

## Chapter IV

### Crimes against humanity

#### A. Introduction

34. 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.<sup>6</sup> 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.

35. From its sixty-seventh session (2015) to its sixty-ninth session (2017), the Commission considered the topic on the basis of three successive reports submitted by the Special Rapporteur,<sup>7</sup> and a memorandum by the Secretariat.<sup>8</sup>

36. At its sixty-ninth session (2017), the Commission adopted, on first reading, the entire set of draft articles on crimes against humanity, which comprised a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto.<sup>9</sup> It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, international organizations and others for comments and observations.<sup>10</sup>

#### B. Consideration of the topic at the present session

37. At the present session, the Commission had before it the fourth report of the Special Rapporteur ([A/CN.4/725](#) and [Add.1](#)), as well as comments and observations received from Governments, international organizations and others ([A/CN.4/726](#), [Add.1](#) and [2](#)).

38. At its 3453rd to 3458th meetings, from 29 April to 7 May 2019, the Commission considered the fourth report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft articles on the basis of the proposals by the Special Rapporteur, taking into account the comments and observations of Governments, international organizations and others, as well as the debate in plenary on the Special Rapporteur’s report.

39. The Commission considered the report of the Drafting Committee ([A/CN.4/L.935](#)) at its 3468th meeting, held on 22 May 2019, and adopted the entire set of draft articles on prevention and punishment of crimes against humanity on second reading (sect. E.1 below).

40. At its 3496th to 3499th meetings, from 31 July to 5 August 2019, the Commission adopted the commentaries to the aforementioned draft articles (see sect. E.2 below).

41. In accordance with its statute, the Commission submits the draft articles to the General Assembly, with the recommendation set out below.

#### C. Recommendation of the Commission

42. At its 3499th meeting, on 5 August 2019, the Commission decided, in conformity with article 23 of its statute, to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly. In particular, the Commission recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

<sup>6</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, para. 266.

<sup>7</sup> See [A/CN.4/680](#) and [Corr.1](#) (first report), [A/CN.4/690](#) (second report), and [A/CN.4/704](#) (third report).

<sup>8</sup> [A/CN.4/698](#).

<sup>9</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, paras. 38–42.

<sup>10</sup> *Ibid.*, para. 43.

## D. Tribute to the Special Rapporteur

43. At its 3499th meeting, held on 5 August 2019, the Commission, after adopting the draft articles on prevention and punishment of crimes against humanity, adopted the following resolution by acclamation:

*“The International Law Commission,*

*Having adopted* the draft articles on prevention and punishment of crimes against humanity,

*Expresses* to the Special Rapporteur, Mr. Sean D. Murphy, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on prevention and punishment of crimes against humanity.”

## E. Text of the draft articles on prevention and punishment of crimes against humanity

### 1. Text of the draft articles

44. The text of the draft articles adopted by the Commission, on second reading, at its seventy-first session is reproduced below.

### Prevention and punishment of crimes against humanity

...

*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,

*Recalling* the principles of international law embodied in the Charter of the United Nations,

*Recalling also* 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,

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

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

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

*Considering also* 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,

...

## Article 1

### Scope

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

## Article 2

### 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, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;
- (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, *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. This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.

### **Article 3**

#### **General obligations**

1. Each State has the obligation not to engage in acts that constitute crimes against humanity.

2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.

3. 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 4**

#### **Obligation of prevention**

Each State undertakes to prevent crimes against humanity, in conformity with international law, through:

(a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

### **Article 5**

#### ***Non-refoulement***

1. No State 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 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 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**

#### **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 commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

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**

### **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**

### **Investigation**

Each State shall ensure that its competent authorities proceed to a prompt, thorough 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**

### **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, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

## **Article 10**

### ***Aut dedere aut judicare***

The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. 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**

### **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 and international humanitarian 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, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, 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. This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State.
2. 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.
3. 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.
4. 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.
5. 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.

6. 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.
7. 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.
8. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto.
9. 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.
10. 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.
11. 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.
12. A requested State shall give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred.
13. Before refusing extradition, the requested State shall consult, as appropriate, 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. 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, 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.
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 video conference;
  - (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 between the States in question.

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.

9. States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity.

## **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

45. The text of the draft articles, together with commentaries thereto, adopted by the Commission on second reading, is reproduced below.

### Prevention and punishment of crimes against humanity

#### General commentary

(1) Three crimes typically have featured in the jurisdiction of international criminal courts and tribunals: genocide, crimes against humanity and war crimes. The crime of genocide<sup>11</sup> and war crimes<sup>12</sup> are the subject of global conventions that require States within their national law to prevent and punish such crimes, and to cooperate among themselves toward 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.<sup>13</sup>

(2) Treaties focused on prevention, punishment and inter-State cooperation exist for many offences far less egregious than crimes against humanity, such as corruption<sup>14</sup> and transnational organized crime.<sup>15</sup> 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*. Matters not regulated by such a convention would continue to be governed by other rules of international law, including customary international law.

(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

<sup>11</sup> Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

<sup>12</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 (hereinafter “Geneva Convention I”); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 (hereinafter “Geneva Convention II”); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 (hereinafter “Geneva Convention III”); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 (hereinafter “Geneva Convention IV”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3 (hereinafter “Additional Protocol I”).

<sup>13</sup> 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).

<sup>14</sup> United Nations Convention against Corruption (New York, 31 October 2003), United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.

<sup>15</sup> United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209.

and Punishment of Crimes against Humanity”.<sup>16</sup> While some aspects of these draft articles may reflect customary international law, codification of existing law is not the objective of these draft articles; rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely adhered-to treaties addressing crimes, as a basis for a possible future convention. Further, the draft articles are without prejudice to existing customary international law. 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.

(4) The present draft articles avoid any conflicts with the obligations of States arising under the constituent instruments of international criminal courts and tribunals, such as the International Criminal Court (as well as “hybrid” tribunals containing a mixture of international law and national law elements). Whereas the 1998 Rome Statute of the International Criminal Court<sup>17</sup> 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. At the same time, the draft articles envisage obligations that may be undertaken by States whether or not they are parties to the Rome Statute. Finally, constituent instruments of international criminal courts or tribunals address the prosecution of persons for the crimes within their jurisdiction, but such instruments are not directed at 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,

*Recalling* the principles of international law embodied in the Charter of the United Nations,

*Recalling also* 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,

<sup>16</sup> See report of the International Law Commission on the work of its sixty-fifth session (2013), *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)*, annex B, para. 3.

<sup>17</sup> Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3 (hereinafter “Rome Statute”).

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

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

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

*Considering also* 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,

...

### Commentary

(1) The draft preamble aims at providing a conceptual framework for the draft articles, setting out the general context in which they were elaborated and their main purposes. 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 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 recalls the principles of international law embodied in the Charter of the United Nations, which include the principle of the sovereign equality of all States and the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.<sup>18</sup> Thus, this preambular paragraph emphasizes, as does draft article 4, that although crimes against humanity may threaten the peace, security and well-being of the world, the prevention and punishment of such crimes must be undertaken in conformity with international law, including the rules on the threat or use of force. The phrasing of this preambular paragraph is modelled on the preamble of the United Nations Convention on Jurisdictional Immunities of States and Their Property and is consistent with the preamble of the Rome Statute.<sup>19</sup>

(5) The fourth preambular paragraph recalls also 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.<sup>20</sup> The Commission has previously indicated that the

<sup>18</sup> Charter of the United Nations (San Francisco, 26 June 1945), Article 2, paras. 1 and 4. See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 26/25 (XXV) of 24 October 1970.

<sup>19</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)*, vol. I, resolution 59/38, preamble; Rome Statute, preamble.

<sup>20</sup> Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, art. 53. See also draft conclusion 2 of the draft conclusions on

prohibition of crimes against humanity is “clearly accepted and recognized” as a peremptory norm of international law.<sup>21</sup> The International Court of Justice has found that the prohibition on certain acts, such as torture,<sup>22</sup> has the character of *jus cogens*,<sup>23</sup> which *a fortiori* suggests that a prohibition of the perpetration of such acts on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*. The status of the prohibition on crimes against humanity as *jus cogens* has also been noted by regional human rights courts,<sup>24</sup> international criminal courts and tribunals,<sup>25</sup> and some national courts.<sup>26</sup> While this preambular paragraph recalls that the prohibition of

peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading (see paragraph 56 below).

- <sup>21</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary to art. 26 of the draft articles on responsibility of States for internationally wrongful acts (maintaining that those “peremptory norms that are clearly accepted and recognized include the prohibition[] of ... crimes against humanity”). See also draft conclusion 23 of the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading (see paragraph 56 below); 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*”).
- <sup>22</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85 (hereinafter “Convention against Torture”).
- <sup>23</sup> *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.
- <sup>24</sup> See *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. 99 (acknowledging the *jus cogens* status of crimes against humanity); *Miguel Castro-Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 25 November 2006, Series C, No. 160, para. 402 (citing to *Almonacid-Arellano* on this point); *Manuel Cepeda Vargas v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 26 May 2010, Series C, No. 213, para. 42 (stating that “the prohibition of crimes against humanity ... is *jus cogens*”).
- <sup>25</sup> See *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Supplement No. 11*, para. 520 (“Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.”); *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, Trial Chamber, International Criminal Court, para. 90 (“It is generally agreed that the interdiction of crimes against humanity enjoys the stature of *jus cogens*”).
- <sup>26</sup> See *Mazzeo, Julio Lilo y otros*, Appeal Judgment, Supreme Court of Argentina, 13 July 2007, *Fallos*: 330:3248, para. 15 (recognizing the prohibition of crimes against humanity as *jus cogens*); *Arancibia Clavel, Enrique Lautaro*, Appeal Judgment, Supreme Court of Argentina, 24 August 2004, *Fallos*: 327:3312, para. 28 (stating that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity implied the recognition of the prohibition of crimes against humanity as a *jus cogens* norm); *Priebke, Erich*, Judgment, Supreme Court of Argentina, 2 November 1995, *Fallos*: 318:2148, paras. 2–5 (recognizing the prohibition of crimes against humanity as *jus cogens*); *Exp No. 0024-2010-PI/TC*, Judgment, Peruvian Constitutional Court, 21 March 2011, para. 53, available at <https://www.tc.gob.pe/jurisprudencia/2011/00024-2010-AI.html> (same); *National Commissioner of the South African Police Service v. Southern African Litigation Centre and Another*, Judgment, South African Constitutional Court, 30 October 2014, *South African Law Reports 2015*, vol. 1, p. 315, para. 37 (“Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because ‘all states have an interest as they violate values that constitute the foundation of the world public order’. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm”); *Attorney-General and 2 Others v. Kenya Section of International Commission of Jurists*, Judgment, Court of Appeal of Kenya, 16 February 2018, available at <http://kenyalaw.org/caselaw/cases/view/148746/> (“Some of the largely accepted examples of those norms from which no derogation is permitted but are obligatory equally upon State and non-State



crimes against humanity is a norm of *jus cogens*, neither it nor the present draft articles seek to address the consequences of the prohibition having such status.

(6) 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 fifth preambular paragraph focuses upon the first of these two objectives (prevention); it foreshadows obligations that appear in draft articles 3, 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.

(7) The sixth 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.

(8) The seventh preambular paragraph considers, as a threshold matter, the definition of crimes against humanity set forth in article 7 of the Rome Statute. This definition served as a useful model when drafting the definition contained in draft article 2 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.

(9) The eighth through tenth preambular paragraphs focus on the second of the two overall objectives (punishment). The eighth 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 competent international court or tribunal.

(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.

(11) The tenth preambular paragraph considers that the effective prosecution of crimes against humanity must be ensured, both by taking measures at the national level and by enhancing international cooperation. Such cooperation includes cooperation with respect to extradition and mutual legal assistance, which is the focus of draft articles 13 and 14, as well as the draft annex.

## **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.

---

actors include prohibition of[:] genocide, crimes against humanity, war crimes[,], torture, piracy and slavery”).

(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.

(3) If the present draft articles ultimately serve as the basis for a convention, the obligations of a State party under that convention, unless a different intention appears, would only operate with respect to acts or facts that took place, or any situation that existed, after the convention enters into force for that State. Article 28 of the 1969 Vienna Convention on the Law of Treaties provides that, “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”<sup>27</sup> The International Court of Justice applied article 28 with respect to a treaty addressing a crime (torture) in *Questions relating to the Obligation to Prosecute or Extradite*, finding that “the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned.”<sup>28</sup> However, States would remain bound at all times by whatever obligations exist under other rules of international law, including customary international law. Further, the law of treaties rule indicated above does not foreclose a State from adopting, at any time, a national law relating to crimes against humanity, so long as it is consistent with the State’s obligations under international law.

(4) In various provisions of the present draft articles, the term “national law” is used to refer to the internal or domestic law of a State. Use of this term is intended to cover all aspects of a State’s internal law, including the level (such as federal or provincial) at which such law should be adopted or to which it applies.

## **Article 2**

### **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, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;
- (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:

<sup>27</sup> Vienna Convention on the Law of Treaties, art. 28.

<sup>28</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 23 above), p. 457, para. 100.

(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. This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.

### Commentary

(1) The first two paragraphs of draft article 2 establish, for the purpose of the present draft articles, a definition of “crime against humanity”. The text of these two paragraphs is almost verbatim the text of article 7 of the Rome Statute, with just a few changes as discussed below. Paragraph 3 of draft article 2 is a “without prejudice” clause which indicates that this definition does not affect any broader definitions provided for in international instruments, customary international law or national law.

#### *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 Charter of the International Military Tribunal established at Nürnberg Charter (hereinafter “Nürnberg Charter”), in article 6, subparagraph (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.<sup>29</sup>

(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".<sup>30</sup>

(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".<sup>31</sup>

(5) Article 5 of the 1993 Statute of the International Criminal 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".<sup>32</sup> 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",<sup>33</sup> 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".<sup>34</sup> 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

<sup>29</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6 (c) (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, No. 251, p. 279 (hereinafter "Nürnberg Charter").

<sup>30</sup> *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 377, para. 119.

<sup>31</sup> *Yearbook ... 1954*, vol. II, p. 150, para. 50, art. 2, para. 11.

<sup>32</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, approved 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 Add.1, annex, art. 5 (hereinafter "Statute of the International Criminal Tribunal for the Former Yugoslavia").

<sup>33</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), document S/25704 and Corr.1, p. 13, para. 48.

<sup>34</sup> 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, approved by the Security Council in its resolution 955 (1994) of 8 November 1994, annex, art. 3 (hereinafter "Statute of the International Criminal Tribunal for Rwanda").

include the discriminatory intent language.<sup>35</sup> Crimes against humanity have also been defined in the jurisdiction of hybrid criminal courts or tribunals.<sup>36</sup>

(7) Article 5, paragraph 1 (b), of the 1998 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 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 Criminal 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 as of mid-2019 by 122 States parties to the Statute and is now being used by many States when adopting or amending their national laws.<sup>37</sup> The Commission considered article 7 to be an appropriate basis for defining such crimes in paragraphs 1 and 2 of draft article 2. Indeed, the text of article 7 is used verbatim except for three changes. 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 phrase in article 7, paragraph 1 (h), of the 1998 Rome Statute that criminalizes acts of persecution when undertaken in connection with “any crime within the jurisdiction of the Court” has not been retained for paragraph 1 (h) of draft article 2, as discussed further below. Third, article 7, paragraph 3, of the Rome Statute on the definition of “gender” (as well as a cross-reference to that paragraph in paragraph 1 (h)) has not been retained for draft article 2, as is also discussed further below.

#### *Paragraphs 1 and 2*

(9) The definition of “crimes against humanity” set forth in paragraphs 1 and 2 of draft article 2 contains three overall requirements that merit some discussion. These requirements, all of which appear in paragraph 1, have been illuminated through the International Criminal Court’s “Elements of Crimes” under the Rome Statute,<sup>38</sup> the case law of the International Criminal Court and other international criminal courts and tribunals, and increasingly national courts. 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

<sup>35</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

<sup>36</sup> 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, art. 2 (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”).

