through negotiation” shall be submitted to compulsory dispute settlement. Although there is no prescribed means or period of time for pursuing such negotiation, a State should make a genuine attempt at negotiation⁵⁶⁶ and not simply protest the conduct of the other State.⁵⁶⁷ If negotiation fails, most treaties addressing crimes within national law oblige an applicant State to pursue arbitration prior to submission of the dispute to the International Court of Justice.⁵⁶⁸ The

Commission, however, deemed it appropriate in the context of the present draft articles, which address crimes against humanity, to provide for immediate resort to the International Court of Justice, unless the two States agree to submit the matter to arbitration. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide likewise provides for immediate resort to the International Court of Justice for dispute settlement.⁵⁶⁹

(4) Draft article 15, paragraph 3, provides that a “State may declare that it does not consider itself bound by paragraph 2”, in which case “other States shall not be bound by paragraph 2” with respect to that State. Most treaties that address crimes under national law and that provide for inter-State dispute settlement allow a State party to opt out of compulsory dispute settlement.⁵⁷⁰ For example, article 66, paragraph 3, of the United Nations Convention against Corruption provides that “[e]ach State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation”. As previously noted, at present there are 181 States parties to the United Nations Convention against Corruption; of those, 42 States parties have filed a reservation declaring that they do not consider themselves bound by paragraph 2 of article 66.⁵⁷¹

(5) Draft article 15, paragraph 4, provides that “[a]ny State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration”. Recent treaties that address crimes under

⁵⁶⁴ See also United Nations Convention against Transnational Organized Crime, art. 35, para. 1; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 1.

⁵⁶⁵ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime, tenth session, Vienna, 17–28 July 2000* (A/AC.254/33), para. 34.

⁵⁶⁶ For analysis of similar provisions, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2011, p. 70, at p. 132, para. 157 (finding that there must be, “at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute”); *ibid.*, p. 133, para. 159 (“the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked”); *Questions relating to the Obligation to Prosecute or Extradite* (footnote 25 above), at pp. 445–446, para. 57 (“The requirement ... could not be understood as referring to a theoretical impossibility of reaching a settlement”); *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, *I.C.J. Reports* 1962, p. 319, at p. 345 (the requirement implies that “no reasonable probability exists that further negotiations would lead to a settlement”).

⁵⁶⁷ See, for example, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports* 2006, p. 6, at pp. 40–41, para. 91.

⁵⁶⁸ See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 12, para. 1; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 1; International Convention against the Taking of Hostages, art. 16, para. 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, para. 1; Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 1; International Convention for the Suppression of Terrorist Bombings, art. 20, para. 1; International Convention for the Suppression of the Financing of Terrorism, art. 24, para. 1; United Nations Convention against Transnational Organized Crime, art. 35, para. 2; Protocol to Prevent, Suppress and Punish Trafficking

in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 2; United Nations Convention against Corruption, art. 66, para. 2. Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination requires the dispute to be submitted first to the Committee on the Elimination of Racial Discrimination, which in turn may place the matter before an *ad hoc* conciliation commission (International Convention on the Elimination of All Forms of Racial Discrimination, arts. 11–13 and 22).

⁵⁶⁹ Convention on the Prevention and Punishment of the Crime of Genocide, art. IX; see also Organization of African Unity Convention on the Prevention and Combating of Terrorism, art. 22, para. 2.

⁵⁷⁰ See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 12, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 2; International Convention against the Taking of Hostages, art. 16, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, para. 2; Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 20, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 24, para. 2; United Nations Convention against Transnational Organized Crime, art. 35, para. 3; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 2.

⁵⁷¹ The European Union also filed a declaration to article 66, paragraph 2, stating: “With respect to Article 66, paragraph 2, the Community points out that, according to Article 34, paragraph 1, of the Statute of the International Court of Justice, only States may be parties before that Court. Therefore, under Article 66, paragraph 2, of the Convention, in disputes involving the Community, only dispute settlement by way of arbitration will be available”; the text of the declaration is available from <https://treaties.un.org> (*Status of Treaties Deposited with the Secretary-General*, chap. XVIII.14).

national law and that provide for inter-State dispute settlement also contain such a provision.⁵⁷² For example, article 66, paragraph 4, of the United Nations Convention against Corruption provides: “Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.”

(6) The view was expressed according to which the present draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. On the other hand, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

ANNEX

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the

United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. A request for mutual legal assistance shall contain:

(a) the identity of the authority making the request;

(b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned; and

(f) the purpose for which the evidence, information or action is sought.

