

Comments to the Draft Articles on Crimes Against Humanity adopted by the International Law Commission on its first reading

- a. **Establishment of a monitoring mechanism for the prevention of crimes against humanity:** even though there are already several monitoring mechanisms capable of scrutinizing situations of crimes against humanity, such mechanisms are mostly focused on the occurrence of such crimes and their punishment, rather than on their early prevention. A monitoring mechanism that would regularly request States to report on initiatives taken to build the resilience of their societies to the risk of these crimes, would crucially contribute to the prevention of the crime. Similar to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the Draft Articles on Crimes Against Humanity have more focus on the element of punishment or post-criminal conduct, rather than on prevention. Even though what constitutes an effective prevention measure will depend on the specific context and situation, the only concrete measure that is mentioned in the Draft Articles is the criminalization of the crime, in addition to the overall idea that the punishment of the crime also contributes to its prevention. Establishing a specific monitoring mechanism, and requiring States to report on their initiatives, would emphasize the importance of the obligation to prevent and create a space for relevant initiatives to be discussed and recommended.

- b. **Obligation to prevent crimes against humanity as an extraterritorial obligation:** the future convention on crimes against humanity provides an opportunity to explicitly mention in its text that the obligation to prevent such crimes is not limited by territory. Even though the International Court of Justice has affirmed that the obligation to prevent genocide is not limited by territory and, in certain circumstances, can be imputed to other States (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina V. Serbia and Montenegro*), that has the value of jurisprudence in a specific case, and on the prevention of the crime of genocide. A determination by an international treaty of the extraterritorial aspect of the obligation to prevent, would avoid any attempt to deny, question or undermine that extension of the obligation. It would also greatly support initiatives aimed at getting States involved in the protection of populations against the most heinous crimes, including the principle of the responsibility to protect, particularly under pillar II (responsibility to assist) and III (responsibility to act).

- c. **Obligation not to commit crimes against humanity:** similar to what was mentioned in the previous paragraph, it would be important to clearly mention that there is an

obligation not to commit crimes against humanity, even though it could be presumed from other obligations within the treaty.

- d. Cooperation with international mechanisms established by intergovernmental bodies of the United Nations:** Consider including language (in draft Article 14 – Mutual legal assistance) to facilitate States cooperation with international mechanisms established by the intergovernmental bodies of the UN, with a mandate to conduct criminal investigations on crimes against humanity. In December 2016, the General Assembly created the International, Impartial and Independent Mechanism for Syria (IIIM). This mechanism is mandated to conduct criminal investigations into international crimes, including crimes against humanity, committed in Syria. The mechanism is building case files with the aim that they will be used for indictments in national or international tribunals with the relevant jurisdiction. In September 2018, the Human Rights Council established a similar mechanism for Myanmar. In its latest progress report to the General Assembly (A/73/295 (2018)) the IIIM noted that some States require legislative changes or formal frameworks in order to cooperate with the mechanism on investigations and prosecutions. Including language in the draft Convention to facilitate this type of mutual legal assistance could encourage States to make standing provisions for such cooperation at the national level for existing or future similar mechanisms.