<sup>37</sup> For information submitted by Governments to the Commission on their national laws in this regard, see [http://legal.un.org/ilc/guide/7\\_7.shtml](http://legal.un.org/ilc/guide/7_7.shtml). For a table compiling national laws, see Coalition for the International Criminal Court, *Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)* (2012), at [http://iccnow.org/documents/Global\\_Ratificationimplementation\\_chart\\_May2012.pdf](http://iccnow.org/documents/Global_Ratificationimplementation_chart_May2012.pdf). At present, however, not all national laws addressing crimes against humanity contain the same definition that appears in article 7 of the Rome Statute.

<sup>38</sup> See International Criminal Court, *Elements of Crimes*, adopted at the Assembly of States Parties to the Rome Statute of the International Criminal Court First session, New York, 3–10 September 2002, (*Official Records*, ICC-ASP/1/3), and amended at the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010 (International Criminal Court publication, RC/11) consolidated version of 2011, available from [www.icc-cpi.int](http://www.icc-cpi.int), pp. 5–12.

International Criminal Court and other international criminal courts and 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 mid-2019.

*“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,<sup>39</sup> although some decisions of the International Criminal Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in the Statute of that tribunal, given the inclusion of such language in the Secretary-General’s report proposing that Statute.<sup>40</sup> Jurisprudence of both the International Criminal 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.<sup>41</sup> 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”.<sup>42</sup>

(11) When this standard was considered for the 1998 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 over-inclusive.<sup>43</sup> Indeed, if “widespread”

<sup>39</sup> 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, para. 579, footnote 144.

<sup>40</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, 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 Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, para. 648.

<sup>41</sup> 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 Criminal Tribunal for the Former Yugoslavia, para. 437 (“[T]he 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, para. 123 (“The attack must contain one of the alternative conditions of being widespread or systematic.”); *Akayesu*, Judgment, 2 September 1998 (footnote 39 above), para. 579; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 648 (“either a finding of widespreadness ... or systematicity ... fulfils this requirement”).

<sup>42</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 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)*, p. 17, 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” (emphasis added)); *Yearbook ... 1995*, vol. II (Part Two), p. 25, 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 art. 20 (“the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations” (emphasis added)); *Yearbook ... 1991*, vol. II (Part Two), p. 103, para. (3) of the commentary to art. 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”).

<sup>43</sup> See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, *Official Records, Volume II*

commission of acts alone were sufficient, these States maintained that 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,<sup>44</sup> meaning that they are alternatives, 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 (33) of the commentary to the present draft article, contains a “State or organizational policy” element.

(12) According to the Trial Chamber of the International Criminal 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”.<sup>45</sup> As such, this requirement refers to a “multiplicity of victims”<sup>46</sup> and excludes isolated acts of violence,<sup>47</sup> such as murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative. A “widespread” attack may be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.<sup>48</sup>

(A/CONF.183/13 Vol. II), 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).

<sup>44</sup> 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 of the Prosecutor against Jean-Pierre Bemba Gombo, 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.

<sup>45</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 428, *Judicial Supplement No. 23*, February/March 2001. See also *Bemba*, Judgment, 21 March 2016 (footnote 44 above), para. 163; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 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 Section A, International Criminal 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 Criminal Tribunal for the Former Yugoslavia, para. 94.

<sup>46</sup> *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 83; *Kayishema*, Judgment, 21 May 1999 (see footnote 41 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 39 above), para. 580; *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 (see footnote 41 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 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”.

<sup>47</sup> 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 abd-al-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 and Sentence, 6 December 1999, Trial Chamber I, International Criminal Tribunal for Rwanda, paras. 67–69; *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), paras. 122–123; para. (4) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47; para. (3) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103.

<sup>48</sup> *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 163 (citing to *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 83).

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.<sup>49</sup> 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.<sup>50</sup> Thus, in the *Bemba* case, an 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 grave sites and a large number of victims.<sup>51</sup> Yet a large geographic area is not required; the International Criminal Tribunal for the Former Yugoslavia has found that the attack can be in a small geographic area against a large number of civilians.<sup>52</sup>

(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”.<sup>53</sup> An attack may be widespread due to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.<sup>54</sup>

(15) Like “widespread”, the term “systematic” excludes isolated or unconnected acts of violence,<sup>55</sup> and jurisprudence from the International Criminal 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 Criminal Tribunal for the Former Yugoslavia defined “systematic” as “the organised nature of the acts of violence and the improbability of their random occurrence”<sup>56</sup> and found that evidence of a pattern or methodical plan establishes that an attack was systematic.<sup>57</sup> 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”.<sup>58</sup> The International Criminal Tribunal for Rwanda has taken a similar approach.<sup>59</sup>

(16) Consistent with jurisprudence of the International Criminal 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

<sup>49</sup> *Kupreškić*, Judgment, 14 January 2000 (see footnote 25 above), para. 550; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 40 above), para. 649.

<sup>50</sup> See, for example, *Ntaganda*, Decision, 13 July 2012 (footnote 47 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, paras. 176–177.

<sup>51</sup> *Bemba*, Decision, 15 June 2009 (see footnote 44 above), paras. 117–124. See *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), paras. 688–689.

<sup>52</sup> *Kordić*, Judgment, 17 December 2004 (see footnote 45 above), para. 94; *Blaškić*, Judgment, 3 March 2000 (see footnote 40 above), para. 206.

<sup>53</sup> *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 95. See also *Bemba*, Judgment, 21 March 2016 (footnote 44 above), para. 163.

<sup>54</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind. See also *Bemba*, Decision, 15 June 2009 (footnote 44 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”).

<sup>55</sup> See para. (3) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47; para. (3) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103.

<sup>56</sup> *Mrkšić*, Judgment, 27 September 2007 (see footnote 41 above), para. 437; *Kunarac*, Judgment, 22 February 2001 (see footnote 45 above), para. 429.

<sup>57</sup> See, for example, *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 648.

<sup>58</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 94, *Judicial Supplement No. 34*, June 2002.

<sup>59</sup> *Kayishema*, Judgment, 21 May 1999 (see footnote 41 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 39 above), para. 580.



organised nature of the acts of violence and improbability of their random occurrence”.<sup>60</sup> An International Criminal Court Pre-Trial Chamber in *Katanga* found that the term “has been understood as either an organized 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’”.<sup>61</sup> 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”.<sup>62</sup> 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 [the] coordinated ... commission of the unlawful acts ... in order to attack the non-Hema civilian population”.<sup>63</sup> 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”.<sup>64</sup>

*“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 2, 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”.<sup>65</sup> As discussed below, jurisprudence from the International Criminal 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 Criminal 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.<sup>66</sup> International Criminal Court Pre-Trial Chambers subsequently adopted this interpretation in the *Bemba* case and the *Situation in the Republic of Kenya* case,<sup>67</sup> as did the International Criminal Court Trial Chambers in the *Katanga* and *Bemba* trial judgments.<sup>68</sup> In the *Bemba* case, an International Criminal Court Pre-Trial Chamber found that there was sufficient evidence showing the attack was “directed against”

<sup>60</sup> *Harun*, Decision, 27 April 2007 (see footnote 47 above), para. 62 (citing to *Kordić*, Judgment, 17 December 2004 (see footnote 45 above), para. 94, which in turn cites to *Kunarac*, Judgment, 22 February 2001 (see footnote 45 above), para. 429). See also *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 179; *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 96; *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 394.

<sup>61</sup> *Katanga*, Decision, 30 September 2008 (see footnote 45), para. 397.

<sup>62</sup> *Ntaganda*, Decision, 13 July 2012 (see footnote 47 above), para. 31. See also *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 179.

<sup>63</sup> *Ntaganda*, Decision, 9 June 2014 (see footnote 46 above), para. 24.

<sup>64</sup> *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 II, International Criminal Court, para. 225.

<sup>65</sup> See Rome Statute. See also International Criminal Court, *Elements of Crimes* (footnote 38 above), p. 5.

<sup>66</sup> See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 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”).

<sup>67</sup> *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 82; *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 76.

<sup>68</sup> *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1104; *Bemba*, Judgment, 21 March 2016, (see footnote 44 above), para. 154.

civilians of the Central African Republic.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> The term “directed” places its emphasis on the intention of the attack rather than the physical result of the attack.<sup>72</sup> It is the attack, not the acts of the individual perpetrator, which must be “directed against” the target population.<sup>73</sup> 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]”.<sup>74</sup> 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”.<sup>75</sup>

(19) The word “any” indicates that “civilian population” is to have a wide definition and hence should be interpreted broadly.<sup>76</sup> An attack can be committed against any civilians, “regardless of their nationality, ethnicity or other distinguishing feature”,<sup>77</sup> and can be committed against either nationals or foreigners.<sup>78</sup> Those targeted may “include a group defined by its (perceived) political affiliation”.<sup>79</sup> In order to qualify as a “civilian population” during a time of armed conflict, those targeted must be “predominantly” civilian in nature;<sup>80</sup> the presence of certain combatants within the population does not change its character.<sup>81</sup>

<sup>69</sup> *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 94. See also *Ntaganda*, Decision, 13 July 2012 (see footnote 47 above), paras. 20–21.

<sup>70</sup> *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 94.

<sup>71</sup> *Ibid.*, paras. 95–98.

<sup>72</sup> See, for example, *Blaškić*, Judgment, 3 March 2000 (footnote 40 above), para. 208, footnote 401.

<sup>73</sup> *Kunarac*, Judgment, 12 June 2002 (see footnote 58 above), para. 103.

<sup>74</sup> *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 674.

<sup>75</sup> *Ibid.*, para. 153 (citing to the jurisprudence of various international courts and tribunals).

<sup>76</sup> See, for example, *Mrkšić*, Judgment, 27 September 2007 (footnote 41 above), para. 442; *Kupreškić*, Judgment, 14 January 2000 (footnote 25 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 41 above), para. 127; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 643.

<sup>77</sup> *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 399 (quoting *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 40 above), para. 635). See also *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1103; *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 155.

<sup>78</sup> See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 423.

<sup>79</sup> *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 164.

<sup>80</sup> See Additional Protocol I, art. 50, para. 1; *Blaškić*, Judgment, 3 March 2000 (footnote 40 above), para. 180 (recognizing civilians for the purpose of common article 3 to the 1949 Geneva Conventions as “persons who are not, or no longer, members of the armed forces”).

<sup>81</sup> See, for example, *Katanga*, Judgment, 7 March 2014 (footnote 45 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 41 above), para. 442; *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 425 (“the presence of certain non-civilians in its midst does not change the character of the population”); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 180; *Blaškić*, Judgment, 3 March 2000, (footnote 40 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 25 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 41 above), para. 128; *Akayesu*, Judgment, 2

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”.<sup>82</sup> The Trial Chamber of the International Criminal Tribunal for Rwanda in *Kayishema* found that during a time of peace, “civilian” shall include 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.<sup>83</sup> The status of any given victim must be assessed at the time the offence is committed;<sup>84</sup> a person should be considered a civilian if there is any doubt as to his or her status.

(20) “Population” does not mean that the entire population of a given geographical location must be subject to the attack;<sup>85</sup> rather, the term implies the collective nature of the crime as an attack upon multiple victims.<sup>86</sup> As the Trial Chamber of the International Criminal 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”.<sup>87</sup> 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.<sup>88</sup>

(21) The first part of draft article 2, paragraph 2 (a), refers to “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian

---

September 1998 (footnote 39 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 40 above), para. 638.

<sup>82</sup> Additional Protocol I, art. 50, para. 3.

<sup>83</sup> *Kayishema*, Judgment, 21 May 1999 (see footnote 41 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”).

<sup>84</sup> With respect to members of armed forces, differing views have been expressed. The *Blaškić* Appeals Chamber found that members of the armed forces, militias, volunteer corps and members of resistance groups cannot be considered civilians for this purpose, even when *hors de combat*. *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 2004*, paras. 110–114. Some other tribunals, however, have followed the approach of the *Blaškić* Trial Chamber, *Blaškić*, Judgment, 3 March 2000 (see footnote 40 above), para. 214, which said that “the 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, for example, Notification on the Interpretation of “Attack against the Civilian Population” in the Context of Crimes against Humanity with Regard to a State’s or Regime’s Own Armed Forces, Case No. 3/07-09-2009-ECCC-OCIJ, 7 February 2017, Extraordinary Chambers in the Courts of Cambodia, para. 56 (“[A]s a matter of principle, between 1975 and 1979 an attack by a state or organisation against its own armed forces, when carried out in peacetime, satisfied the *chapeau* requirement of an attack against any civilian population.”). See also *Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, Judgment and Sentence, 13 April 2006, Trial Chamber II, International Criminal Tribunal for Rwanda, paras. 48–51; *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Judgment, 12 September 2006, Trial Chamber II, International Criminal Tribunal for Rwanda, para. 513.

<sup>85</sup> See *Situation in the Republic of Kenya*, Decision, 31 March 2010 (footnote 44 above), para. 82; *Bemba*, Decision, 15 June 2009 (footnote 44 above), para. 77; *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 424; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 644. See also *Yearbook ... 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to art. 21 (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*” (emphasis added)).

<sup>86</sup> See *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 644.

<sup>87</sup> *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment, vol. II, 15 April 2011, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, para. 1704.

<sup>88</sup> *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 81; *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 77; *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 154.

population”. Although no such language was contained in the statutory definition of crimes against humanity for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, this language reflects jurisprudence from both these tribunals,<sup>89</sup> and was expressly stated in article 7, paragraph 2 (a), of the 1998 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”.<sup>90</sup> 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”.<sup>91</sup>

(22) The second part of draft article 2, paragraph 2 (a), states that the attack must be “pursuant to or in furtherance of a State or organizational policy to commit such an 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 Rome Statute.<sup>92</sup> While the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contained no policy requirement in their definition of crimes against humanity,<sup>93</sup> some early jurisprudence required it.<sup>94</sup> Indeed, the *Tadić* Trial Chamber provided an important discussion of the policy element early in the work of the International Criminal 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.<sup>95</sup>

<sup>89</sup> See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 415 (defining attack as “a course of conduct involving the commission of acts of violence”); *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 122 (defining attack as the “event in which the enumerated crimes must form part”); *Akayesu*, Judgment, 2 September 1998 (footnote 39 above), para. 581 (“The concept of ‘attack’ may be defined as a[n] 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”).

<sup>90</sup> See International Criminal Court, *Elements of Crimes* (footnote 38 above), p. 5.

<sup>91</sup> *Katanga*, Judgment, 7 March 2014 (footnote 45 above), para. 1101.

<sup>92</sup> Article 6 (c) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Nürnberg Judgment, however, did use a “policy” descriptor when discussing article 6 (c) in the context of the concept of the “attack” as a whole. See *Judgment of 30 September 1946*, International Military Tribunal, in *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945–1 October 1946)*, vol. 22 (1948), p. 493 (“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”). 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 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, in *Official Gazette of the Control Council for Germany*, vol. 3, p. 52 (1946).

<sup>93</sup> The Appeals Chamber of the International Criminal 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 58 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.

<sup>94</sup> See, for example, *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), paras. 626, 644, and 653–655.

<sup>95</sup> *Ibid.*, para. 653.

The Trial Chamber further noted that, because of the policy element, such crimes “cannot be the work of isolated individuals alone”.<sup>96</sup> Later jurisprudence of the International Criminal 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.<sup>97</sup>

(23) Prior to the 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*”.<sup>98</sup> The Commission decided to include the State instigation or tolerance requirement in order to exclude inhumane acts committed by private persons on their own without any State involvement.<sup>99</sup> 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*”.<sup>100</sup> 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”.<sup>101</sup> 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 2, paragraph 2 (a), contains the same policy element as set forth in article 7, paragraph 2 (a), of the 1998 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”,<sup>102</sup> 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”.<sup>103</sup>

<sup>96</sup> *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 Criminal Tribunal for the Former Yugoslavia, para. 26).

<sup>97</sup> See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 58 above), para. 98; *Kordić*, Judgment, 26 February 2001 (footnote 81 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 41 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 39 above), para. 580.

<sup>98</sup> Art. 2, para. 11, of the draft Code of Offences against the Peace and Security of Mankind, *Yearbook ... 1954*, vol. II, p. 150 (emphasis added).

<sup>99</sup> *Ibid.*

<sup>100</sup> Art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47 (emphasis added).

<sup>101</sup> Para. (5) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *ibid.* 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.*

<sup>102</sup> International Criminal Court, *Elements of Crimes* (see footnote 38 above), p. 5.