5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

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

7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

8. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft annex;

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

⁵⁷² See, for example, United Nations Convention against Transnational Organized Crime, art. 35, para. 4; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 3.

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

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

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

10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

12. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State, in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

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

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the present draft articles, may be transferred if the following conditions are met:

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

(a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) the State to which the person is transferred shall without delay implement its obligation to return

the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

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

Commentary

(1) Draft article 14 applies to any request for mutual legal assistance between a requesting and requested State. As indicated in draft article 14, paragraph 8, the draft annex additionally applies to a request when the requesting and requested States have no mutual legal assistance treaty between them. When those States do have such a treaty, they may choose to apply the draft annex if it facilitates cooperation.

(2) The draft annex is an integral part of the draft articles. Consequently, paragraph 1 of the draft annex provides that the draft annex “applies in accordance with draft article 14, paragraph 8”.

Designation of a central authority

(3) Paragraph 2 of the draft annex requires the State to designate a central authority responsible for handling incoming and outgoing requests for assistance and to notify the Secretary-General of the United Nations of the chosen central authority. In designating a “central authority”, the focus is not on the geographical location of the authority, but rather its centralized institutional role with respect to the State or a region thereof.⁵⁷³ This paragraph is based on article 46, paragraph 13, of the 2003

United Nations Convention against Corruption.⁵⁷⁴ As of 2015, all but three States parties to that convention had designated a central authority.⁵⁷⁵

Procedures for making a request

(4) Paragraphs 3 to 5 of the draft annex address the procedures by which a State makes a request to another State for mutual legal assistance.

(5) Paragraph 3 of the draft annex stipulates that requests must be written and made in a language acceptable to the requested State. Further, it obligates each State to notify the Secretary-General of the United Nations about the language or languages acceptable to that State. This paragraph is based on article 46, paragraph 14, of the United Nations Convention against Corruption.⁵⁷⁶

(6) Paragraph 4 of the draft annex indicates what must be included in any request for mutual legal assistance, such as the identity of the authority making the request, the purpose for which the evidence, information or action is sought, and a statement of the relevant facts. While this provision lays out the minimum requirements for a request for mutual legal assistance, it should not be read to preclude the inclusion of further information if it will expedite or clarify the request. This paragraph is based on article 46, paragraph 15, of the United Nations Convention against Corruption.⁵⁷⁷

(7) Paragraph 5 of the draft annex allows the requested State to request supplemental information when it is either necessary to carry out the request under its national law, or when additional information would prove helpful in doing so. This paragraph is intended to encompass a broad array of situations, such as where the national law of the requested State requires more information for the request to be approved and executed or where the requested State requires new information or guidance from the requesting State on how to proceed with a specific investigation.⁵⁷⁸ This paragraph is based on article 46, paragraph 16, of the United Nations Convention against Corruption.⁵⁷⁹

its first to eleventh sessions (A/55/383/Add.1) (footnote 489 above), para. 40.

⁵⁷⁴ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 8; United Nations Convention against Transnational Organized Crime, art. 18, para. 13.

⁵⁷⁵ See UNODC, *State of implementation of the United Nations Convention against Corruption ...* (footnote 536 above), p. 197.

⁵⁷⁶ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 9; United Nations Convention against Transnational Organized Crime, art. 18, para. 14; UNODC, *State of implementation of the United Nations Convention against Corruption ...* (footnote 536 above), p. 199.

⁵⁷⁷ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 10; United Nations Convention against Transnational Organized Crime, art. 18, para. 15; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (footnote 531 above), p. 189, para. 7.33.

⁵⁷⁸ See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (footnote 531 above), pp. 189–190, para. 7.34.

⁵⁷⁹ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 11; United Nations Convention against Transnational Organized Crime, art. 18, para. 16.

⁵⁷³ See the report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of

Response to the request by the requested State

(8) Paragraphs 6 to 12 of the draft annex address the response by the requested State to the request for mutual legal assistance.

