



The Council of Europe would like to convey its gratitude to the Special Rapporteur Mr Sean D. Murphy for his "Third report on crimes against humanity" on which the ILC's examination of the topic was based this year. The Council of Europe welcomes the work of the ILC in this field and supports the initiative of addressing various actions to be taken by States under their national laws with respect to crimes against humanity.

The Council of Europe has attached and continues to attach great importance to actions taken under national law to ensure the end of impunity for offences constituting crimes against humanity. Indeed, the Council of Europe was one of the first actors to address the prevention of impunity for crimes against humanity with the adoption in 1974 of its *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (ETS No. 82). This Convention aims at ensuring that the punishment and prosecution of crimes against humanity and the most serious violations of the laws and customs of war is not prevented by statutory limitations. As it was mentioned by the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI) in 2016 this Convention has even been interpreted and understood as constituting evidence of an international custom.

Indeed, the adoption of measures to secure that statutory limitation shall not apply to the prosecution of crimes against humanity, to facilitate international cooperation in criminal matters (mutual legal assistance and extradition) and the victim and witness centred approach are at the heart of the initiatives adopted by the Council of Europe. With regard to the Draft Articles on Crimes against Humanity, as contained in Chapter IV of the Report of the ILC of its 69th Session, the Council of Europe would like to confine its comments and observations to the following six issues as detailed in the attached Appendix to this letter:

- Draft Article 5 – *Non-refoulement*
- Draft Article 6 – Criminalisation under national law and non-applicability of any statutory limitation
- Draft Article 11 – Fair treatment of the alleged offender
- Draft Article 12 – Victims, witnesses and others
- Draft Article 13 – Extradition
- Draft Article 14 – Mutual legal assistance

APPENDIX:

Observations of the Council of Europe Secretariat concerning the Draft Articles on Crimes against Humanity adopted by the International Law Commission on first reading at its 69th Session

1. Draft Article 5 - *Non-refoulement*

We welcome the inclusion of an express obligation of *non-refoulement* in Draft Article 5 paragraph 1 prohibiting the expulsion, return, surrender or extradition of 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. As mentioned in paragraph 3 of the Commentary to Draft Article 5, the European Court of Human Rights (ECtHR) has firmly established an obligation of *non-refoulement* under Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) of the *European Convention on Human Rights* (ECHR).¹ A State's responsibility thus arises 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 ECHR if expelled, returned, surrendered or extradited to the country of destination. In our opinion the prohibition of *refoulement* under Draft Article 5 paragraph 1 should also apply in cases where there are substantial grounds to believe that the person to be expelled, returned, surrendered or extradited will be in danger of persecution or other specified harm, such as torture or inhuman or degrading treatment or punishment, upon his or her return even if the expected harm falls short of reaching the threshold of a crime against humanity.

According to the ECtHR, the assessment of the existence of a real risk of ill-treatment in the country of destination triggering the prohibition of *refoulement* must focus on the foreseeable consequences of the individual's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances.² Additionally, if applicable, the Court furthermore has regard to whether there is a general situation of violence existing in the country of destination.³ With regard to the assessment of evidence, the Court has established in its case-law that "the existence 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".⁴ The Contracting State therefore has the obligation to take into account not only the evidence submitted by the individual to be removed but also all other facts, which are relevant in the case under examination.⁵ In assessing the weight to be attached to country material, the Court has found in its case-law that consideration must be given to the source of such material, in particular its

¹ The [Convention for the Protection of Human Rights and Fundamental Freedoms](#) (ETS No. 5) was opened for signature on 4 November 1950 and entered into force on 3 September 1956.

² ECtHR, [Vilvarajah and Others v. the United Kingdom](#), nos. 13163/87, 13164/87, 13165/87, 13447/87 & 13448/87, Chamber judgment of 30 October 1991, para. 108.

³ ECtHR, [Sufi and Elmi v. the United Kingdom](#), nos. 8319/07 & 11449/07, Chamber judgment of 28 June 2011, para. 216.

⁴ ECtHR, [F.G. v. Sweden](#), no. 43611/11, Grand Chamber judgment of 23 November 2016, para. 115.

⁵ ECtHR, [J.K. and Others v. Sweden](#), no. 59166/12, Grand Chamber judgment of 23 August 2016, para. 87.

independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.⁶

We welcome the fact that the abovementioned requirements established by the ECtHR appear to lie also at the heart of Article 5 paragraph 2 of the Draft Articles which instructs the States' competent authorities to "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", when determining whether there are substantial grounds for believing that the person to be expelled, returned, surrendered or extradited would be in danger of being subjected to a crime against humanity.