<sup>103</sup> *Ibid.* Other precedents also emphasize that deliberate failure to act can satisfy the policy element. See *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), paras. 554–555 (discussing acts “approved”, “condoned”, and for which “explicit or implicit approval” has been given); *Yearbook ... 1954*, vol. II, p. 150, art. 2, para. 11 of the draft Code of Offences against the Peace and Security of Mankind (“toleration”); Security Council, Final Report of the Commission of Experts Established

(26) This “policy” element has been addressed in several cases at the International Criminal Court.<sup>104</sup> 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 1998 Rome Statute of a “widespread” or “systematic” attack.<sup>105</sup> Rather, while “systematic” requires high levels of organization and patterns of conduct or recurrence of violence,<sup>106</sup> 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”.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> Moreover, the policy need not be concrete or precise, and it may evolve over time as circumstances unfold.<sup>110</sup> 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.<sup>111</sup>

(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”.<sup>112</sup> Specifically, the Trial 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”.<sup>113</sup> The policy element requires that the acts be “linked” to a State or organization,<sup>114</sup> and it excludes “spontaneous or isolated acts of violence”, but a policy need not be formally adopted<sup>115</sup> and proof of a particular rationale or motive is not required.<sup>116</sup> 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”.<sup>117</sup> 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.<sup>118</sup>

(28) The second part of draft article 2, 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 1998 Rome Statute. In its *Situation in the Republic of Kenya* decision, an International

Pursuant to Security Council resolution 780 (1992), document [S/1994/674](#), para. 85 (“[u]nwillingness to manage, prosecute and punish”).

<sup>104</sup> See, for example, *Ntaganda*, Decision, 13 July 2012 (footnote 47 above), para. 24; *Bemba*, Decision, 15 June 2009 (footnote 44 above), para. 81; *Katanga*, Decision, 30 September 2008 (footnote 45 above), para. 396.

<sup>105</sup> *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), paras. 1111–1112. See also *ibid.*, para. 1101; *Gbagbo*, Decision, 12 June 2014 (see footnote 64 above), para. 208.

<sup>106</sup> *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), paras. 1111–1113.

<sup>107</sup> *Ibid.*, para. 1113.

<sup>108</sup> *Ibid.*, paras. 1108–1109 and 1113.

<sup>109</sup> *Ibid.*, para. 1109. See also *Gbagbo*, Decision, 12 June 2014 (see footnote 64 above), paras. 211–212, and 215.

<sup>110</sup> *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1110.

<sup>111</sup> *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 161.

<sup>112</sup> *Gbagbo*, Judgment, 12 June 2014 (see footnote 64 above), paras. 208 and 216.

<sup>113</sup> *Ibid.*, para. 216.

<sup>114</sup> *Ibid.*, para. 217.

<sup>115</sup> *Ibid.*, para. 215.

<sup>116</sup> *Ibid.*, para. 214.

<sup>117</sup> *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 115.

<sup>118</sup> *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), para. 669.

Criminal Court Pre-Trial Chamber suggested that the meaning of “State” in article 7, paragraph 2 (a), is “self-explanatory”.<sup>119</sup> The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.<sup>120</sup>

(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”.<sup>121</sup> 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”.<sup>122</sup>

(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”.<sup>123</sup> 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 1998 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 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.<sup>124</sup>

(31) As a consequence of the “policy” potentially emanating from a non-State organization, the definition set forth in paragraphs 1 and 2 of draft article 2 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

<sup>119</sup> *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 89.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 396 (citing case law of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Commission’s 1991 draft Code of Crimes against the Peace and Security of Mankind, para. (5) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103. See *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 81.

<sup>122</sup> *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1119.

<sup>123</sup> *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 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 45 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).

<sup>124</sup> *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 185. See also *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 44 above), para. 93; *Situation in the Republic of Côte d’Ivoire*, Case No. ICC-02/11, Corrigendum to the Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization 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.

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”.<sup>125</sup> 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”.<sup>126</sup> 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”.<sup>127</sup> While an organized criminal group or gang normally does not commit the kind of widespread or systematic violations covered by draft article 2, it might in certain circumstances.

(32) Jurisprudence of the International Criminal 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 Criminal 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”.<sup>128</sup> 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.<sup>129</sup>

(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.<sup>130</sup> 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”.<sup>131</sup> 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”<sup>132</sup> which “is organised in a military-type hierarchy and operates as an army”.<sup>133</sup> 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

<sup>125</sup> *Yearbook ... 1991*, vol. II (Part Two), pp. 103–104, para. (5) of the commentary to art. 21 of the draft Code of Crimes against the Peace and Security of Mankind. The United Nations Convention against Transnational Organized Crime defines an “organized criminal group” as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” United Nations Convention against Transnational Organized Crime, art. 2 (a).

<sup>126</sup> Art. 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47 (emphasis added).

<sup>127</sup> *Ibid.*, para. (5) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind.

<sup>128</sup> *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 40 above), para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.

<sup>129</sup> *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005, Trial Chamber II, International Criminal Tribunal for Former Yugoslavia, paras. 212–214.

<sup>130</sup> *Ntaganda*, Decision, 13 July 2012 (see footnote 47 above), para. 22.

<sup>131</sup> *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.

<sup>132</sup> *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.

<sup>133</sup> *Ibid.*, para. 7.



army, Kalenjin elders and local leaders”.<sup>134</sup> 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”.<sup>135</sup>

*“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 Criminal 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.<sup>136</sup> This two-part approach is reflected in the Elements of Crimes under the 1998 Rome Statute, which requires as the last element for each of the proscribed acts: “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,

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.<sup>137</sup>

(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”.<sup>138</sup> Indeed, it need not be proven that the perpetrator knew the specific details of the attack;<sup>139</sup> rather, the perpetrator’s knowledge may be inferred from circumstantial evidence.<sup>140</sup> 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.<sup>141</sup> 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

<sup>134</sup> *Ruto*, Decision, 23 January 2012 (see footnote 50 above), para. 182.

<sup>135</sup> *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.

<sup>136</sup> See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 418; *Kayishema*, Judgment, 21 May 1999 (footnote 41 above), para. 133.

<sup>137</sup> International Criminal Court, *Elements of Crimes* (see footnote 38 above), p. 5.

<sup>138</sup> *Gbagbo*, Decision, 12 June 2014 (see footnote 64 above), para. 214.

<sup>139</sup> *Kunarac*, Judgment, 22 February 2001 (see footnote 45 above), para. 434 (finding that the knowledge requirement “does not entail knowledge of the details of the attack”).

<sup>140</sup> See *Blaškić*, Judgment, 3 March 2000 (footnote 40 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 40 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 41 above), para. 134 (finding that “actual or constructive knowledge of the broader context of the attack” is sufficient).

<sup>141</sup> *Bemba*, Decision, 15 June 2009 (see footnote 44 above), para. 126. See *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), paras. 166–169.

superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.<sup>142</sup>

(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.<sup>143</sup> According to the Appeals Chamber of the International Criminal 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”.<sup>144</sup> 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 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.<sup>145</sup> 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.<sup>146</sup> A Trial Chamber of the International Criminal 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”.<sup>147</sup> 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.<sup>148</sup> 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”.<sup>149</sup>

#### *Prohibited acts*

(37) Like article 7 of the 1998 Rome Statute, draft article 2, paragraph 1, at subparagraphs (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.<sup>150</sup> 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 2, paragraph 1.<sup>151</sup> 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.<sup>152</sup>

<sup>142</sup> *Katanga*, Decision, 30 September 2008 (see footnote 45 above), para. 402.

<sup>143</sup> See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 58 above), para. 103; *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), para. 558.

<sup>144</sup> *Kunarac*, Judgment, 12 June 2002 (see footnote 58 above), para. 103.

<sup>145</sup> See, for example, *Kunarac*, Judgment, 22 February 2001 (footnote 45 above), para. 592.

<sup>146</sup> *Ibid.*, paras. 2–11

<sup>147</sup> *Ibid.*, para. 592.

<sup>148</sup> *Katanga*, Judgment, 7 March 2014 (see footnote 45 above), para. 1125.

<sup>149</sup> *Ibid.*

<sup>150</sup> See, for example, *Kunarac*, Judgment, 12 June 2002 (footnote 58 above), para. 100; *Tadić*, Opinion and Judgment, 7 May 1997 (footnote 40 above), para. 649.

<sup>151</sup> *Bemba*, Judgment, 21 March 2016 (footnote 44 above), para. 165.

<sup>152</sup> See, for example, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009, Appeals Chamber, International Criminal 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 Criminal Tribunal for the Former Yugoslavia, para. 234, *Judicial Supplement No. 42*, June 2003; *Mrkšić*, Judgment, 27 September 2007 (footnote 41 above), para. 438; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A,

(38) Two aspects of these subparagraphs bear mention. First, with respect to subparagraph (h), article 7, paragraph 1 (h), of the 1998 Rome Statute that 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”. The clause “or any crime within the jurisdiction of the Court” has not been retained for paragraph 1 (h) of draft article 2. The Commission considered this clause to be designed to establish a specific jurisdiction of the International Criminal Court and not to indicate the scope of what should constitute persecution as a crime against humanity more generally or for purposes of national law. Such a clause is not used as a jurisdictional threshold for other contemporary international criminal tribunals.<sup>153</sup> At the same time, the clause “in connection with any act referred to in this paragraph” has been retained due to: (a) a concern that otherwise the text would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity; and (b) a recognition that subparagraph 1 (k) encompasses, in accordance with its terms, other inhumane acts. As such, the “in connection with any act referred to in this paragraph” clause provides guidance as to the nature of the persecution that constitutes a crime against humanity, specifically persecutory acts of a similar character and severity to those acts listed in the other subparagraphs of paragraph 1. Separately, it is noted that the clause “or other grounds ...” in subparagraph (h) allows for persecution on grounds other than those expressly listed, provided that such grounds “are universally recognized as impermissible under international law”. Certain other grounds have been suggested in this regard, such as persecution in the form of acts targeting children on the basis of age or birth.<sup>154</sup>

(39) Second, with respect to subparagraph (k) on “other inhumane acts”, it is noted that the Elements of Crimes under the 1998 Rome Statute provide for the following requirements to constitute a crime against humanity:

- (1) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
- (2) Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
- (3) The perpetrator was aware of the factual circumstances that established the character of the act.
- (4) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (5) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>155</sup>

#### *Definitions within the definition*

(40) As noted above, draft article 2, paragraph 2 (a), defines “attack directed against any civilian population” for the purpose of draft article 2, paragraph 1. The remaining subparagraphs (b)–(i) of draft article 2, paragraph 2, define further terms that appear in

Judgment, 15 July 1999, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 249, *Judicial Supplement No. 6*, June/July 1999.

<sup>153</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5 (h) (although it is noted that the Tribunal’s definition of crimes against humanity included “when committed in armed conflict”); Statute of the International Criminal Tribunal for Rwanda, art. 3 (h); Statute of the Special Court for Sierra Leone, art. 2 (h); Extraordinary Chambers of Cambodia Law, art. 5; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (Malabo, 27 June 2014), art. 28C, para. 1 (h), available from <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

<sup>154</sup> Office of the Prosecutor of the International Criminal Court, “Policy on Children” (2016), para. 51 (“The Office considers that ... acts targeting children on the basis of age or birth may be charged as persecution on ‘other grounds’”).

<sup>155</sup> See International Criminal Court, *Elements of Crimes* (footnote 38 above), p. 12.

paragraph 1, specifically: “extermination”; “enslavement”;<sup>156</sup> “deportation or forcible transfer of population”; “torture”; “forced pregnancy”; “persecution”; “the crime of apartheid”; and “enforced disappearance of persons”. These definitions also appear in article 7 of the 1998 Rome Statute and were viewed by the Commission as relevant for retention in draft article 2.

(41) Article 7, paragraph 3, of the 1998 Rome Statute provides for the purposes of that Statute a definition of “gender” as referring “to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”. That paragraph (as well as a cross-reference to that paragraph in article 7, paragraph 1 (h)), has not been retained in draft article 2. Since the adoption of the Rome Statute, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term “gender”, notably: the 2004 guidance document by the International Committee of the Red Cross;<sup>157</sup> the 2010 Committee on the Elimination of Discrimination against Women general recommendation No. 28;<sup>158</sup> the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence;<sup>159</sup> and recent reports of United Nations special rapporteurs or independent experts.<sup>160</sup> Moreover, the Office of the Prosecutor of the International Criminal Court in 2014 issued the “Policy paper on sexual and gender-based crimes”, which states:

Article 7 (3) of the Statute defines “gender” as referring to “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and

<sup>156</sup> The definition of “enslavement” refers in part to “trafficking in persons”. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2237, No. 39574, p. 319, defines “trafficking in persons” at article 3 (a) as follows:

“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

<sup>157</sup> ICRC, *Addressing the Needs of Women Affected by Armed Conflict: an ICRC Guidance Document*, Geneva, 2004, p. 7 (“The term ‘gender’ refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term ‘sex’ refers to biological and physical characteristics”).

<sup>158</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 38 (A/66/38 (Part Two))*, annex III, p. 108. Paragraph 5 of the recommendation refers to gender as “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences”.

<sup>159</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *Treaty Series*, No. 210. Article 3 (c) of the Convention defines “gender” for purposes of the Convention to “mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.

<sup>160</sup> See, for example, the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (2017) ([A/HRC/35/23](#)), paras. 17 *et seq.*; the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2018) ([A/73/152](#)), para. 2 (“Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms.”).

interpret this in accordance with internationally recognised human rights pursuant to article 21(3) [of the 1998 Rome Statute].<sup>161</sup>

A similar approach of viewing gender as a socially constructed (rather than biological) concept has been taken by various other international authorities<sup>162</sup> and in the jurisprudence of international criminal courts and tribunals.<sup>163</sup>

(42) Accordingly, the Commission decided not to include the definition of “gender” found in article 7, paragraph 3, of the 1998 Rome Statute, thereby allowing the term to be applied for the purposes of the present draft articles based on an evolving understanding as to its meaning. While the term is therefore undefined in the present draft articles, the same is true as well for various other terms used in draft article 2, paragraph 1 (h), such as “political”, “racial”, “national”, “ethnic”, “cultural”, or “religious”. States, however, may be guided by the sources indicated above for understanding the meaning of the term “gender”.

### Paragraph 3

(43) Paragraph 3 of draft article 2 provides: “This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in 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”.<sup>164</sup> Article 10 of the 1998 Rome Statute (appearing in Part II on “Jurisdiction,

<sup>161</sup> Office of the Prosecutor of the International Criminal Court, “Policy paper on sexual and gender-based crimes” (2014), para. 15. Article 21 of the Rome Statute on “applicable law” begins in paragraph 3 as follows: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights ...”.

<sup>162</sup> *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo* [Gender identity, and equality and non-discrimination against same-sex couples], Advisory Opinion OC-24/17 of 24 November 2017, Inter-American Court of Human Rights, para. 32 (available only in Spanish); Committee against Torture, ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2016) (CAT/C/57/4 and Corr.1), para. 53; Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women’s access to justice (CEDAW/C/GC/33); Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X; Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the Covenant), *Official Records of the Economic and Social Council, Report on the Thirty-fourth and Thirty-fifth Sessions, Supplement No. 2* (E/2006/22-E/C.12/2005/4), annex VIII; Report of the Secretary-General, Question of torture and other cruel, inhuman or degrading treatment or punishment (2001) (A/56/156); Human Rights Committee, general comment No. 28 (2000) on article 3 (equality of rights between men and women), *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (A/55/40), vol. I, annex VI B; Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (1996) (A/51/322); Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1993) on violence against women, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38* (A/47/38), chap. I.

<sup>163</sup> *Prosecutor v. Ferdinand Nahimana, Jean Bosco and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, Trial Chamber I, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 2003*, p. 376, at p. 1116, para. 1079; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 327; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 369–370; *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, Trial Chamber I, International Criminal Court, para. 191.

<sup>164</sup> Convention against Torture, art. 1, para. 2.

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”.