(9) Paragraph 6 of the draft annex provides that the request “shall be executed in accordance with the national law of the requested State” and, to the extent not contrary to such law and where possible, “in accordance with the procedures specified in the request”. This provision is narrowly tailored to address only the process by which the State executes the request; it does not provide grounds for refusing to respond to a request, which are addressed in paragraph 8 of the draft annex. This paragraph is based on article 46, paragraph 17, of the United Nations Convention against Corruption.⁵⁸⁰

(10) Paragraph 7 of the draft annex provides that the request shall be addressed as soon as possible, taking into account any deadlines suggested by the requesting State, and that the requested State shall keep the requesting State reasonably informed of its progress in handling the request. Read in conjunction with paragraph 6, paragraph 7 obligates the requested State to execute a request for mutual legal assistance in an efficient and timely manner. At the same time, paragraph 7 is to be read in the light of the permissibility of a postponement for the reason set forth in paragraph 10. Paragraph 7 is based on article 46, paragraph 24, of the United Nations Convention against Corruption.⁵⁸¹

(11) Paragraph 8 of the draft annex indicates four circumstances under which a request for mutual legal assistance may be refused, and is based on article 46, paragraph 21, of the United Nations Convention against Corruption.⁵⁸² Subparagraph (a) allows a requested State to refuse mutual legal assistance when the request does not conform to the requirements of the draft annex. Subparagraph (b) allows a requested State to refuse to provide mutual legal assistance “if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests”. Subparagraph (c) allows mutual legal assistance to be refused “if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to

any similar offence” if it were being prosecuted in the requested State. Subparagraph (d) allows a requested State to refuse mutual legal assistance when granting the request would be contrary to the requested State’s legal system. The Commission considered whether to add an additional ground for refusal based on a principle of non-discrimination, but decided that the existing grounds (especially (b) and (d)) were sufficiently broad to embrace such a ground. Among other things, it was noted that a proposal to add such an additional ground was contemplated during the drafting of the 2000 United Nations Convention against Transnational Organized Crime, but was not included because it was viewed as already encompassed in subparagraph (b).⁵⁸³

(12) Paragraph 9 of the draft annex provides that “[r]easons shall be given for any refusal of mutual legal assistance”. Such a requirement ensures the requesting State understands why the request was rejected, thereby allowing better understanding as to constraints that exist not just for that particular request but also for future requests. This paragraph is based on article 46, paragraph 23, of the United Nations Convention against Corruption.⁵⁸⁴

(13) Paragraph 10 of the draft annex provides that mutual legal assistance “may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding”. This provision allows the requested State some flexibility to delay the provision of information if necessary to avoid prejudicing an ongoing investigation or proceeding of its own. This paragraph is based on article 46, paragraph 25, of the United Nations Convention against Corruption.⁵⁸⁵

(14) Paragraph 11 of the draft annex obliges the requested State, before refusing a request, to “consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions”. In some cases, the reason for refusal may be a purely technical matter which can be easily remedied by the requesting State, in which case consultations will help to clarify the matter and allow the request to proceed. A formulation of this paragraph in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances indicated only that consultations should take place regarding possible postponement of requests for mutual legal assistance.⁵⁸⁶ The United Nations Convention against Transnational Organized Crime, however,

⁵⁸⁰ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 12; United Nations Convention against Transnational Organized Crime, art. 18, para. 17.

⁵⁸¹ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 24.

⁵⁸² See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 15; United Nations Convention against Transnational Organized Crime, art. 18, para. 21; European Convention on Mutual Assistance in Criminal Matters, art. 2; Model Treaty on Mutual Assistance in Criminal Matters (footnote 541 above), art. 4, para. 1. For commentary, see Council of Europe, Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters, p. 4, *European Treaty Series*, No. 30; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (footnote 531 above), pp. 195–196, paras. 7.49–7.51; report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (A/55/383/Add.1) (footnote 489 above), para. 42.

⁵⁸³ See the report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (A/55/383/Add.1) (footnote 489 above), para. 42.

⁵⁸⁴ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 16; United Nations Convention against Transnational Organized Crime, art. 18, para. 23; Model Treaty on Mutual Assistance in Criminal Matters (footnote 541 above), art. 4, para. 5.

⁵⁸⁵ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17; United Nations Convention against Transnational Organized Crime, art. 18, para. 25; Model Treaty on Mutual Assistance in Criminal Matters (footnote 541 above), art. 4, para. 3.

⁵⁸⁶ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17.

expanded the application of this provision to cover refusals of assistance as well.⁵⁸⁷ This approach was replicated in article 46, paragraph 26, of the United Nations Convention against Corruption,⁵⁸⁸ upon which paragraph 11 is based.

(15) Paragraph 12 of the draft annex addresses the provision of government records, documents and information from the requested State to the requesting State, indicating that such information that is publicly available “shall” be provided, while information that is not publicly available “may” be provided. Such an approach encourages but does not require a requested State to release confidential information. This paragraph is based on article 46, paragraph 29, of the United Nations Convention against Corruption.⁵⁸⁹

Use of information by the requesting State

(16) Paragraphs 13 and 14 of the draft annex address the use of information received by the requesting State from the requested State.