The Commentary to Draft Article 5 refers in paragraph 10 to the practice of the UN Human Rights Committee when determining the weight to be given to diplomatic assurances from the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law. We would like to draw attention to the fact that also the ECtHR has dealt extensively with the issue of diplomatic assurances in its case-law holding that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment.⁷ In its assessment, the Court will examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment by looking at the quality of the assurances given, and, whether, in light of the receiving State's practices, they can be relied upon.⁸ In doing so the Court will have regard, *inter alia*, to factors such as whether the assurances are specific or general and vague⁹, whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms¹⁰, and, whether there is an effective system of protection against torture in the receiving State¹¹.

2. Draft Article 6 paragraph 6 – Non-applicability of statutory limitation

We welcome the text of Draft Article 6 paragraph 6, which obliges States to take the necessary measures to ensure that, under their national criminal law, offences constituting

⁶ ECtHR, [Saadi v. Italy](#), no. 37201/06, Grand Chamber judgment of 28 February 2008, para. 143; ECtHR, [NA. v. the United Kingdom](#), no. 25904/07, Chamber judgment of 17 July 2008, para. 120; and, ECtHR, [Sufi and Elmi](#), cited above, para. 230.

⁷ ECtHR, [Othman \(Abu Qatada\) v. the United Kingdom](#), no. 8139/09, Chamber judgment of 17 January 2012, para. 187.

⁸ *Ibid.*, para. 189

⁹ ECtHR, [Saadi v. Italy](#), cited above, paras 147-148; ECtHR, [Klein v. Russia](#), no. 24268/08, Chamber judgment of 1 April 2010, para. 55; ECtHR, [Khaydarov v. Russia](#), no. 21055/09, Chamber judgment of 20 May 2010, para. 111.

¹⁰ ECtHR, [Chentiev and Ibragimov v. Slovakia](#), nos. 21022/08 & 51946/08, Chamber decision of 14 September 2010, and, [Gasayev v. Spain](#), no. 22781/06, Chamber decision of 18 September 2006.

¹¹ ECtHR, [Ben Khemais v Italy](#), no. 246/07, Chamber judgment of 24 February 2009, paras. 59-60; ECtHR, [Soldatenko v. Ukraine](#), no. 2440/07, Chamber judgment of 23 October 2008, para. 73; ECtHR, [Koktysh v. Ukraine](#), no. 43707/07, Chamber judgment of 10 December 2009, para. 63.

crimes against humanity shall not be subject to any statute of limitations. The Council of Europe attaches great importance to actions to be taken under national law to ensure the end of impunity for offences constituting crimes against humanity. Indeed, the Council of Europe was one of the first actors to address the prevention of impunity for crimes against humanity with the adoption in 1974 of its *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes*¹². This Convention aims at ensuring that the punishment and prosecution of crimes against humanity and the most serious violations of the laws and customs of war is not prevented by statutory limitations.

Moreover, the ECtHR has in its case law dealt with the issue of extensive time lapses between the commission of such offences and their prosecution. In the case of *Kolk and Kislyiy*¹³, for example, the Court, in declaring the application inadmissible, noted that the acts of which the applicants had been accused in 2003 under the national Criminal Code had even been expressly recognised as crimes against humanity in the *Charter of the Nuremberg Tribunal* of 1945. This was especially true of crimes against humanity, the Court reasoned, in respect of which the *Charter of the Nuremberg International Tribunal* had laid down a rule that they could not be time-barred. In its case law on other international crimes (e.g. *Sawoniuk*¹⁴ in 2001, and *Kononov*¹⁵ in 2010) the Court has consistently held that those who committed war crimes during the Second World War did not have a human right for them to be statute barred, and noted a number of international Conventions that now prohibit statutory limitations for war crimes.

3. Draft Article 11 – Fair treatment of the alleged offender

We are pleased to note the inclusion in Draft Article 11 of the rights of an alleged offender with regard to fair treatment, including a fair trial and full protection of his or her rights. Paragraph 4 of the Commentary to Draft Article 11 makes clear that the term “fair treatment” is to be viewed as incorporating rights such as those under Article 14 of the 1966 *International Covenant on Civil and Political Rights*. We would like to draw attention to the fact that in this connection reference could also be made to the pertinent jurisprudence of the ECtHR under Article 6 of the ECHR for instance with regard to the right to free assistance of an interpreter under Article 6 paragraph 3 (e) of the ECHR.¹⁶

¹² The [European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes](#) (ETS No. 82) was opened for signature on 25 January 1974 and entered into force on 27 June 2003. To date, the Convention has received 8 ratifications and 1 signature.

¹³ ECtHR, [Kolk and Kislyiy v. Estonia](#), nos. 23052/04 & 24018/04, Chamber decision of 17 January 2006.

¹⁴ ECtHR, [Sawoniuk v. United Kingdom](#), no. 63716/00, Chamber decision of 29 May 2001.

¹⁵ ECtHR, [Kononov v. Latvia](#), no. 36376/04, Grand Chamber judgment of 17 May 2010.