(44) Paragraph 3 is meant to ensure that the definition of “crimes against humanity” set forth in the first two paragraphs of draft article 2 does not call into question any broader definitions that may exist in international law, in particular in international instruments or in customary international law, or in national legislation. “International instrument” is to be understood as being broader than just a legally binding international agreement, but as being limited to instruments developed by States or international organizations, such as the United Nations. To the extent that the definition of crimes against humanity is broader in certain respects under customary international law, then here too the present draft articles are without prejudice to such law. States also may adopt national laws that contain a broader definition of crimes against humanity, perhaps under the influence of broader definitions that may exist in international instruments or in customary international law. Thus, notwithstanding that 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, if a State wishes to adopt or retain a broader definition in its national law, the present draft articles do not preclude it from doing so.

(45) For example, the definition of “enforced disappearance of persons” as contained in draft article 2 follows article 7 of the 1998 Rome Statute, but differs from the definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,<sup>165</sup> in the 1994 Inter-American Convention on Forced Disappearance of Persons<sup>166</sup> and in the 2006 International Convention for the Protection of All Persons against Enforced Disappearance.<sup>167</sup> 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.

(46) In light of such differences, the Commission thought it prudent to include the “without prejudice” clause that appears in draft article 2, paragraph 3. However, any elements adopted in a national law, which do 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, unless the States concerned so agree.

### **Article 3**

#### **General obligations**

1. Each State has the obligation not to engage in acts that constitute crimes against humanity.
2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.
3. 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 3 sets forth in paragraph 1 the general obligation of States not to engage in acts that constitute crimes against humanity. Paragraph 2 sets forth a further general obligation to prevent and punish crimes against humanity. Paragraph 3 makes clear that no

<sup>165</sup> Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 1.

<sup>166</sup> Inter-American Convention on Forced Disappearance of Persons (Belem, 9 June 1994), Organization of American States, *Treaty Series*, No. 60, art. II.

<sup>167</sup> International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3, art. 2.

exceptional circumstances whatsoever may be invoked as a justification of crimes against humanity.

(2) Paragraph 1 of draft article 3 sets forth the first general obligation, which is that “Each State has the obligation not to engage in acts that constitute crimes against humanity.” Prior conventions, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1984 Convention against Torture, usually have not expressly provided that States shall not commit the acts at issue in those conventions. Nevertheless, the Commission viewed it as desirable for such an obligation to be made explicit in draft article 3. A formula that calls for States not to engage in “acts that constitute” crimes against humanity is appropriate since States themselves do not commit crimes; rather, crimes are committed by persons, but the “acts” that “constitute” such crimes may be acts attributable to the State under the rules on the responsibility of States for internationally wrongful acts.

(3) The general obligation “not to engage in acts” contains two components. First, 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”.<sup>168</sup> In *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 found that the identification of genocide as a crime, as well as the obligation of a State to prevent genocide, necessarily implies an obligation of the State not to commit 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.<sup>169</sup>

(4) 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 obligations [...] in question”.<sup>170</sup>

(5) A breach of the obligation not to commit directly such acts engages the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on the responsibility of States for internationally wrongful acts. Indeed, in the context of disputes that may arise under the 1948 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 1948 Convention on the Prevention and Punishment of the Crime of Genocide is upon prosecuting

<sup>168</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (see footnote 13 above), p. 43 at p. 113, para. 166.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*, p. 120, para. 183.

individuals for the crime of genocide, the International Court of Justice has stressed that the breach of the obligation not to commit genocide is not a *criminal* violation by the State but, rather, concerns a breach of international law that engages State responsibility.<sup>171</sup> The Court's approach is consistent with views previously expressed by the Commission,<sup>172</sup> including in the commentary to the 2001 draft articles on the 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".<sup>173</sup>

(6) Second, States have obligations under international law not to aid or assist, or to direct, control or coerce, another State in the commission of an internationally wrongful act.<sup>174</sup>

(7) Paragraph 2 of draft article 3 sets forth a second general obligation: "Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict." In *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 found (again when considering article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide) that States have an obligation "to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing" acts of genocide.<sup>175</sup> In that 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" the acts, which in turn depends on the State party's geographic, political and other links to the persons or groups at issue.<sup>176</sup> At the same time, the Court found that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed".<sup>177</sup> Further content of this second general obligation is addressed in various ways through the 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 with, as appropriate, other organizations.

(8) The Court also analysed the meaning of "undertake" as contained in article I of the 1948 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".<sup>178</sup> 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

<sup>171</sup> *Ibid.*, p. 114, para. 167 (noting that international responsibility is "quite different in nature from criminal responsibility").

<sup>172</sup> *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").

<sup>173</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142, para. (3) of the commentary to art. 58 of the draft articles on responsibility of States for internationally wrongful acts.

<sup>174</sup> *Ibid.*, p. 27, arts. 16–18 of the draft articles on responsibility of States for internationally wrongful acts.

<sup>175</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 13 above), p. 43, at p. 113, para. 166.

<sup>176</sup> *Ibid.*, p. 221, para. 430.

<sup>177</sup> *Ibid.*, p. 221, para. 431. See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27, art. 14, para. 3 of the draft articles on responsibility of states for internationally wrongful acts: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs").

<sup>178</sup> *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.



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.<sup>179</sup>

The undertaking to prevent and punish crimes against humanity, as formulated in paragraph 2 of draft article 3, is intended to express the same kind of legally binding obligation upon States; it, too, is not merely hortatory or purposive, and is not merely an introduction to later draft articles.

(9) The International Court of Justice also noted that the duty to punish in the context of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide 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”,<sup>180</sup> the Court found that “the duty to prevent genocide and the duty to punish its perpetrators ... are ... two distinct yet connected obligations”.<sup>181</sup> 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”.<sup>182</sup>

(10) In the course of stating this second general obligation “to prevent and to punish crimes against humanity”, paragraph 2 of draft article 3 recognizes such crimes as “crimes under international law, whether or not committed in time of armed conflict”. While such language might have been incorporated in paragraph 1 of draft article 3, it is used in paragraph 2 where the focus is on the prevention and punishment of “crimes” committed by individuals, rather than on the acts of States.

(11) With respect to crimes against humanity being “crimes under international law”, the Nürnberg Charter included “crimes against humanity” as a component of the jurisdiction of the Tribunal. 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”.<sup>183</sup> Crimes against humanity were also within the jurisdiction of the International Military Tribunal for the Far East (hereinafter “Tokyo Tribunal”).<sup>184</sup>

(12) The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1946 by the General Assembly.<sup>185</sup> The Assembly also directed the Commission to “formulate” the Nürnberg Charter principles and to prepare a draft code of offences.<sup>186</sup> 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”.<sup>187</sup> Further, the Commission completed in 1954 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

<sup>179</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (see footnote 13 above), p. 43, at p. 111, para. 162.

<sup>180</sup> *Ibid.*, p. 219, para. 426.

<sup>181</sup> *Ibid.*, para. 425.

<sup>182</sup> *Ibid.*, p. 220, para. 427.

<sup>183</sup> *Judgment of 30 September 1946* (see footnote 92 above), p. 466.

<sup>184</sup> Charter of the International Military Tribunal for the Far East, art. 5 (c) (Tokyo, 19 January 1946) (as amended on 26 April 1946), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 4, C. Bevans, ed. (Washington, D.C., Department of State, 1968), p. 20, at p. 23, art. 5 (c) (hereinafter “Tokyo Charter”). No persons, however, were convicted of this crime by that tribunal.

<sup>185</sup> *Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal*, General Assembly resolution 95 (I) of 11 December 1946.

<sup>186</sup> *Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal*, General Assembly resolution 177 (II) of 21 November 1947.

<sup>187</sup> *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 376, principle VI of the Nürnberg Principles.

this Code, are crimes under international law, for which the responsible individuals shall be punished”.<sup>188</sup>

(13) 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. Article 6 (c) of 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”. 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 are punishable under national law”.<sup>189</sup> 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.<sup>190</sup>

(14) Paragraph 2 of draft article 3 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.<sup>191</sup> The Nürnberg Charter definition of crimes against humanity, as amended by the Berlin Protocol,<sup>192</sup> linked the jurisdiction of the International Military Tribunal over crimes against humanity to the existence of an international armed conflict; the acts fell under the Tribunal’s jurisdiction only if committed “in execution of or in connection with” any crime within the jurisdiction of the Tribunal, meaning a crime against peace or a war crime. As such, while the Charter did not exclude jurisdiction over acts that had been committed prior to the armed conflict, 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.<sup>193</sup> 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 armed conflict, although in

<sup>188</sup> *Yearbook ... 1954*, vol. II, p. 150, art. 1 of the draft Code of Offences against the Peace and Security of Mankind.

<sup>189</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50, art. 1 of the draft Code of Crimes against the Peace and Security of Mankind. The 1996 draft Code contained five categories of crimes, one of which was crimes against humanity.

<sup>190</sup> See footnote 21 above and accompanying text.

<sup>191</sup> See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., 2016, para. 218 of the commentary to common article 2 (hereinafter “ICRC, *Commentary on the First Geneva Convention*, 2016”) (“Armed conflicts in the sense of Article 2(1) are those which oppose High Contracting Parties (i.e. States) and occur when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation.”); *ibid.*, para. 387 of the commentary to common article 3 (“A situation of violence that crosses the threshold of an ‘armed conflict not of an international character’ is a situation in which organized Parties confront one another with violence of a certain degree of intensity. It is a determination made based on the facts.”).

<sup>192</sup> Protocol Rectifying Discrepancy in Text of Charter (Berlin, 6 October 1945), in *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945–1 October 1946)*, vol. 1 (1947), pp. 17–18 (hereinafter “Berlin Protocol”). The Berlin Protocol replaced a semi-colon after “during the war” with a comma, so as to harmonize the English and French texts with the Russian text. *Ibid.*, p. 17. 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.

<sup>193</sup> See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (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”).

some instances the connection of those crimes with other crimes within the jurisdiction of the International Military Tribunal was tenuous.<sup>194</sup>

(15) 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.<sup>195</sup> 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.<sup>196</sup> 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".<sup>197</sup> 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".<sup>198</sup>

(16) The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia included "crimes against humanity". Article 5 of its Statute provided 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".<sup>199</sup> Thus, the formulation used in article 5 retained a connection to armed conflict, but it is best understood contextually. The Statute of the Tribunal was developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia. 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 Tribunal's Appeals Chamber 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.<sup>200</sup> 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".<sup>201</sup> Indeed, the Appeals Chamber later maintained that such a connection in the Statute of the Tribunal was simply circumscribing the subject-matter of its jurisdiction, not codifying customary international law.<sup>202</sup>

(17) In 1994, the Security Council established the International Criminal Tribunal for Rwanda and provided it with jurisdiction over "crimes against humanity". Although article

<sup>194</sup> See, for example, *Kupreškić*, Judgment, 14 January 2000 (footnote 25 above), 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).

<sup>195</sup> *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 377, principle VI (c) of the Nürnberg Principles.

<sup>196</sup> *Ibid.*, para. 123.

<sup>197</sup> *Ibid.*, para. 124.

<sup>198</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73. As of July 2019, there were 55 States parties to this Convention. For a regional convention of a similar nature, see the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 25 January 1974), Council of Europe, *Treaty Series*, No. 82. As of July 2019, there were eight States parties to this Convention.

<sup>199</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5.

<sup>200</sup> *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-I-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, para. 140.

<sup>201</sup> *Ibid.*

<sup>202</sup> See, for example, *Kordić*, Judgment, 26 February 2001 (footnote 81 above), para. 33; *Tadić*, Judgment, 15 July 1999 (footnote 152 above), para. 251 ("[T]he 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").

3 of the Statute of that Tribunal retained the same series of acts as appeared in the Statute of the International Criminal Tribunal for the Former Yugoslavia, the chapeau language did not retain the reference to armed conflict.<sup>203</sup> Likewise, article 7 of the 1998 Rome Statute did not retain any reference to armed conflict, nor has it existed with respect to other relevant criminal tribunals.<sup>204</sup>

(18) 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 courts and tribunals, including the 1998 Rome Statute. In its place, as discussed in relation to the “chapeau” requirements of draft article 2, paragraph 1 (in conjunction with paragraph 2 (a)), the crime must 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.

(19) Such treaty practice, jurisprudence, and the well-settled acceptance by States establish that crimes against humanity are crimes under international law that should be prevented and punished whether or not committed in time of armed conflict, and whether or not criminalized under national law.

(20) Draft article 3, paragraph 3, indicates that no exceptional circumstances may be invoked as a justification of crimes against humanity. This text is inspired by article 2, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>205</sup> but has been refined for the context of crimes against humanity. The expression “state of war or threat of war” has been replaced by the expression “armed conflict,” as was done in draft article 3, paragraph 2. In addition, the words “such as” are used to stress that the examples given are not meant to be exhaustive.

(21) 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,<sup>206</sup> as does article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture.<sup>207</sup>

(22) One advantage of the formulation in draft article 3, paragraph 3, with respect to crimes against humanity is that it is drafted in a manner that relates 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 obligations of States as set forth in paragraphs 1 and 2 and not, for example, in the context of possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility.

<sup>203</sup> Statute of the International Criminal Tribunal for Rwanda, art. 3. 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 Criminal 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”).

<sup>204</sup> See, for example, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgment, 23 November 2016, Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, para. 721 (finding that the definition of crimes against humanity under customary international law by 1975 did not require a nexus to an armed conflict).

<sup>205</sup> Convention against Torture, art. 2, para. 2 (“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”).

<sup>206</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 1, para. 2 (“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”).

<sup>207</sup> Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985), Organization of American States, *Treaty Series*, No. 67, art. 5 (“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”).

## Article 4

### Obligation of prevention

Each State undertakes to prevent crimes against humanity, in conformity with international law, through:

- (a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; and
- (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

### Commentary

(1) Draft article 4 elaborates upon the obligation to prevent crimes against humanity that is set forth in general terms in draft article 3, paragraph 2. 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”.<sup>208</sup> 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 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 1948 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 for States parties to call upon the competent organs of the United Nations to act for the prevention of genocide.

(3) Such an obligation to take preventive measures 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;<sup>209</sup> the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;<sup>210</sup> the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid;<sup>211</sup> the 1979 International Convention against the Taking of

<sup>208</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. I.

<sup>209</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971), United Nations, *Treaty Series*, vol. 974, No. 14118, p. 177. Article 10, paragraph 1, provides: “Contracting States shall, in accordance with international and national law, endeavour to take all practicable measure[s] for the purpose of preventing the offences mentioned in Article 1”.

<sup>210</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167, art. 4 (“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”).

<sup>211</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243, art. IV: (“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”).

Hostages;<sup>212</sup> the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>213</sup> the 1985 Inter-American Convention to Prevent and Punish Torture;<sup>214</sup> the 1994 Inter-American Convention on the Forced Disappearance of Persons;<sup>215</sup> the 1994 Convention on the Safety of United Nations and Associated Personnel;<sup>216</sup> the 1997 International Convention on the Suppression of Terrorist Bombings;<sup>217</sup> the 2000 United Nations Convention against Transnational Organized Crime;<sup>218</sup> the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;<sup>219</sup> the 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime;<sup>220</sup> the 2001

- 
- <sup>212</sup> International Convention against the Taking of Hostages (New York, 17 December 1979), United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205, art. 4 (“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”).
- <sup>213</sup> Convention against Torture, art. 2, para. 1 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”).
- <sup>214</sup> Inter-American Convention to Prevent and Punish Torture, art. 1 (“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”.
- <sup>215</sup> Inter-American Convention on Forced Disappearance of Persons, art. 1 (“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”).
- <sup>216</sup> Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994), United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363, art. 11 (“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”).
- <sup>217</sup> International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256, art. 15 (“States Parties shall cooperate in the prevention of the offences set forth in article 2”).
- <sup>218</sup> United Nations Convention against Transnational Organized Crime, art. 9, para. 1 (“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, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials”); art. 9, para. 2 (“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”); art. 29, para. 1 (“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”); art. 31, para. 1 (“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”).
- <sup>219</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 9, para. 1 (“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”).
- <sup>220</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2241, No. 39574, p. 480, art. 11, para. 1 (“Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants”); art. 11, para. 2 (“Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime;<sup>221</sup> the 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>222</sup> the 2003 United Nations Convention against Corruption;<sup>223</sup> and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.<sup>224</sup>

(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 1966 International Convention on the Elimination of All

---

commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol"); art. 14, para. 1 ("States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol").

