

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 the attack:

(a) – (g)

(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~~ with the crime of genocide, war crimes or the crime of aggression;

[Art. 7 (1) (h) RS]

Arguments: Rome Statute should be reflected accurately and fully which is best done by spelling out the relevant crimes in the Statute, which itself refers to “any crime within the jurisdiction of the Court”, thus including the crime of aggression.

[2.]

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.~~ refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys. **[Understanding of “gender” adopted by the OTP of the ICC¹]**

Arguments: In order to consistently reflect the Rome Statute accurately and fully, the definition of “gender” should be the same as the definition of gender as interpreted by the Office of the Prosecutor of the ICC, which stresses that the “definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys”, deciding therefore to apply and interpret “gender” in accordance with internationally recognized human rights.² Failure to reflect the current human rights definition of gender could sideline women, LGBTI persons, and other marginalized groups; it could also result in greater impunity for gender-based crimes. As only little jurisprudence related to gender under international criminal law exists, the Convention will serve as a mean to contribute to the legal understanding of gender. In short, if the ILC decides to have a definition of “gender” in the draft articles based in the Rome Statute this has to be consistent with the

¹ <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

² Latest example, UN Secretary-General, Protection against violence and discrimination based on sexual orientation and gender identity UN Doc. A/73/152 (12 July 2018).

whole legal framework created by the said treaty, including the reference to international human rights and the most recent development on its interpretation.

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.

2.bis This ~~Statute~~ *Convention* 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~~ *Convention*, nor shall it, in and of itself, constitute a ground for reduction of sentence. **[Art. 27 (1) RS]**

2.ter Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar national courts of a state party from exercising its jurisdiction over such a person. **[Art. 27 (2) RS]**

Argument: To ensure that States waive, limit or exclude the inviolability or immunity from jurisdiction accorded to their own head of state, heads of government or ministers of foreign affairs before foreign jurisdictions.

[3. – 4.]

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

[Art. 29 RS] Each State shall also take the necessary measures to restrict the applicability of statutory limitations in civil proceedings.³

Argument: Provision should be more ‘self-executing’; reflect current developments in case law showing that in certain circumstances it is unreasonable for a State to invoke statutory limitations

³ Alternative proposal by Hugo Relva, Amnesty International: “Statutory limitations shall not apply to criminal or civil proceedings in which victims of crimes against humanity seek full reparation”.

in civil litigation; useful guidance in anticipation of an increase in civil litigation concerning acts that may amount to international crimes⁴.

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, **including but not limited to the following:**

(a) In respect of an investigation under this ~~Statute~~ *Convention*, a person:

(i) Shall not be compelled to incriminate himself or herself or to confess guilty;

(ii) Shall not be subject to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(iii) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(iv) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such ground and in accordance with such procedures as are established in this ~~Statute~~ *Convention*.

(b) Where there are ground to believe that a person has committed an offence covered by the present draft articles and that person is to be questioned, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(i) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed an offense covered by the present draft articles;

(ii) To remain silent, without such silence being a consideration in the determination of guilt or innocence

(iii) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(iv) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel. **[Art. 55 RS]**

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(c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this ~~Statute~~ *Convention*, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (i) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (ii) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (iii) To be tried without undue delay;
- (iv) To be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (v) To examine, or have examined, the witness against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this ~~Statute~~ *Convention*;
- (vi) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the national courts of a state party are not in a language which the accused fully understands and speaks;
- (vii) Not to be compelled to testify or confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (viii) To make an unsworn oral or written statement in his or her defence; and
- (ix) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal. **[Art. 67 (1) RS]**

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 provision 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 **as defined in paragraph X**, 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.
- X.** Each victim has the right to know the truth regarding the circumstances of ~~the enforced disappearance—an offence covered by the present draft articles~~, the progress ~~and results~~ of the investigation, ~~and its results~~. Each State ~~Party~~ shall take appropriate measures in this regard. **[Art. 24 (2) CPED]**
- Y.** For the purposes of the ~~Statute and the Rules of Procedure and Evidence Convention~~:
- (a) “Victims” means natural persons who have suffered harm as a result of the commission of any ~~crime within the jurisdiction of the Court~~ *offence covered by the present draft articles*;
 - (b) Victims may also 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. **[Rule 85 ICC RPE]**

Argument: Fundamentally necessary to classify who is considered a victim and subject to reparation rights; victims and their relatives require to know the full and complete truth of what happened to them.

Article new – Reservations

No reservations may be made to this ~~Statute~~ *Convention*. [Art. 120 RS]

Arguments: Ensure that all State Parties assume the same obligations in repressing these heinous crimes and to ensure consistency with the ICC Statute; prevent undermining the convention's integrity and effectiveness; alternative of relying on other States to raise objections according to the VCLT provisions is "inappropriate to address the problem of reservations to human rights treaties" because maybe no interest to do so; alleviates the shortcomings of not having a treaty monitoring body; creates certainty about the extent of obligations.

Article new – Territorial scope of ~~treaties~~ *the Convention*

Unless a different intention ~~appears from the treaty or~~ is otherwise established, a ~~treaty~~ *this Convention* is binding upon each party in respect of its entire territory. [Art. 29 VLCT]

Argument: Constructive with regard to federal states.