(17) Paragraph 13 of the draft annex precludes the requesting State from transmitting the information to a third party, such as another State, and precludes it from using the information “for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State”. As noted with respect to paragraph 4 of the draft annex, the requesting State must indicate in its request “the purpose for which the evidence, information or action is sought”. At the same time, when the information received by the requesting State is exculpatory to an accused person, the requesting State may disclose the information to that person (as it may be obliged to do under its national law), after providing advance notice to the requested State when possible. This paragraph is based on article 46, paragraph 19, of the United Nations Convention against Corruption.⁵⁹⁰

(18) Paragraph 14 of the draft annex allows the requesting State to require the requested State to keep the fact and substance of the request confidential, except to the extent necessary to execute the request. This paragraph is based on article 46, paragraph 20, of the United Nations Convention against Corruption.⁵⁹¹

⁵⁸⁷ United Nations Convention against Transnational Organized Crime, art. 18, para. 26.

⁵⁸⁸ United Nations Convention against Corruption, art. 46, para. 26 (“Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions”).

⁵⁸⁹ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 29.

⁵⁹⁰ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 13; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 3; United Nations Convention against Transnational Organized Crime, art. 18, para. 19. For commentary, see *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (footnote 531 above), p. 193, para. 7.43.

⁵⁹¹ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 20; Model Treaty on Mutual Assistance in Criminal Matters (footnote 541 above), art. 9.

Testimony of person from the requested State

(19) Paragraphs 15 and 16 of the draft annex address the procedures for a requesting State to secure testimony from a person present in the requested State.

(20) Paragraph 15 of the draft annex is essentially a “safe conduct” provision, which gives a person travelling from the requested State to the requesting State protection from prosecution, detention, punishment or other restriction of liberty by the requesting State during the person’s testimony, with respect to acts that occurred prior to the person’s departure from the requested State. As set forth in paragraph 15, such protection does not extend to acts committed after the person’s departure nor does it continue indefinitely after the testimony is given. This paragraph is based on article 46, paragraph 27, of the United Nations Convention against Corruption.⁵⁹²

(21) Paragraph 16 of the draft annex addresses testimony by witnesses through videoconferencing, a cost-effective technology that is becoming increasingly common. While testimony by videoconference is not mandatory, if it is “not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State”, then the requested State may permit the hearing to take place by videoconference. This will only occur, however, when “possible and consistent with fundamental principles of national law”, a clause which refers to the laws of both the requesting and the requested States. This paragraph is based on article 46, paragraph 18, of the United Nations Convention against Corruption.⁵⁹³ The 2015 implementation report for the United Nations Convention against Corruption indicates that the use of this provision is widespread:

The hearing of witnesses and experts by videoconference has proved to be a time- and cost-saving tool in the context of mutual legal assistance and can help to overcome practical difficulties, for example, when the person whose evidence is sought is unable or unwilling to travel to the foreign country to give evidence. Hence, there is growing acceptance and practical use of this measure by competent authorities.⁵⁹⁴

Transfer for testimony of person detained in the requested State

(22) Paragraphs 17 to 19 of the draft annex address the situation where a requesting State seeks the transfer from the requested State of a person who is being detained or serving a sentence in the latter.

⁵⁹² See also United Nations Convention against Transnational Organized Crime, art. 18, para. 27; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 18; Model Treaty on Mutual Assistance in Criminal Matters (footnote 541 above), art. 15; European Convention on Mutual Assistance in Criminal Matters, art. 12; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (footnote 531 above), pp. 197–198, para. 7.55.

⁵⁹³ See also United Nations Convention against Transnational Organized Crime, art. 18, para. 18; report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (A/55/383/Add.1) (footnote 489 above), para. 41; UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 358 above), pp. 174–175, para. 629.

⁵⁹⁴ UNODC, *State of implementation of the United Nations Convention against Corruption ...* (footnote 536 above), p. 200.