<sup>221</sup> Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (New York, 31 May 2001), United Nations, *Treaty Series*, vol. 2326, No. 39574, p. 208, art. 9 ("A State Party that does not recognize a deactivated firearm as a firearm in accordance with its domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms"); art. 11 ("In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each State Party shall take appropriate measures: (a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and (b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation"); art. 14 ("States Parties shall cooperate with each other and with relevant international organizations, as appropriate, so that States Parties may receive, upon request, the training and technical assistance necessary to enhance their ability to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms").

<sup>222</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 18 December 2002), United Nations, *Treaty Series*, vol. 2375, No. 24841, p. 237, preamble ("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"); art. 3 ("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").

<sup>223</sup> United Nations Convention against Corruption, art. 6, para. 1 ("Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption"); art. 9, para. 1 ("Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption"); art. 12, para. 1 ("Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures").

<sup>224</sup> International Convention for the Protection of All Persons from Enforced Disappearance, preamble ("Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance"); art. 23 ("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").

Forms of Racial Discrimination;<sup>225</sup> the 1979 Convention on the Elimination of All Forms of Discrimination against Women;<sup>226</sup> and the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.<sup>227</sup> 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 Rights<sup>228</sup> and the 1989 Convention on the Rights of the Child.<sup>229</sup>

(5) The International Court of Justice has stated that, when engaging in measures of prevention, “it is clear that every State may only act within the limits permitted by international law”.<sup>230</sup> The Commission deemed it important to express that requirement explicitly in the chapeau 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 its obligation to prevent crimes against humanity 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.

(6) Draft article 4 obliges States to prevent crimes against humanity in two specific ways provided for in subparagraphs (a) and (b), respectively.

(7) First, pursuant to subparagraph (a) of draft article 4, States must pursue actively and in advance measures designed to help prevent the offence from occurring, through “effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction”. 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,

<sup>225</sup> International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195, art. 3 (“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”).

<sup>226</sup> Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13, art. 2 (“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”) and art. 3 (“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all 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”).

<sup>227</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 4, para. 2 (“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”).

<sup>228</sup> International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, art. 2, para. 2 (“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”).

<sup>229</sup> Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, art. 4 (“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”).

<sup>230</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (see footnote 13 above), p. 43, at p. 221, para. 430.



administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.<sup>231</sup>

(8) The term “other appropriate preventive measures” rather than just “other measures” is used to reinforce the point that the measures at issue in subparagraph (a) relate solely to those aimed at prevention. The term “appropriate” offers some flexibility to each State when implementing this obligation, allowing it to tailor other preventive measures to the circumstances faced by that particular State. 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 1984 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.<sup>232</sup>

(9) 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 genocide<sup>233</sup> that provides some insights into the kinds of measures that are expected in fulfilment of article I of the 1948 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”;<sup>234</sup> (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”;<sup>235</sup> 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”.<sup>236</sup>

(10) In the regional context, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)<sup>237</sup> 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 a positive obligation on States parties to safeguard the lives of those within their jurisdiction, consisting of two aspects: (a) the duty to provide a regulatory framework and (b) the obligation to take preventive measures.<sup>238</sup> At the same time, the Court has recognized that

<sup>231</sup> Convention against Torture, art. 2, para. 1.

<sup>232</sup> See Committee against Torture, general comment No. 2 (2007).

<sup>233</sup> 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 on the prevention of genocide, adopted by the Human Rights Council on 27 March 2015.

<sup>234</sup> *Ibid.*, para. 2.

<sup>235</sup> *Ibid.*, para. 3.

<sup>236</sup> *Ibid.*, para. 4.

<sup>237</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

<sup>238</sup> *Makaratzis v. Greece*, Application No. 50385/99, Judgment of 20 December 2004, Grand Chamber, European Court of Human Rights, ECHR 2004-XI, para. 57; see *Kiliç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, European Court of Human Rights, 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 State party's obligation in this regard is limited.<sup>239</sup> The Court has similarly held that States parties have an obligation, pursuant to article 3 of the Convention to prevent torture and other forms of ill-treatment.<sup>240</sup> Likewise, although the 1969 American Convention on Human Rights<sup>241</sup> 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,<sup>242</sup> 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.<sup>243</sup>

Similar reasoning has animated the Court's approach to the interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.<sup>244</sup>

(11) 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

the lives of those within its jurisdiction); Application No. 47848/08, Judgment of 17 July 2014, Grand Chamber, European Court of Human Rights, ECHR 2014, para. 130.

<sup>239</sup> *Mahmut Kaya v. Turkey*, Application No. 22535/93, Judgment of 28 March 2000, First Section, European Court of Human Rights, 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*, Application Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, and 5684/05, Final Judgment of 15 September 2011, First Section, European Court of Human Rights, para. 246; *Osman v. the United Kingdom*, Judgment of 28 October 1998, Grand Chamber, European Court of Human Rights, *Reports* 1998-VIII, para. 116.

<sup>240</sup> *A v. United Kingdom*, Judgment of 23 September 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-VI, para. 22; *O'Keeffe v. Ireland* [Grand Chamber], Application No. 35810/09, Judgment of 28 January 2014, European Court of Human Rights, ECHR 2014, para. 144.

<sup>241</sup> American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), Organization of American States, *Treaty Series*, vol. 1144, No. 17955, p. 123.

<sup>242</sup> 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 recognise the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them". African Charter on Human and Peoples' Rights ("Banjul Charter") (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

<sup>243</sup> *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-Paquiyaui 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 Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 99, paras. 137 and 142.

<sup>244</sup> *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-Paquiyaui Brothers v. Peru* (footnote 243 above), para. 155.

others.<sup>245</sup> 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 obliged 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.<sup>246</sup>

(12) Subparagraph (a) 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, which is used at various places in the draft articles, covers the territory of a State, but also covers 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.<sup>247</sup>

<sup>245</sup> 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 acquired immunodeficiency syndrome (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, paras. 6–7, in *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 31 (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, principle 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”).

<sup>246</sup> Training or dissemination programmes may already exist in relation to international humanitarian law and the need to prevent the commission of war crimes. Common article 1 to the 1949 Geneva Conventions obliges High Contracting Parties “to respect and ensure respect” for the rules of international humanitarian law, which may have encouraged pursuit of such programmes. See ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 145–146, 150, 154, 164 and 178 (on common article 1). Further, article 49 of Geneva Convention I (a provision common to the other Conventions) also imposes obligations to enact legislation to provide effective penal sanctions and to suppress acts contrary to the Convention. See *ibid.*, paras. 2842, 2855 and 2896 (on article 49).

<sup>247</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. (12) of the commentary to art. 1 of the draft articles on the 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

(13) Second, pursuant to subparagraph (b) of draft article 4, States have an obligation to pursue certain forms of cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations. 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”.<sup>248</sup>

(14) Consequently, subparagraph (b) 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 and mandate, on the legal 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, such as the components of the International Red Cross and Red Crescent Movement, within the limits of their respective mandates.<sup>249</sup> 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.

---

1971, p. 16, at p. 54, para. 118). See also *Yearbook ... 2006*, vol. II (Part Two), p. 70, para. (25) of 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; *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”).

<sup>248</sup> 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.

<sup>249</sup> The International Red Cross and Red Crescent Movement (Movement) consists of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and 191 National Red Cross and Red Crescent Societies. In accordance with their respective mandates set out, *inter alia*, in the Statutes of the Movement, the components of the Movement have different roles in ensuring respect for international humanitarian law, including by preventing violations of it, which may also include crimes against humanity. The limits of the Movement’s engagement in the prevention of international crimes are found in the Fundamental Principles of the Movement, in particular that of neutrality. Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 1986 and amended in 1995 and 2006, preamble, available at [www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf](http://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf). In accordance with this principle, the components of the Movement do not participate, contribute or associate themselves with the investigation and prosecution of such crimes as this may be perceived as supporting one side against another or as engaging in controversies of a political, racial, religious or ideological nature. See generally [www.icrc.org/en/who-we-are/movement](http://www.icrc.org/en/who-we-are/movement).

## Article 5

### *Non-refoulement*

1. No State 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 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 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 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.

(2) As a general matter, the principle of *non-refoulement* obligates a State not to return or otherwise transfer 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. Paragraph 1 refers to such transfer “to another State” rather than “to territory under the jurisdiction of another State” so as also to encompass situations where the person is transferred from the control of one State to that of another even if it occurs within the same territory or occurs outside any territory (such as on or over the high seas). The principle was incorporated in various treaties during the twentieth century, including the 1949 Fourth Geneva Convention,<sup>250</sup> but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees.<sup>251</sup> Other conventions and instruments<sup>252</sup> addressing refugees have incorporated the principle, such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>253</sup>

(3) The principle also has been applied with respect to all aliens (not just refugees) in various instruments<sup>254</sup> and treaties, such as the 1969 American Convention on Human Rights<sup>255</sup> and the 1981 African Charter on Human and Peoples’ Rights.<sup>256</sup> Indeed, the

<sup>250</sup> Geneva Convention IV, art. 45. ICRC interprets common article 3 to the four Geneva Conventions as implicitly including a *non-refoulement* obligation. ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 708–716 on common article 3.

<sup>251</sup> Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137, art. 33, para. 1 (“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”).

<sup>252</sup> See, for example, Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, Colombia, 22 November 1984, conclusion 5.

<sup>253</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45, art. II, para. 3.

<sup>254</sup> See, for example, Declaration on Territorial Asylum, General Assembly resolution 2312 (XXII) of 14 December 1967 (A/6716), art. 3; Final of the 1966 Bangkok Principles on the Status and Treatment of Refugees, adopted by the Asian-African Legal Consultative Organization at its fortieth session, held in New Delhi on 24 June 2001, art. III; 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.

<sup>255</sup> American Convention on Human Rights, art. 22, para. 8.

<sup>256</sup> African Charter on Human and Peoples’ Rights (“Banjul Charter”), art. 12, para. 3.



principle was addressed in this broader sense in the Commission's 2014 draft articles on the expulsion of aliens.<sup>257</sup> 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 Rights<sup>258</sup> and article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms<sup>259</sup> 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 11, 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 specific 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.<sup>260</sup> 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) 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 obligation is without prejudice to other obligations of *non-refoulement* arising from treaties

<sup>257</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/69/10)*, para. 44, art. 23, para. 1, of the draft articles on the expulsion of aliens ("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").

<sup>258</sup> 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").

<sup>259</sup> See, for example, *Chahal v. United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, Grand Chamber, European Court of Human Rights, ECHR 1996-V, para. 80.

<sup>260</sup> A similar provision is included in the Charter of Fundamental Rights of the European Union, adopted in Nice on 7 December 2000, *Official Journal of the European Communities*, No. C 364, 18 December 2000, 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").

or customary international law. Indeed, the obligations of States contained in all relevant treaties continue to apply in accordance with their terms.

(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 “substantial grounds” standard has been addressed by various expert treaty bodies and by international courts. For example, the Committee against Torture, in considering communications alleging that a State has violated article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has stated that “substantial grounds” exist whenever the risk of torture is “foreseeable, personal, present, and real”.<sup>261</sup> It has also explained that each person’s “case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards”.<sup>262</sup>

(8) In guidance to States, the Human Rights Committee has indicated that a State has 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”.<sup>263</sup> 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.<sup>264</sup> 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”.<sup>265</sup>

(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 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>266</sup> In applying this legal test, States must examine the “foreseeable consequences” of sending an individual to the receiving

<sup>261</sup> Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (CAT/C/GC/4), para. 11. For relevant communications, see Committee against Torture, *Dadar v. Canada*, communication No. 258/2004, Views 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, Views adopted on 6 May 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 44 (A/65/44)*, annex XIII, sect. A, p. 335, para. 7.3; *Subakaran R. Thirugnanasampanthar v. Australia*, communication No. 614/2014, Decision adopted on 9 August 2017 (CAT/C/61/D/614/2014), para. 8.3.

<sup>262</sup> Committee against Torture, general comment No. 4, para. 13.

<sup>263</sup> Human Rights Committee, general comment No. 31, para. 12. See also Human Rights Committee, general comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36) [this general comment has not yet been published so citations and paragraph numbers may be subject to change in the final version], para. 30.

<sup>264</sup> 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.

<sup>265</sup> See, for example, Human Rights Committee, *Maksudov and others v. Kyrgyzstan*, communication 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.

<sup>266</sup> See, for example, *Soering v. United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, European Court of Human Rights, Series A, vol. 161, para. 88; *Chahal v. United Kingdom* (footnote 259 above), para. 74.

country.<sup>267</sup> While a “mere possibility” of ill-treatment is not sufficient, it is not necessary according to the European Court to show that subjection to ill-treatment is “more likely than not”.<sup>268</sup> The European Court has stressed that the examination of evidence of a real risk must be “rigorous”.<sup>269</sup> 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 the expulsion”,<sup>270</sup> though regard can be had to information that comes to light subsequently.<sup>271</sup>

(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 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 1966 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”.<sup>272</sup> 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 detailed list of “non-exhaustive examples of human rights situations that may constitute an indication of risk of torture, to which [States parties] should give consideration in their decisions on the removal of a person from their territory and take into account when applying the principle of ‘non-refoulement’”.<sup>273</sup> When considering whether it is appropriate for States to rely on assurances made by other States,<sup>274</sup> the European Court of Human Rights considers such factors as whether the assurances are specific or are general and vague,<sup>275</sup> whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms,<sup>276</sup> and whether there is an effective system of protection against the violation in the receiving State.<sup>277</sup>

(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

<sup>267</sup> See, for example, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, Grand Chamber, European Court of Human Rights, ECHR 2008-II, para. 130.

<sup>268</sup> *Ibid.*, paras. 131 and 140.

<sup>269</sup> *Ibid.*, para. 128.

<sup>270</sup> *Ibid.*, para. 133.

<sup>271</sup> See, for example, *El-Masri v. the former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment of 13 December 2012, Grand Chamber, European Court of Human Rights, ECHR 2012-VI, para. 214.

<sup>272</sup> *Maksudov v. Kyrgyzstan* (see footnote 265 above), para. 12.4.

<sup>273</sup> Committee against Torture, general comment No. 4, para. 29.

<sup>274</sup> *Ibid.*, para. 20 (“[T]he Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State”).

<sup>275</sup> See, for example, *Saadi v. Italy*, (footnote 267 above), paras. 147–148.

<sup>276</sup> See, for example, *Chentiev and Ibragimov v. Slovakia*, Application Nos. 21022/08 & 51946/08, Decision as to admissibility of 14 September 2010, Fourth Section, European Court of Human Rights.

<sup>277</sup> See, for example, *Soldatenko v. Ukraine*, Application No. 2440/07, Judgment of 23 October 2008, Fifth Section, European Court of Human Rights, para. 73. Other factors that Court might consider include: whether the terms of assurances are disclosed to the Court; who has given assurances and whether those assurances can bind the receiving State; if the assurances were issued by the central government of a State, whether local authorities can be expected to abide by such assurances; whether the assurances concern treatment which is legal or illegal in the receiving State; the length and strength of bilateral relations between the sending and receiving States; whether the individual has been previously ill-treated in the receiving State; and whether the reliability of the assurances has been examined by the domestic courts of the sending State. *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, Fourth Section, European Court of Human Rights, ECHR 2012 (extracts), para. 189.



presented a serious security risk.<sup>278</sup> Treaties since that time, however, have not included such exceptions, treating the obligation as absolute in nature.<sup>279</sup> 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 commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.
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.

<sup>278</sup> Convention relating to the Status of Refugees, art. 33, para. 2.

<sup>279</sup> See, for example, *Maksudov v. Kyrgyzstan* (footnote 265 above), para. 12.4; *Othman (Abu Qatada) v. United Kingdom* (footnote 277 above), 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, Views adopted on 1 June 2012, *ibid.*, *Sixty-seventh Session, Supplement No. 44 (A/67/44)*, annex XIV, sect. A, p. 530, para. 13.7.

