

## **Response of the Republic of Singapore to the International Law Commission's Request for Comments and Observations on the Draft Articles on Crimes Against Humanity**

Singapore is pleased to respond to the International Law Commission's request for comments and observations on the draft articles on crimes against humanity as adopted on first reading.

### **Draft article 4 (Obligation of prevention)**

2. Singapore agrees with the principle in draft article 4, paragraph 2 that States should undertake to prevent crimes against humanity through "cooperation with other States, relevant intergovernmental organizations, and, as appropriate other organizations". However, the scope of a State's obligation in this regard is not clear. The relationship between the duty of prevention through cooperation contained in draft article 4, paragraph 2 and the obligations in other provisions, such as the obligation to take preliminary measures when an alleged offender is present in territory under a State's jurisdiction to ensure his or her presence (draft article 9), and the obligation to render mutual legal assistance in investigations, prosecutions and judicial proceedings (draft article 14), is not clear. We understand that the type of cooperation to be expected is likely to be contextual in nature, but some explanation of the scope of the obligation in the commentary on this draft article would assist States to understand the nature of the commitment contained in draft article 4, paragraph 2.

### **Draft article 6 (Criminalization under national law)**

3. Draft article 6, paragraph 5 provides that States should ensure that the fact that the offence is "committed by a person holding an official position is not a ground for excluding criminal responsibility".

4. Paragraph 31 of the commentary on this draft article states that draft article 6, paragraph 5 is without prejudice to the "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". For clarity, Singapore proposes that this statement should be incorporated into the text of the draft article itself. This would make clear that the obligation under draft article 6, paragraph 5 only addresses substantive criminal responsibility under national law, and does not preclude raising immunity of State officials as a procedural bar to the exercise of foreign criminal jurisdiction over State officials.

### **Draft article 7 (Establishment of national jurisdiction)**

5. Draft article 7, paragraph 2 requires States to establish jurisdiction whenever an alleged offender is present on the State's territory, regardless of whether any of the other jurisdictional links in paragraph 1 are satisfied by the State, when that State does not extradite or surrender the person in accordance with the articles. Our understanding is

that draft article 7, paragraph 2, is intended to provide an additional *treaty based* jurisdiction in respect of an alleged offender on the basis of presence alone when none of the other connecting factors are present. Therefore, jurisdiction under that paragraph can only be exercised in respect of nationals of States parties. In other words, our understanding is that draft article 7, paragraph 2 only permits States to establish jurisdiction over crimes committed by a national of a State party and does not extend to establishing jurisdiction over nationals of States non-parties.

6. This should be expressly reflected in the text of this draft article.

7. As draft article 7 accommodates multiple bases for the establishment of jurisdiction, it is possible that multiple States may have national jurisdiction over the criminal offence in question and wish to exercise such jurisdiction. The draft articles do not explain how any such potential conflicts of jurisdiction can be solved. The Special Rapporteur has explained that such matters are often resolved through comity and cooperation among the States and that practically, the State in whose territory the alleged offender is present, is well positioned to proceed with the prosecution if it is willing and able to do so.<sup>1</sup>

8. Where such conflicts of jurisdiction exist, the draft articles should accord primacy to the State which can exercise jurisdiction on the basis of at least one of the limbs in Article 7, paragraph 1, rather than a custodial State that can only exercise jurisdiction on the basis of Article 7, paragraph 2 alone. This is because the former would be the State with a greater interest in prosecuting the offence in question.

### **Draft article 8 (Investigation)**

9. Singapore agrees with the requirement in draft article 8 that States should “ensure that its competent authorities proceed to a prompt and impartial investigation” of possible crimes against humanity that have been conducted or are being conducted in any territory under its jurisdiction. However, we consider that the commentary on this draft article should clearly state that the reference to “impartiality” does not require any special impartiality measures above and beyond the general standards of investigations for criminal proceedings that are applicable under domestic law.

### **Draft article 9 (Preliminary measures when an alleged offender is present)**

10. 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 to ensure his or her presence. Draft article 9, paragraph 2 provides that States shall “immediately make a preliminary inquiry into the facts”. States may face practical difficulties in investigating crimes where jurisdiction is exercised on the basis of the alleged offender’s presence in any territory under the State’s jurisdiction only and where other jurisdictional links provided in draft article 7, paragraph 1 are absent. The commentary

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<sup>1</sup> International Law Commission, Sixty-eighth session (2016), Second report on crimes against humanity, by Sean D. Murphy, Special Rapporteur (A/CN.4/690) at para 115.

on the draft article should make clear that the extent of the inquiry required would be dependent, among other things, on the jurisdictional basis for the State's exercise of criminal jurisdiction.

**Draft article 11 (Fair treatment of alleged offender)**

11. Singapore agrees with the principle in draft article 11, paragraph 1 that any person against whom measures are taken in connection with an alleged offence shall be accorded "fair treatment" at all stages of the proceedings. Paragraphs 3 and 4 of the commentary on draft article 11, paragraph 1 appear to suggest that "fair treatment" should be understood as incorporating the standards set forth in article 14 of the 1966 International Covenant on Civil and Political Rights ("ICCPR"). The obligation to accord an accused person a "fair and public hearing" (as provided in Article 10 of the Universal Declaration of Human Rights) is part of customary international law. However, it does not appear settled that all the provisions of Article 14 of the ICCPR reflect the precise content of the relevant rule of customary international law. Paragraphs 3 and 4 of the commentary of draft article 11, paragraph 1 should be amended to reflect this.

**Draft article 12 (Victims, witnesses and others)**

12. Article 12, paragraph 3 requires States to ensure that, in their legal systems, "victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis". Singapore considers that an explicit reference to moral damages is not necessary. It should be left to each State to decide the scope of damage for which reparation may be available for victims. This would be consistent with the approach in Article 75, paragraph 1 of the Rome Statute of the International Criminal Court, which also does not contain an explicit reference to moral damages, but rather permits the court to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims".

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