(23) Paragraph 17 of the draft annex allows for the transfer of a person who is in the custody of the requested State to the requesting State where the person to be transferred “freely gives his or her informed consent” and the “competent authorities” of the requesting State and requested State agree to the transfer. The provision should be understood as covering persons who are in custody for criminal proceedings or serving a sentence, who are performing mandatory community service, or who are confined to particular areas under a probationary system. Although testimony may be the principal reason for such transfers, the provision also broadly covers transfer for any type of assistance sought from such a person for “investigations, prosecutions or judicial proceedings”. This paragraph is based on article 46, paragraph 10, of the United Nations Convention against Corruption.⁵⁹⁵

(24) Paragraph 18 of the draft annex describes the obligation of the requesting State to keep the person transferred in custody, unless otherwise agreed, and to return the transferee to the requested State in accordance with the transfer agreement, without the requested State needing to initiate extradition proceedings. This paragraph also addresses the obligation of the requested State to give credit to the transferee for the time which he or she spends in custody in the requesting State. This paragraph is based on article 46, paragraph 11, of the United Nations Convention against Corruption.⁵⁹⁶

(25) Paragraph 19 of the draft annex is similar to the “safe conduct” provision contained in paragraph 15, whereby the transferred person is protected from prosecution, detention, punishment or other restriction to liberty by the requesting State during the course of the person’s presence in the requesting State, with respect to acts that occurred prior to the person’s departure from the requested State. Paragraph 19, however, allows the requested State to agree that the requesting State may undertake such actions. Further, this provision must be read in conjunction with paragraph 18, which obliges the requesting State to keep the transferee in custody, unless otherwise agreed, based upon his or her detention or sentence in the requested State. This paragraph is based on article 46, paragraph 12, of the United Nations Convention against Corruption.⁵⁹⁷

Costs

(26) Paragraph 20 of the draft annex addresses the issue of costs, stating, *inter alia*, that “[t]he ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned”. The second sentence of the provision allows for States to consult with each other where the expenses to fulfil the

request will be “of a substantial or extraordinary nature”. This paragraph is based on article 46, paragraph 28, of the United Nations Convention against Corruption.⁵⁹⁸

(27) Various interpretative notes or commentary with respect to comparable provisions in other treaties provide guidance as to the meaning of this provision. For example, the commentary to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides:

This rule makes for simplicity, avoiding the keeping of complex accounts, and rests on the notion that over a period of time there will be a rough balance between States that are sometimes the requesting and sometimes the requested party. In practice, however, that balance is not always maintained, as the flow of requests between particular pairs of parties may prove to be largely in one direction. For this reason, the concluding words of the first sentence enable the parties to agree to a departure from the general rule even in respect of ordinary costs.⁵⁹⁹

(28) A footnote to the 1990 United Nations Model Treaty on Mutual Assistance in Criminal Matters indicates that:

For example, the requested State would meet the ordinary cost of fulfilling the request for assistance except that the requesting State would bear (a) the exceptional or extraordinary expenses required to fulfil the request, where required by the requested State and subject to previous consultations; (b) the expenses associated with conveying any person to or from the territory of the requested State, and any fees, allowances or expenses payable to that person while in the requesting State ...; (c) the expenses associated with conveying custodial or escorting officers; and (d) the expenses involved in obtaining reports of experts.⁶⁰⁰

(29) An interpretative note to the United Nations Convention against Transnational Organized Crime states:

The *travaux préparatoires* should indicate that many of the costs arising in connection with compliance with requests [regarding the transfer of persons or videoconferencing] would generally be considered extraordinary in nature. Further, the *travaux préparatoires* should indicate the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.⁶⁰¹

(30) Finally, according to the *travaux préparatoires* of the United Nations Convention against Corruption:

Further, the *travaux préparatoires* will also indicate the understanding that developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.⁶⁰²

⁵⁹⁵ See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 1; United Nations Convention against Transnational Organized Crime, art. 18, para. 10; report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (A/55/383/Add.1) (footnote 489 above), para. 39.

⁵⁹⁶ See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 2; United Nations Convention against Transnational Organized Crime, art. 18, para. 11.

⁵⁹⁷ See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 3; United Nations Convention against Transnational Organized Crime, art. 18, para. 12.

⁵⁹⁸ See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 19; United Nations Convention against Transnational Organized Crime, art. 18, para. 28; Model Treaty on Mutual Assistance in Criminal Matters (footnote 541 above), art. 19.

⁵⁹⁹ *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (footnote 531 above), p. 198, para. 7.57.

⁶⁰⁰ Model Treaty on Mutual Assistance in Criminal Matters (see footnote 541 above), art. 19, footnote 124.

⁶⁰¹ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (A/55/383/Add.1) (see footnote 489 above), para. 43.

⁶⁰² Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, addendum, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Corruption (A/58/422/Add.1), para. 44.