*Ensuring that “crimes against humanity” are offences in national criminal law*

(2) Draft article 6, paragraph 1, provides that each State “shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.” The International Military Tribunal at Nürnberg recognized the importance of punishing individuals, *inter alia*, for crimes against humanity when it stated that: “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”.<sup>280</sup> 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: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”.<sup>281</sup> 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 1998 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. 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.<sup>282</sup>

(4) The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 4, paragraph 1, that: “Each State Party shall ensure that all acts of torture are offences under its criminal law”.<sup>283</sup> 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:

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.<sup>284</sup>

<sup>280</sup> *Judgment of 30 September 1946* (see footnote 92 above), p. 466.

<sup>281</sup> *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 374, para. 97 (principle 1).

<sup>282</sup> 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, paras. 63–72 (finding that a national prosecution for ordinary domestic crimes was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution).

<sup>283</sup> Convention against Torture, art. 4, para. 1.

<sup>284</sup> See Committee against Torture, general comment No. 2 (2007), 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.

(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 2, paragraphs 1 and 2, 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 2, paragraphs 1 and 2, 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 2, paragraphs 1 and 2. The term “crimes against humanity” used in draft article 6 (and in other draft articles), however, does not include the “without prejudice” clause contained in draft article 2, paragraph 3. While that clause recognizes the possibility of a broader definition of “crimes against humanity” in any international instrument, in customary international law or in national law, for the purposes of these draft articles the definition of “crimes against humanity” is limited to draft article 2, paragraphs 1 and 2.

(7) Like the 1984 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.<sup>285</sup> Some treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>286</sup> and the 1949 Geneva Conventions,<sup>287</sup> 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.

<sup>285</sup> See, for example: Convention against Torture, art. 4; Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105, 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; Inter-American Convention to Prevent and Punish Torture, art. 6; Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 1; Inter-American Convention on Forced Disappearance of Persons, art. III; International Convention for the Suppression of Terrorist Bombings, art. 4; International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), United Nations, *Treaty Series*, vol. 2178, No. 38349, p. 197, art. 4; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (Algiers, 14 July 1999), *ibid.*, vol. 2219, No. 39464, p. 179, art. 2 (a); 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 Convention on Counter Terrorism (Cebu, 13 January 2007), art. IX, para. 1, in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 336.

<sup>286</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

<sup>287</sup> Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146. See ICRC, *Commentary on the First Geneva Convention*, 2016, para. 896 (on common article 3 regarding conflicts not of an international character) and paras. 2838–2846 (on article 49 regarding penal sanctions). See also Additional Protocol I, arts. 85 and 86, para. 1.

(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 organizations, committed any of the following crimes”. Likewise, the Statutes of both the International Criminal Tribunal for the Former Yugoslavia<sup>288</sup> and the International Criminal Tribunal for Rwanda<sup>289</sup> provided that a person who “committed” crimes against humanity “shall be individually responsible for the crime”. The 1998 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”.<sup>290</sup> Similarly, the instruments regulating the Special Court for Sierra Leone,<sup>291</sup> the Special Panels for Serious Crimes in East Timor,<sup>292</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>293</sup> the Supreme Iraqi Criminal Tribunal<sup>294</sup> and the Extraordinary African Chambers within the Senegalese Judicial System<sup>295</sup> 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 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,<sup>296</sup> while the 1949 Geneva Conventions and Additional Protocol I call upon States parties to enact any legislation necessary to provide effective penal sanctions for persons “committing” any of the grave breaches of those treaties.<sup>297</sup> In light of the above, paragraph 2 (a) requires each State to take the necessary measures to ensure the act of “committing a crime against humanity” is an offence under its criminal law.

(10) Second, almost all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in the form of an “attempt” to commit the offence. The Statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone contained no provision for such

<sup>288</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1.

<sup>289</sup> Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

<sup>290</sup> See Rome Statute, art. 25, paras. 2 and 3 (a).

<sup>291</sup> Statute of the Special Court for Sierra Leone, art. 6.

<sup>292</sup> 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. 14.3 (a) (2000) (hereinafter “East Timor Tribunal Charter”).

<sup>293</sup> Extraordinary Chambers of Cambodia Law, art. 29. 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.

<sup>294</sup> Statute of the Iraqi Special Tribunal, *International Legal Materials*, vol. 43 (2004), p. 231, art. 15 (2004) (hereinafter, “Supreme Iraqi Criminal Tribunal Statute”). The Iraqi Interim Government 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 (18 October 2005).

<sup>295</sup> 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, *International Law Materials*, vol. 52 (2013), p. 1028, arts. 4 (b), 6 and 10.2 (hereinafter “Extraordinary African Chambers Statute”).

<sup>296</sup> Convention on the Prevention and Punishment of the Crime of Genocide, arts. III (a) and IV.

<sup>297</sup> Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146. See also Additional Protocol I, arts. 11 and 85.

responsibility. In contrast, the 1998 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 completion of the crime.<sup>298</sup> 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”.<sup>299</sup> With this in mind, paragraph 2 (b) requires each State to take the necessary measures to ensure the act of “attempting to commit” a crime against humanity is an offence under its criminal law.

(11) Third, all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in the form of “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”, “planning”, or “joint criminal enterprise”. Thus, the Statute of the International Criminal Tribunal for the Former Yugoslavia provides: “A person who planned, instigated, 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”.<sup>300</sup> The Statute of the International Criminal Tribunal for Rwanda used virtually identical language.<sup>301</sup> Both tribunals have convicted defendants for participation in such offences within their respective jurisdictions.<sup>302</sup> Similarly, the instruments regulating the Special Court for Sierra Leone,<sup>303</sup> the Special Panels for Serious Crimes in East Timor,<sup>304</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>305</sup> the Supreme Iraqi Criminal Tribunal<sup>306</sup> and the Extraordinary African Chambers within the Senegalese Judicial System<sup>307</sup> 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 1998 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 the 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 common purpose”, subject to certain conditions.<sup>308</sup> So as to allow national legal systems to approach such accessorial responsibility in a manner consistent with their criminal laws, the Commission decided to use a streamlined version of the various terms set forth in the 1998 Rome Statute as the basis for the terms used in draft article 6, subparagraph 2 (c).

(13) The Commission considered whether to refer expressly to “conspiracy” or “incitement” in draft article 6, paragraph 2. The 1948 Convention on the Prevention and

<sup>298</sup> Rome Statute, art. 25, para. 3 (f).

<sup>299</sup> *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.

<sup>300</sup> Statute of the International Criminal 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 152 above) (finding that “the notion of common design as a form of accomplice liability is firmly established in customary international law”).

<sup>301</sup> Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

<sup>302</sup> See, for example, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, para. 246 (finding that “[i]f [the defendant] 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”).

<sup>303</sup> Statute of the Special Court for Sierra Leone, art. 6, para. 1.

<sup>304</sup> East Timor Tribunal Charter, sect. 14.

<sup>305</sup> Extraordinary Chambers of Cambodia Law, art. 29.

<sup>306</sup> Supreme Iraqi Criminal Tribunal Statute, art. 15.

<sup>307</sup> Extraordinary African Chambers Statute, art. 10.2.

<sup>308</sup> Rome Statute, art. 25, para. 3 (a)–(d).

Punishment of the Crime of Genocide addresses not just the commission of genocide, but also “[c]onspiracy to commit genocide” and “[d]irect and public incitement to commit genocide”.<sup>309</sup> The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity broadly provides that: “If 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”.<sup>310</sup> The Commission referred expressly to “incitement” and “conspiracy” in its 1996 draft Code of Crimes against the Peace and Security of Mankind, but only included them in circumstances where “the crime ... in fact occur[ed]”.<sup>311</sup> The Rome Statute does not refer to either “conspiracy” or “incitement” with respect to crimes against humanity, an approach which the Commission has elected to follow for the present draft articles. The Rome Statute does refer to direct and public incitement to commit genocide,<sup>312</sup> but the negotiating history indicates that States consciously chose not to include in the Rome Statute direct and public incitement to commit crimes against humanity.<sup>313</sup> Paragraph 2 does not cover the concept of incitement as an inchoate or incomplete offence (i.e., an offence that can occur even if the crime is not consummated, such as “attempt” in subparagraph 2 (b)). At the same time, the various terms found in paragraph 2 (c) do encompass the concept of incitement to a crime against humanity when the crime in fact occurs.

(14) 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 in their power to prevent such acts or to punish the perpetrators.

(15) As a general matter, treaties addressing the establishment and exercise of national jurisdiction over crimes other than crimes against humanity typically call for criminal responsibility of persons using broad terminology, so as not to require States to alter the preferred terminology or modalities that are well settled in national criminal law. In other words, such treaties use general terms rather than detailed language, allowing States to spell out the precise contours 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

<sup>309</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. III (b)–(c).

<sup>310</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. 2.

<sup>311</sup> See the Commission’s 1996 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 18, para. 50, at art. 2, para. 3 (e) (an individual is responsible if that person “[d]irectly participates in planning or conspiring to commit such a crime which in fact occurs”); *ibid.*, art. 2, para. 3 (f) (an individual is responsible if that person “[d]irectly and publicly incites another individual to commit such a crime which in fact occurs”).

<sup>312</sup> See Rome Statute, art. 25, para. 3 (e) (in conjunction with article 6). Similarly, the constituent instruments for the International Criminal Tribunal for the Former Yugoslavia (Statute, art. 4), the International Criminal Tribunal for Rwanda (Statute, art. 2), and the Panels with Exclusive Jurisdiction over Serious Criminal Offences for East Timor (East Timor Tribunal Charter, sect. 14 (e)) provided for the crime of direct and public incitement to commit genocide, but only inducement or instigation of crimes against humanity.

<sup>313</sup> See Report of the Preparatory Committee on the Establishment of an International Criminal Court, draft statute and draft final act, [A/CONF.183/2/Add.1](#), p. 50. See also W.K. Timmermann, “Incitement in international criminal law”, *International Review of the Red Cross*, vol. 88 (December 2006), p. 843 (“During the Diplomatic Conference in Rome the drafters rejected the suggestion that the incitement provision be extended to apply also to crimes against humanity, war crimes and aggression”).

person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”.<sup>314</sup> The language of draft article 6, paragraph 2, takes a similar 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 failed to take measures 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.<sup>315</sup> Notably, the Nürnberg and Tokyo tribunals used command responsibility with respect to both military and civilian commanders, an approach that influenced later tribunals.<sup>316</sup> 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”.<sup>317</sup>

(18) Article 86, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions contains a general provision addressing command/superior responsibility:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.<sup>318</sup>

(19) The Statute of the International Criminal Tribunal for the Former Yugoslavia followed this general approach. It provides that:

The 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.<sup>319</sup>

<sup>314</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (a).

<sup>315</sup> 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. 11 (Washington D.C., United States Government Printing Office, 1950), pp. 543–544.

<sup>316</sup> See *ibid.*; *International Criminal Law: International Enforcement*, M.C. Bassiouni, ed., vol. III, 3rd ed. (Leiden, Martinus Nijhoff, 2008), p. 461; K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press, 2011), pp. 262–263.

<sup>317</sup> See *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment and sentence, 27 January 2000, Trial Chamber I, International Criminal Tribunal for Rwanda, para. 132.

<sup>318</sup> Protocol I, art. 86, para. 2. See ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2855 (on article 49) (“Commanders and other superiors can be held criminally responsible for grave breaches and other serious violations of humanitarian law committed pursuant to their orders. They can also be held individually responsible for failing to take proper measures to prevent their subordinates from committing such violations, or, if already committed, for failing to punish the persons responsible. It is essential for national law to provide for the effective sanctioning of commanders or superiors, if the system of repression is to be effective during armed conflict”). Such a standard also exists in other treaties addressing crimes. See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (b).

<sup>319</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 3.



Several defendants were convicted by the Tribunal on such a basis.<sup>320</sup> The same language appears in the Statute of the International Criminal Tribunal for Rwanda,<sup>321</sup> which also convicted several defendants on such a basis.<sup>322</sup> Similar language appears in the instruments regulating the Special Court for Sierra Leone,<sup>323</sup> the Special Tribunal for Lebanon,<sup>324</sup> the Special Panels for Serious Crimes in East Timor,<sup>325</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>326</sup> the Supreme Iraqi Criminal Tribunal<sup>327</sup> and the Extraordinary African Chambers within the Senegalese Judicial System.<sup>328</sup>

(20) Article 28 of the 1998 Rome Statute contains a more 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.<sup>329</sup> 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.<sup>330</sup> Article 28 also addresses the issue of other “superior and subordinate relationships” arising in a non-military or civilian context.<sup>331</sup> Such superiors include civilians that “lead” but are not “embedded” in military activities.

(21) National laws and military manuals also often contain this type of criminal responsibility for war crimes, and sometimes for genocide and crimes against humanity, under the influence of both treaty obligations and calls by relevant international bodies.<sup>332</sup> Based on a detailed analysis of State practice, as well as of international and national jurisprudence, the 2005 ICRC study on *Customary International Humanitarian Law* formulated a general standard for war crimes as follows:

<sup>320</sup> See, for example, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Supplement No. 6*, June/July 1999, paras. 66–81 and 90–118; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 330–400 and 605–775.

<sup>321</sup> Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 3.

<sup>322</sup> See, for example, *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and sentence, 4 September 1998, Trial Chamber, International Criminal Tribunal for Rwanda, para. 40.

<sup>323</sup> Statute of the Special Court for Sierra Leone, art. 6, para. 3.

<sup>324</sup> Statute of the Special Tribunal for Lebanon, Security Council resolution 1757 (2007) of 30 May 2007 (annex and attachment included), art. 3, para. 2.

<sup>325</sup> East Timor Tribunal Charter, sect. 16.

<sup>326</sup> Extraordinary Chambers of Cambodia Law, art. 29.

<sup>327</sup> Supreme Iraqi Criminal Tribunal Statute, art. 15 (d).

<sup>328</sup> Extraordinary African Chambers Statute, art. 10, para. 4.

<sup>329</sup> Rome Statute, art. 28 (a). See, for example, *Kordić*, Judgment, 26 February 2001 (footnote 81 above), para. 369.

<sup>330</sup> An Appeals Chamber of the International Criminal Court applied this standard in 2018 when reversing Trial Chamber III’s 2016 conviction of Jean-Pierre Bemba Gombo of crimes against humanity and war crimes. The Trial Chamber had found that Mr. Bemba was a person effectively acting as a military commander who knew that the Mouvement de Libération du Congo (MLC) forces under his effective authority and control were committing or about to commit the crimes charged. *Bemba*, Judgment, 21 March 2016 (see footnote 44 above), paras. 697 and 700. Yet the Appeals Chamber concluded that the Trial Chamber had made serious errors in its finding that Mr. Bemba had failed to take all necessary and reasonable measures to prevent or repress the commission of crimes of the MLC forces during military operations in 2002 and 2003 in the Central African Republic. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, Appeals Chamber, International Criminal Court, paras. 170–173 and 189–194.

<sup>331</sup> Rome Statute, art. 28 (b).

<sup>332</sup> See Commission on Human Rights report on the 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 on impunity of 21 April 2005, 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”).



Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.<sup>333</sup>

(22) Draft article 6, paragraph 3, uses similar language to express a general standard for addressing command/superior responsibility in the context of crimes against humanity. While a more detailed standard might be used, draft article 6 as a whole generally seeks not to be overly prescriptive, allowing States instead to implement their international obligations in a manner that takes account of existing national laws, practice and jurisprudence. Doing so for paragraph 3 does not, however, foreclose any State from adopting a more detailed standard in its national law, such as appears in article 28 of the Rome Statute, should it wish to do so.

#### *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.<sup>334</sup> 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 defence to such acts of brutality".<sup>335</sup> 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".<sup>336</sup>

(26) While article 33 of the 1998 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.<sup>337</sup> The

<sup>333</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules*, Cambridge University Press, 2005, pp. 558–563 (Rule 153).

<sup>334</sup> See Commission on Human Rights, resolution 2005/81 on impunity, 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").

<sup>335</sup> *Judgment of 30 September* (see footnote 92 above), p. 466.

<sup>336</sup> Tokyo Charter, art. 6.