¹⁶ See, for instance, ECtHR, [Hermi v. Italy](#), no. 18114/02, Grand Chamber judgment of 18 October 2006, paras. 69-72; ECtHR, [Hokkelling v. the Netherlands](#), no. 30749/12, Chamber judgment of 14 February 2017; ECtHR, [Baytar v. Turkey](#), no. 45440/04, Chamber judgment of 14 October 2014, paras. 46-59; ECtHR, [Protopapa v. Turkey](#), no. 16084/90, Chamber judgment of 24 February 2009, paras. 77-82; ECtHR, [Isyar v. Bulgaria](#), no. 391/03, Chamber judgment of 20 November 2008, paras. 45-49; ECtHR, [Cusciani v. the United Kingdom](#), no. 32771/96, Chamber judgment of 24 September 2002, paras. 34-40; ECtHR, [Kamasinski v. Austria](#), no. 9783/82, Chamber judgment of 19 December 1989, paras. 72-86; ECtHR, [Luedicke, Belkacem and Koç v. Germany](#), nos. 6210/73, 6877/75 and 7132/75, Chamber judgment of 28 November 1978, paras. 38-50.

Furthermore, Draft Article 11 paragraph 2 affords an alleged offender, who is in prison, custody or detention and who is not of the State's nationality, the right to have access to a representative of his or her State thus summarily reaffirming the more detailed rights accorded in the 1963 *Vienna Convention on Consular Relations*. We welcome the acknowledgement of such rights and would like to draw attention in this regard to the 1967 *European Convention on Consular Functions*¹⁷, which, in its Article 6, is equally concerned with consular functions in a case where a national of the sending State is deprived of his liberty.

4. Draft Article 12 - Victims, witnesses and others

We welcome Draft Article 12, which addresses the rights of victims, witnesses and other affected persons. The protection and assistance of victims as well as reparation to them are key elements of a successful rule of law-based criminal justice response to the most serious crimes of concern to the international community. The Council of Europe has a long-standing practice and experience in this field and has created a legal corpus where the victims – and the witnesses – are placed at the very heart of the justice system. For instance, the 1983 *European Convention on the Compensation of Victims of Violent Crimes*¹⁸ obliges States Parties to compensate the victims of intentional and violent offences resulting in bodily injury or death. In addition, the Committee of Ministers of the Council of Europe adopted in 2005 a *Recommendation on the protection of witnesses and collaborators of justice*¹⁹, which provides that member States should take appropriate legislative and practical measures to ensure that witnesses and collaborators of justice may testify freely and without being subjected to any act of intimidation. Furthermore, in 2006, it adopted a *Recommendation on assistance to crime victims*²⁰ which sets forth principles that should guide member States when taking measures to ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights. These principles concern, *inter alia*, the role of public services, State compensation, assistance, trainings and victim support services. Moreover, several conventions concluded within the framework of the Council of Europe contain binding provisions in relation to the assistance and compensation to victims of most serious crimes such as terrorism²¹ or trafficking in human

¹⁷ The [European Convention on Consular Functions](#) (ETS No. 61) was opened for signature on 11 December 1967 and entered into force on 9 June 2011. To date, the Convention has received 5 ratifications/accessions and 4 signatures.

¹⁸ The [European Convention on the Compensation of Victims of Violent Crimes](#) (ETS No. 116) was opened for signature on 24 November 1983 and entered into force on 1 February 1988. To date, the Convention has received 26 ratifications/accessions and 8 signatures.

¹⁹ [Recommendation Rec\(2005\)9 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice](#) adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies.

²⁰ [Recommendation Rec\(2006\)8 of the Committee of Ministers to member states on assistance to crime victims](#) adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies.

²¹ See, Article 13 of the [Council of Europe Convention on the Prevention of Terrorism](#) (CETS No.196). The Convention was opened for signature on 16 May 2005 and entered into force on 1 June 2007. To date, the Convention has received 39 ratifications/accessions and 9 signatures.

beings²². The rights of victims of international crimes have further been addressed by the ECtHR. For instance, in the *Jelić*²³ case in 2014 the Court held that the relatives of victims of a war crime had a right to an investigation into the circumstances in which their relatives died, and a prosecution against those responsible.

Finally, we would like to draw attention to the fact that the *Guidelines on the protection of victims of terrorist acts*²⁴, as mentioned in footnote 236 on page 16 of the Special Rapporteur's "Third report on crimes against humanity", have recently been revised in order to incorporate additional elements in light of the new face of terrorism. The *Revised Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts*²⁵ aim at recalling the measures to be taken by the member States in order to support and protect the fundamental rights of any person who has suffered direct physical or psychological harm as a result of a terrorist act, and, in appropriate circumstances, of their close family by incorporating the following four lines of action: implementing a general legal framework to assist victims, providing assistance to victims in legal proceedings, raising public awareness of the need for societal recognition of victims - including the role of the media -, and involving victims of terrorism in the fight against terrorism.²⁶ It is recommended that Draft Article 12 adopt an equally holistic approach in addressing the different needs of victims of crimes.