<sup>337</sup> Rome Statute, art. 33 (the defence is not available if the order was manifestly unlawful and, "[f]or purposes of this article, orders to commit genocide or crimes against humanity are manifestly

instruments regulating the International Criminal Tribunal for the Former Yugoslavia,<sup>338</sup> the International Criminal Tribunal for Rwanda,<sup>339</sup> the Special Court for Sierra Leone,<sup>340</sup> the Special Tribunal for Lebanon,<sup>341</sup> the Special Panels for Serious Crimes in East Timor,<sup>342</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>343</sup> the Supreme Iraqi Criminal Tribunal<sup>344</sup> and the Extraordinary African Chambers within the Senegalese Judicial System<sup>345</sup> all similarly exclude superior orders as a defence for crimes against humanity. 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.<sup>346</sup>

(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;<sup>347</sup> the 1985 Inter-American Convention to Prevent and Punish Torture;<sup>348</sup> the 1994 Inter-American Convention on Forced Disappearance of Persons;<sup>349</sup> and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.<sup>350</sup> In the context of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticized national legislation that permits such a defence or is ambiguous on the issue.<sup>351</sup> 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.<sup>352</sup>

---

unlawful"). On availability of the defence with respect to war crimes, see ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2856 (on article 49) ("[I]t is widely accepted that obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act. A corollary of this rule is that every combatant has a duty to disobey a manifestly unlawful order. The fact that a war crime was committed as a result of superior orders has nevertheless been taken into account as a factor mitigating the punishment").

<sup>338</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 4.

<sup>339</sup> Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4.

<sup>340</sup> Statute of the Special Court for Sierra Leone, art. 6, para. 4.

<sup>341</sup> Statute of the Special Tribunal for Lebanon, art. 3, para. 3.

<sup>342</sup> East Timor Tribunal Charter, sect. 21.

<sup>343</sup> Extraordinary Chambers of Cambodia Law, art. 29.

<sup>344</sup> Supreme Iraqi Criminal Tribunal Statute, art. 15 (e).

<sup>345</sup> Extraordinary African Chambers Statute, art. 10, para. 5.

<sup>346</sup> See, for example, Statute of the International Criminal 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. See in particular *Prosecutor v. Darko Mrđa*, Case No. IT-02-59-S, Sentencing Judgment, 31 March 2004, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 65 and 67.

<sup>347</sup> Convention against Torture, art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

<sup>348</sup> 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").

<sup>349</sup> Inter-American Convention on 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").

<sup>350</sup> 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, General Assembly resolution 47/133 of 18 December 1992, art. 6.

<sup>351</sup> 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 by States parties under article 19 of the Convention, Guatemala, para. 32 (13).

<sup>352</sup> 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 by States parties

*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 courts and 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”.<sup>353</sup> 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”.<sup>354</sup> 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”.<sup>355</sup>

(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”.<sup>356</sup> 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”.<sup>357</sup> The 1998 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”.<sup>358</sup>

(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”.<sup>359</sup> The 1973 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”.<sup>360</sup>

---

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 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”).

<sup>353</sup> Nürnberg Charter, art. 7.

<sup>354</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and commentaries thereto, *Yearbook ... 1950*, vol. II, document A/1316 Part III, 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).

<sup>355</sup> Tokyo Charter, art. 6.

<sup>356</sup> *Yearbook ... 1954*, vol. II, p. 152, para. 54, art. 3.

<sup>357</sup> *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, p. 26, art. 7.

<sup>358</sup> Rome Statute, art. 27, para. 1.

<sup>359</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. IV.

<sup>360</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, art. III.

(31) In 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.<sup>361</sup> 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 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 be 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. This provision does not obligate a State to prosecute offences referred to in the draft article that took place before such offences have been criminalized in the State’s national law. Further, as noted in the commentary with respect to draft article 1, if the present draft articles ultimately serve as the basis for a convention, the obligations of a State party under that convention, unless a different intention appears, would only operate with respect to acts or facts that took place, or any situation that existed, after the convention enters into force for that State.

(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 to the period from 30 January 1933 to 1 July 1945”.<sup>362</sup> Likewise, the Rome Statute expressly addresses the matter, providing that: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”.<sup>363</sup> The drafters of the Statute strongly supported this provision as applied to crimes against humanity.<sup>364</sup> Similarly, the Law on the Establishment of Extraordinary Chambers in Cambodia, the Statute of the Supreme Iraqi Criminal Tribunal and the East Timor Tribunal Charter all

<sup>361</sup> 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”).

<sup>362</sup> Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, para. 5.

<sup>363</sup> Rome Statute, art. 29.

<sup>364</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, *Official Records*, vol. II, 2nd meeting (A/CONF.183/13), p. 138, paras. 45–74.

explicitly defined crimes against humanity as offences for which there is no statute of limitations.<sup>365</sup>

(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 rule of municipal law relating to the period of limitation for ordinary crimes is a serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes”.<sup>366</sup> The following year, States adopted the 1968 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.<sup>367</sup> 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.<sup>368</sup> 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.<sup>369</sup> Similarly, while the 1966 International Covenant on Civil and Political Rights<sup>370</sup> 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.<sup>371</sup> The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires a long statutory period,<sup>372</sup> as do the United Nations Convention against Transnational Organized Crime<sup>373</sup> and the United Nations Convention against Corruption.<sup>374</sup>

<sup>365</sup> Extraordinary Chambers of Cambodia Law, 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 its establishment, between 1975 and 1979, when the Khmer Rouge held power.

<sup>366</sup> 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”, preamble. See also General Assembly resolution 2712 (XXV) of 15 December 1970; General Assembly resolution 2840 (XXVI) of 18 December 1971.

<sup>367</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. IV.

<sup>368</sup> European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, art. 1.

<sup>369</sup> 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 by States parties under article 19 of the Convention, Italy, para. 40 (19).

<sup>370</sup> International Covenant on Civil and Political Rights, p. 171.

<sup>371</sup> 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).

<sup>372</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988), United Nations, *Treaty Series*, vol. 1582, No. 27627, p. 95, art. 3, para. 8 (“Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice”).

<sup>373</sup> United Nations Convention against Transnational Organized Crime, art. 11, para. 5 (“Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which

The 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides: “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) Is of long duration and is proportionate to the extreme seriousness of this offence”.<sup>375</sup> 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.<sup>376</sup>

#### *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: “An 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”.<sup>377</sup> 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”.<sup>378</sup> 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”.<sup>379</sup>

(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 Criminal Tribunal for the Former Yugoslavia provides that: “The 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”.<sup>380</sup> Furthermore, the International Criminal 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”.<sup>381</sup> 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”.<sup>382</sup> Even for convictions for the most serious crimes of international concern, this can result in a wide range of sentences. Article 77 of the 1998 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

---

to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice”).

<sup>374</sup> United Nations Convention against Corruption, art. 29 (“Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice”).

<sup>375</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 8, para. 1 (a). In contrast, article VII of the Inter-American Convention on Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations.

<sup>376</sup> See 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.

<sup>377</sup> *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, art. 3.

<sup>378</sup> *Ibid.*, para. (3) of the commentary to art. 3.

<sup>379</sup> *Ibid.*

<sup>380</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 1.

<sup>381</sup> *Ibid.*, art. 24, para. 2.

<sup>382</sup> Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 1.



circumstances of the convicted person”.<sup>383</sup> Similar formulations may be found in the instruments regulating the Special Court for Sierra Leone,<sup>384</sup> the Special Tribunal for Lebanon,<sup>385</sup> the Special Panels for Serious Crimes in East Timor,<sup>386</sup> the Supreme Iraqi Criminal Tribunal,<sup>387</sup> and the Extraordinary African Chambers within the Senegalese Judicial System.<sup>388</sup> 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.<sup>389</sup> The 1948 Convention on the Prevention and Punishment of the Crime of Genocide simply calls for “effective penalties for persons guilty of genocide or any of the other acts enumerated ...”.<sup>390</sup> 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 ...”.<sup>391</sup> 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 diplomatic agents and other 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.<sup>392</sup> That 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.<sup>393</sup> Since 1973, this approach – that each “State Party shall make these offences punishable by the 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.<sup>394</sup> In some treaties, the issue of gravity is expressed using terms such as “extreme seriousness”, “serious nature” or “extreme gravity” of the offences.<sup>395</sup>

<sup>383</sup> Rome Statute, art. 77.

<sup>384</sup> Statute of the Special Court for Sierra Leone, art. 19.

<sup>385</sup> Statute of the Special Tribunal for Lebanon, art. 24.

<sup>386</sup> East Timor Tribunal Charter, sect. 10.

<sup>387</sup> Supreme Iraqi Criminal Tribunal Statute, art. 24.

<sup>388</sup> Extraordinary African Chambers Statute, art. 24.

<sup>389</sup> 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 regard); Commission on Human Rights resolution 2005/81 on impunity, para. 15 (calling upon “all States ... to ensure that penalties are appropriate and proportionate to the gravity of the crime committed”).

<sup>390</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

<sup>391</sup> Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146. See ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 2838–2846 (on article 49).

<sup>392</sup> 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 ...”).

<sup>393</sup> *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), para. (12) of the commentary to draft article 2, para. 2.

<sup>394</sup> Convention against Torture, art. 4. See also International Convention against the Taking of Hostages, art. 2; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201, art. 5; 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

### *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.<sup>396</sup> In States where the concept is known, such liability sometimes exists with respect to international crimes.<sup>397</sup> Acts that can lead to such liability are, of course, committed by natural persons, who act as officials, directors, 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 international criminal courts and 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.<sup>398</sup> The International Criminal 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 1998 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”<sup>399</sup> and, although proposals for inclusion of a provision on such responsibility were made, the 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 the Financing of Terrorism, art. 4 (b); United Nations Convention against Transnational Organized Crime, art. 11, para. 1; United Nations Convention against Corruption, art. 30, paras. 1, 5 and 7; International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005), United Nations, *Treaty Series*, vol. 2445, No. 44004, p. 89, arts. 5 (b) and 6; OAU Convention on the Prevention and Combating of Terrorism, art. 2 (a).

<sup>395</sup> 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 Forced Disappearance of Persons, art. III.

<sup>396</sup> See, for example, *New TV S.A.L. Karma Mohamed Tashin 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 (“[T]he practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems”).

<sup>397</sup> See, for example, Ecuador Código Orgánico Integral Penal, *Registro Oficial, Suplemento*, Año 1, N° 180, 10 February 2014, art. 90 (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”).

<sup>398</sup> See, for example, *United States v. Krauch and others (The I.G. Farben Case)*, in *Trials of War Criminals before the Nuernberg Military Tribunals*, vols. VII–VIII (Washington D.C., Nürnberg Military Tribunals, 1952).

<sup>399</sup> See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, *Official Records*, vol. III (A/CONF.183/13), art. 23, para. 6, footnote 71.



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".<sup>400</sup>

(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 (with the exception of States) for international crimes, including crimes against humanity.<sup>401</sup> 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 concluded in 2014 that the Tribunal had jurisdiction to prosecute a legal person for contempt of court.<sup>402</sup>

(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;<sup>403</sup> the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;<sup>404</sup> the 1999 International Convention for the Suppression of the Financing of Terrorism;<sup>405</sup> the 2000 United Nations Convention against Transnational Organized Crime;<sup>406</sup> the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;<sup>407</sup> the 2003 United Nations Convention against Corruption;<sup>408</sup> and a series of treaties concluded within the Council of Europe.<sup>409</sup> Other

<sup>400</sup> *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, p. 23, art. 3.

<sup>401</sup> See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, art. 46C.

<sup>402</sup> *Al Khayat*, Decision of 2 October 2014 (see footnote 396 above), para. 74. 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.) 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.) Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/A/AP, Appeals Panel, Decision of 8 March 2016.

<sup>403</sup> See 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").

<sup>404</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989), United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57, 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").

<sup>405</sup> International Convention for the Suppression of the Financing of Terrorism, art. 5. For the proposals submitted during the negotiations that led to art. 5, see "Measures to eliminate international terrorism: report of the working group" (A/C.6/54/L.2) (26 October 1999).

<sup>406</sup> United Nations Convention against Transnational Organized Crime, art. 10.

<sup>407</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000), United Nations, *Treaty Series*, vol. 2171, No. 27531, p. 227, art. 3, para. 4.

<sup>408</sup> United Nations Convention against Corruption, art. 26. For background, see United Nations Office on Drugs and Crime, *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. (2012), pp. 107–113. 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 (Paris, 21 November 1997), 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").

<sup>409</sup> See, for example, Council of Europe, Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), United Nations, *Treaty Series*, vol. 2216, No. 39391, p. 225, art. 18, supplemented by the Additional Protocol (Strasbourg, 15 May 2003) (relating to bribery of arbitrators and jurors), *ibid.*, vol. 2466, No. 39391, p. 168.

regional instruments address the issue as well, mostly in the context of corruption.<sup>410</sup> Such treaties 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 2000 and entered into force in 2002. As of mid-2019, 176 States are party 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, such 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.<sup>411</sup> 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 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.<sup>412</sup>

(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.

<sup>410</sup> See, for example, Inter-American Convention against Corruption (Caracas, 29 March 1996, *International Legal Materials*, vol. 35, No. 3 (May 1996), p. 727, art. VIII; Southern African Development Community Protocol against Corruption (Blantyre, Malawi, 14 August 2001), art. 4, para. 2. See also African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), art. 11 (“State Parties undertake to: 1) Adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector”).

<sup>411</sup> See, for example, the Council of Europe Criminal Law Convention on Corruption makes explicit such exclusion (see, for example, art. 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”).

<sup>412</sup> For a brief overview of divergences in various common law and civil law jurisdictions on liability of legal persons, see *Al Jadeed*, Contempt Judge, Decision of 18 September 2015 (footnote 402 above), paras. 63–67.

(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 2000 Optional Protocol, as discussed above, but also in other widely adhered-to treaties, such as the 2000 United Nations Convention against Transnational Organized Crime<sup>413</sup> and the 2003 United Nations Convention against Corruption.<sup>414</sup> 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;

(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 any territory under its jurisdiction, has been committed by one of its nationals or when the offender is present in any 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”.<sup>415</sup> The breadth of such jurisdiction was necessary because: “The Commission

<sup>413</sup> 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”).

<sup>414</sup> 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”).

<sup>415</sup> *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, art. 8.

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”.<sup>416</sup> The preamble to the 1998 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 Human Rights Commission convened to draft an international instrument on enforced disappearance concluded that: “The 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”.<sup>417</sup> At the same time, such treaties typically only obligate a State party 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 competent international tribunal (see draft article 10 below).

(4) Reflecting on the acceptance of a treaty obligation to establish jurisdiction, and in the context of 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.<sup>418</sup>

(5) Provisions comparable to those appearing in draft article 7 exist in many treaties addressing crimes.<sup>419</sup> While no treaty yet exists relating to crimes against humanity, Judges Higgins, Kooijmans and Buergenthal indicated in their joint separate opinion in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that:

<sup>416</sup> *Ibid.*, para. (5) of the commentary to art. 8.

<sup>417</sup> 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.

<sup>418</sup> See *Questions relating to the Obligation to Prosecute or Extradite* (footnote 23 above), p. 451, para. 75.

<sup>419</sup> 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; Convention against Torture, art. 5; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4; Convention on the Safety of United Nations and Associated Personnel, art. 10; Inter-American Convention on 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; OAU Convention on the Prevention and Combating of Terrorism, art. 6, para. 1; United Nations Convention against Transnational Organized Crime, art. 15; United Nations Convention against Corruption, art. 42; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, paras. 1–2; Inter-American Convention to Prevent and Punish Torture, art. 12; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VII, paras. 1–3.

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, 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.<sup>420</sup>

(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 any territory "under [the State's] jurisdiction" which, as is the case for draft article 4, is intended to encapsulate the territory *de jure* of the State, as well as any other territory under its jurisdiction. Draft article 7, paragraph 1 (a), also requires that a State exercise jurisdiction when the offence occurs on board a vessel or aircraft registered in that State. 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 the territory of that State".<sup>421</sup> 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 the 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 obliged 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. When taking the "necessary measures" to establish this type of jurisdiction, States should adopt procedural safeguards to ensure its proper exercise.<sup>422</sup>

<sup>420</sup> *Arrest Warrant of 11 April 2000* (see footnote 361 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buerghenthal, para. 51.

<sup>421</sup> See Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117, art. 1 ("[T]he term 'stateless person' means a person who is not considered as a national by any State under the operation of its law").