5. Draft Article 13 – Extradition

We are pleased to note that under Draft Article 13 paragraph 2 a request for extradition based on an offence constituting a crime against humanity may not be refused on the sole ground of the alleged crime constituting a political offence, an offence connected with a political offence or an offence inspired by political motives. Article 1 of the 1975 *Additional Protocol to the European Convention on Extradition*²⁷ concluded in the framework of the Council of Europe takes a similar approach in declaring that certain crimes against humanity and war crimes shall not be considered as political offences for which extradition may be refused under Article 3 of the 1957 *European Convention on Extradition*.²⁸

²² See, Chapter III of the [Council of Europe Convention on Action against Trafficking in Human Beings](#) (CETS No.197). The Convention was opened for signature on 16 May 2005 and entered into force on 1 February 2008. To date, the Convention has received 47 ratifications/accessions.

²³ ECtHR, *Jelić v. Croatia*, no. 57856/11, Chamber judgment of 12 June 2014.

²⁴ As elaborated by the Council of Europe Directorate General of Human Rights and adopted by the Committee of Ministers of the Council of Europe on 2 March 2005.

²⁵ [Revised Guidelines of the Committee of Ministers on the protection of victims of terrorist acts](#), document prepared by the Steering Committee for Human Rights (CDDH) adopted at the 127th Session of the Committee of Ministers of the Council of Europe on 19 May 2017 in Nicosia (Cyprus).

²⁶ Report of the Secretary General of the Council of Europe „The fight against violent extremism and radicalisation leading to terrorism“ (CM(2016)64) presented at the 126th Session of the Committee of Ministers (Sofia, 18 May 2016).

²⁷ The [Additional Protocol to the European Convention on Extradition](#) (ETS No. 86) was opened for signature on 15 October 1975 and entered into force on 20 August 1979. To date, the Convention has received 40 ratifications and 1 signature.

²⁸ The [European Convention on Extradition](#) (ETS No. 24) was opened for signature on 13 December 1957 and entered into force on 18 April 1960. To date, the Convention has received 50 ratifications/accessions.

The inclusion in Draft Article 13 paragraph 9 of the possibility for States to refuse extradition in cases where there are 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 recognised as impermissible under international law is to be welcomed. Article 3 paragraph 2 of the 1957 *European Convention on Extradition* incorporates a similar exception to the duty to extradite. The ECtHR has further held that it may be "inhuman treatment" to extradite an individual where there is good reason to believe that the extradition process is being abused by the requesting State in order to prosecute him for a political offence or even simply because of his political opinions.²⁹ Finally, it merits to be emphasised, as is done in paragraph 27 of the Commentary to Draft Article 13, that if a requested State does not extradite, that State is still required to submit the matter to its own prosecutorial authorities in accordance with Draft Article 10, which incorporates the principle of *aut dedere aut judicare*.

6. Draft Article 14 – Mutual legal assistance

We concur with the ILC holding in paragraph 5 of the Commentary to Draft Article 14 that in the field of mutual legal assistance detailed provisions are essential to provide States with extensive guidance. In our view Draft Article 14 combined with the applicability of the Draft Annex pursuant to Draft Article 14 paragraph 8 in cases where the States in question are not bound by a treaty of mutual legal assistance lives up to this standard of specificity. Such a detailed approach is also followed in the 1959 *European Convention on Mutual Assistance in Criminal Matters*³⁰ and its two Additional Protocols. Having been ratified/acceded to by all forty-seven member States of the Council of Europe and three non-member States this Convention has proven to be a useful tool to facilitate cooperation between States with regard to requests of mutual legal assistance.

The intention of the ILC to take account of privacy concerns in Draft Article 14 paragraph 3 (a) as stated in paragraph 12 of the Commentary to the said Draft Article is commendable. Similar motivation certainly lies at the heart of Paragraph 14 of the Draft Annex, which 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. In our opinion the importance of issues involving data protection could, however, equally warrant the adoption of a separate regulation on this matter - at least in the Draft Annex - as is done by Article 26 of the 2001 *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*³¹.

²⁹ ECtHR, *Altun v. Germany*, no. 10308/83, Commission decision of 3 May 1983.

³⁰ The *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30) was opened for signature on 20 April 1959 December 1957 and entered into force on 12 June 1962.

³¹ The *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters* (ETS No. 182) was opened for signature on 8 November 2001 and entered into force on 1 February 2004. To date, the Protocol has received 37 ratifications/accessions and 6 signatures.