<sup>422</sup> At the request of the General Assembly of the United Nations, the Secretary-General has produced a series of reports compiling information on national laws and procedures concerning "The scope and application of the principle of universal jurisdiction," which includes a section on "Conditions, restrictions or limitations to the exercise of jurisdiction". See [A/73/123](#) (2018), sect. II.B. For examples of national laws and procedures in this regard, see Spain, Organic Act No. 1/2014, art. 23, para. 5 (b) (2) (whereby the offence will not be prosecuted in Spain if there are proceedings to investigate and prosecute the offence initiated in the State in which the offence was committed or in the State of nationality of the accused person, unless the Supreme Court determines that such State is unwilling or unable genuinely to carry out the investigation); United Kingdom, Government, "Note on the Investigation and Prosecution of Crimes of Universal Jurisdiction" (2018) (providing that initiation of United Kingdom proceedings be subject to the express consent of a high-level official, that the necessary evidentiary threshold required for initiating preliminary measures in such cases not be lower than the threshold generally necessary in each particular criminal jurisdiction, and other procedural safeguards).

(10) Draft article 7, paragraph 3, makes clear that, while each State is obliged 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.<sup>423</sup> In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal cited, *inter alia*, such a provision in the Convention against Torture, 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.<sup>424</sup>

(11) Establishment of the various types of national jurisdiction set out in draft article 7 are important for supporting an *aut dedere aut judicare* obligation, as set forth in draft article 10 below. In his separate opinion in the *Arrest Warrant* 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 all the offences in question is assured, as the perpetrators are denied refuge in all States.<sup>425</sup>

(12) Treaties addressing crimes typically require various States to *establish* jurisdiction over the crime, but do not seek to require States to *exercise* such jurisdiction unless the alleged offender is present in any territory under the State’s jurisdiction (see draft articles 9 and 10 below). Once an alleged offender is present, it is possible that one or more other States will have established jurisdiction over the offence and will wish to exercise such jurisdiction, in which case they may seek extradition of the alleged offender from the State where he or she is present. If so, draft article 13, paragraph 12, requires that the State where the alleged offender is present “give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred”.<sup>426</sup>

## **Article 8**

### **Investigation**

Each State shall ensure that its competent authorities proceed to a prompt, thorough 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

<sup>423</sup> See Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, revised draft United Nations Convention against Transnational Organized Crime (A/AC.254/4/Rev.4), p. 20, footnote 102. See also Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, European Treaty Series, No. 173, para. 83 (“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”).

<sup>424</sup> *Arrest Warrant of 11 April 2000* (see footnote 361 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

<sup>425</sup> *Ibid.*, Separate Opinion of Judge Guillaume, para. 9 (emphasis added).

<sup>426</sup> See commentary to draft article 13 below, at paras. (29)–(30) and paras. (33)–(34).



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, which must be conducted in good faith, can lay the foundation not only for identifying alleged offenders and their location, but also for helping to stop (pursuant to draft article 3) 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 below in draft article 9, paragraph 2.

(2) A comparable obligation has featured in some treaties addressing other crimes.<sup>427</sup> 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 1984 Convention against Torture to undertake an inquiry into the facts concerning a particular alleged offender.

(3) Draft article 8 requires that the investigation be carried out whenever there is "reasonable ground to believe" that the offence has been committed. According to the Committee against Torture, such a belief arises when relevant information is presented or available to the competent authorities but does not require that victims have formally filed complaints with those authorities.<sup>428</sup> 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 will be made, a violation of article 12 of the 1984 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".<sup>429</sup>

(4) The requirement of a "prompt" investigation means that as soon as there is a reasonable ground to believe that crimes against humanity have been or are being committed, the State must initiate an investigation without delay. In most cases where the Committee against Torture 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".<sup>430</sup> 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.<sup>431</sup>

<sup>427</sup> 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; see also Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 55, para. 1.

<sup>428</sup> See Committee against Torture, *Encarnación Blanco Abad v. Spain*, communication No. 59/Views adopted on 14 May 1998, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44)*, annex X, sect. A.3, para. 8.2; *Danilo Dimitrijevic v. Serbia and Montenegro*, communication No. 172/2000, Views adopted on 16 November 2005, *ibid.*, *Sixty-first Session, Supplement No. 44 (A/61/44)*, annex VIII, sect. A, para. 7.3.

<sup>429</sup> See *Dhaou Belgacem Thabti v. Tunisia*, communication No. 187/2001, Views adopted on 14 November 2003, *ibid.*, *Fifty-ninth Session, Supplement No. 44 (A/59/44)*, annex VII, sect. A, para. 10.4.

<sup>430</sup> *Qani Halimi-Nedzibi v. Austria*, communication No. 8/1991, Views adopted on 18 November 1993, *ibid.*, *Forty-ninth Session, Supplement No. 44 (A/49/44)*, annex V. See also *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, para. 13.5.

<sup>431</sup> *Encarnación Blanco Abad v. Spain* (see footnote 428 above), para. 8.2.

(5) The requirement of a “thorough” investigation means that a State must proceed with its investigation in a manner that takes all reasonable steps available to that State to secure evidence and that enables the serious assessment of that evidence.<sup>432</sup> Inclusion of this element is consistent with article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance. The General Assembly of the United Nations,<sup>433</sup> the Human Rights Committee,<sup>434</sup> and regional human rights courts have also emphasized the requirement of a thorough investigation.<sup>435</sup>

(6) The requirement of an “impartial” investigation means that the State must proceed with its investigation in a serious, effective and unbiased manner. Such investigation might be done by a governmental authority, but could also be done by some other entity, such as an independent commission of inquiry, a truth and reconciliation commission, or a national human rights institution. In some instances, the Committee against Torture has recommended that investigation of offences be “under the direct supervision of independent members of the judiciary”.<sup>436</sup> In other instances, it has stated that “all government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so”.<sup>437</sup> 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.<sup>438</sup>

(7) Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. The 1949 Geneva Conventions call on States parties to search for and prosecute alleged offenders. This has been interpreted as implying that each State party must provide in its national legislation for the mechanisms and procedures to ensure that it can actively search for alleged offenders, make a preliminary inquiry into facts and, when so warranted, submit any such cases to the appropriate authorities for prosecution.<sup>439</sup> In addition, although the 1966 International Covenant on Civil and Political Rights contains no such express obligation to investigate,

<sup>432</sup> See, for example, *Barabanshchikov v. Russia*, Application No. 36220/02, Judgment, 8 January 2009, First Section, European Court of Human Rights, para. 54 (“thorough” means “that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard”).

<sup>433</sup> Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 13, para. 1.

<sup>434</sup> See, for example, Human Rights Committee, general comment No. 36 (2018), paras. 28 and 58; and Human Rights Committee, general comment No. 31, para. 15; Human Rights Committee, general comment No. 6 (1982) on the right to life, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, para. 4; *Bousroual v. Algeria*, communication No. 992/2001, Views adopted on 30 March 2006, *ibid.*, *Sixty-first Session, Supplement No. 40 (A/61/40)*, vol. II, annex V, sect. I, paras. 9.11 and 11; annex V I, paras. 9.11 and 11, (CCPR/C/86/D/992/2001); *Herrera Rubio v. Colombia*, communication No. 161/1983, 2 November 1987, *ibid.*, *Forty-third Session, Supplement No. 40 (A/43/40)*, vol. II, annex VII, sect. B, para. 10.3.

<sup>435</sup> See, for example, *Kurt v. Turkey*, Judgment of 25 May 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-III, para. 140.

<sup>436</sup> 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. See Economic and Social Council resolution 2006/23 of 27 July 2006 on strengthening basic principles of judicial conduct, annex (Bangalore Principles of Judicial Conduct), value 2.

<sup>437</sup> Report of the Committee against Torture, *Official Records of the General Assembly, 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).

<sup>438</sup> *Khaled Ben M'Barek v. Tunisia*, communication No. 60/1996, 10 November 1999, *ibid.*, *Fifty-fifth Session, Supplement No. 44 (A/55/44)*, annex VIII, sect. A, paras. 11.9–11.10.

<sup>439</sup> See Geneva Convention I, art. 49, para. 2; ICRC, *Commentary on the First Geneva Convention*, 2016, paras 2859–2860 (on article 49).



the Human Rights Committee has repeatedly asserted that States must investigate, in good faith, violations of the Covenant.<sup>440</sup> Regional human rights bodies have also interpreted their legal instruments as implicitly containing a duty to conduct an investigation.<sup>441</sup>

## 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, as appropriate, 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, upon being satisfied that the circumstances so warrant,<sup>442</sup> to take the person into custody or take other legal measures<sup>443</sup> 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, and to prevent tampering of evidence 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, after taking the person into custody, immediately notify the States referred to in draft article 7, paragraph 1, of the detention and

<sup>440</sup> See Human Rights Committee, general comment No. 31, para. 15. See also *Nazriev v. Tajikistan*, communication No. 1044/2002, Views adopted on 17 March 2006, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 40 (A/61/40)*, vol. II, annex V, sect. P, para. 8.2; *Kouidis v. Greece*, communication No. 1070/2002, Views adopted on 28 March 2006, *ibid.*, sect. T, para. 9; *Agabekov v. Uzbekistan*, communication No. 1071/2002, views adopted on 16 March 2007, *ibid.*, *Sixty-second Session, Supplement No. 40 (A/62/40)*, vol. II, annex VII, sect. I, para. 7.2; *Karimov v. Tajikistan* and *Nursatov v. Tajikistan*, communication Nos. 1108/2002 and 1121/2002, Views adopted on 26 March 2007, *ibid.*, sect. H, para. 7.2.

<sup>441</sup> See, for example, *Ergi v. Turkey*, Judgment of 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*, Application Nos. 33097/96 and 57834/00, Final Judgment of 3 September 2004, First Section, European Court of Human Rights, ECHR 2004-IV, 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 of Human Rights, OEA/Ser.L/V/II.114 doc. 5 rev., p. 563.

<sup>442</sup> Such "circumstances" refer not just to factual circumstances relating to the prior conduct of the alleged offender, but also the legal circumstances (to include any procedural safeguards) concerning the exercise of jurisdiction over an alleged offender.

<sup>443</sup> See United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), General Assembly resolution 45/110 of 14 December 1990, annex; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229 of 21 December 2010, annex.

of the circumstances which warrant it. Further, after making its preliminary inquiry, the State shall promptly report its findings to those States and shall indicate 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 another 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. The State's reporting of its findings need only be "as appropriate", meaning that in some circumstances the State may need to withhold some of the information it has uncovered, for example, to protect the identities of victims or witnesses or to protect an ongoing investigation. Nevertheless, such withholding of reporting must be undertaken in good faith.

(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".<sup>444</sup> 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 norms of international law".<sup>445</sup> 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".<sup>446</sup>

(5) Treaties addressing crimes typically provide for such preliminary measures,<sup>447</sup> such as article 6 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>448</sup> Reviewing, *inter alia*, the provisions contained in article 6, 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 ...".<sup>449</sup> 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".<sup>450</sup> The Court further noted that "the choice of means for conducting the inquiry remains in the hands of the States parties",

<sup>444</sup> 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.

<sup>445</sup> 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.

<sup>446</sup> Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

<sup>447</sup> See, for example, Geneva Convention I, art. 49, para. 2; ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2860 (on article 49); 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. 6; International Convention for the Suppression of Terrorist Bombings, art. 7; International Convention for the Suppression of the Financing of Terrorism, art. 9; OAU 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.

<sup>448</sup> Convention against Torture, art. 6.

<sup>449</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 23 above), p. 450, para. 72.

<sup>450</sup> *Ibid.*, p. 453, para. 83.

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”.<sup>451</sup> 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”.<sup>452</sup> With respect to the appropriate timing for making a preliminary inquiry, the Court found a violation of article 6 where Senegal had “not immediately initiate[d] a preliminary inquiry as soon as [it] had reason to suspect [the alleged perpetrator], who was in [its] territory, of being responsible for acts of torture”.<sup>453</sup>

#### Article 10

##### *Aut dedere aut judicare*

The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. 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 case to its competent authorities for the purpose of prosecution. 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 court or tribunal that is willing and able itself to submit the case 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 Commission<sup>454</sup> and that is contained in numerous multilateral treaties addressing crimes.<sup>455</sup> 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”.<sup>456</sup>

(3) Most multilateral treaties containing such an obligation<sup>457</sup> use what is referred to as “the Hague formula”, after the 1970 Hague Convention for the Suppression of Unlawful

<sup>451</sup> *Ibid.*, p. 454, para. 86.

<sup>452</sup> *Ibid.*, p. 451, para. 74.

<sup>453</sup> *Ibid.*, p. 454, para. 88.

<sup>454</sup> See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, chap. VI.

<sup>455</sup> Survey of multilateral conventions 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*)”, study by the Secretariat (A/CN.4/630).

<sup>456</sup> *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, art. 9. See also Commission on Human Rights resolution 2005/81 on impunity, 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”).

<sup>457</sup> See Organization of American States (OAS), Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington, D.C., 2 February 1971), United Nations, *Treaty Series*, vol. 1438, No. 24371, p. 195, art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa (Libreville, 3 July 1977), *ibid.*, vol. 1490, No. 25573, p. 89, arts. 8 and 9, paras. 2–3; European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977), *ibid.*, vol. 1137, No. 17828, p. 93, art. 7; Inter-American Convention to Prevent and Punish Torture, art. 14; South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of

Seizure of Aircraft.<sup>458</sup> 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.<sup>459</sup> 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 police and prosecutorial authorities, who may or may not decide to prosecute in accordance with relevant procedures and policies. For example, if the competent authorities determine that there is insufficient evidence of guilt, or that the allegations have already been investigated elsewhere and found to be without basis, then the accused need not be indicted, nor stand trial or face punishment.<sup>460</sup> 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”.<sup>461</sup>

(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

---

Terrorism (Kathmandu, 4 November 1987), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 174, art. IV; Inter-American Convention on Forced Disappearance of Persons, art. VI; Inter-American Convention on International Traffic in Minors (Mexico, 18 March 1994), OAS, *Treaty Series*, No. 79, 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 (Washington, D.C., 14 November 1997), art. XIX, para. 6; League of Arab States, Arab Convention on the Suppression of Terrorism (Cairo, 22 April 1998), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 178, art. 5; Council of Europe, Criminal Law Convention on Corruption, art. 27, para. 5; Convention of the Organisation of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1 July 1999), annex to resolution 59/26-P, art. 6; Council of Europe, Convention on Cybercrime (Budapest, 23 November 2001), *European Treaty Series*, No. 185, 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 (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 196, art. 18, para. 1; Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 197, art. 31, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. XIII, para. 1.

<sup>458</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, art. 7.

<sup>459</sup> Under the 1949 Geneva Conventions, the obligations to search, investigate and prosecute are listed before the possibility of extradition. These obligations exist independently of any extradition request. ICRC, *Commentary on the First Geneva Convention*, 2016, para. 2859 (on article 49).

<sup>460</sup> Survey of multilateral conventions 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*)”, study by the Secretariat (A/CN.4/630), pp. 74–75.

<sup>461</sup> Statement of Chairperson Gilbert Guillaume (delegate from 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.

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.<sup>462</sup>

(5) The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;<sup>463</sup> referral of the matter to a regional organization;<sup>464</sup> or difficulties with implementation under the State's internal law.<sup>465</sup>

<sup>462</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 23 above), pp. 454–461, paras. 90–91, 94–95, 114–115 and 120.

<sup>463</sup> *Ibid.* p. 460, para. 112.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*, para. 113.

(6) The first sentence of draft article 10 recognizes that the State's obligation can be satisfied by extraditing or surrendering the alleged offender to a State. As was noted with respect to draft article 7, it is possible that one or more other States will have established jurisdiction over the offence and will wish to exercise such jurisdiction, in which case they may seek extradition of the alleged offender from the State where he or she is present. If so, draft article 13, paragraph 12, requires that a State where the alleged offender is present "give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred".<sup>466</sup>

(7) The first sentence of draft article 10 also recognizes that the State's obligation can be satisfied by extraditing or surrendering the alleged offender to an international criminal court or tribunal that is competent to prosecute the offender. This other option has arisen in conjunction with the establishment of the International Criminal Court and other international criminal courts and tribunals.<sup>467</sup> The term "competent" serves two purposes; it captures the notion that the international criminal court or tribunal must have jurisdiction over the offence and the offender, and the notion that the State concerned is in a legal relationship with the court or tribunal that would allow for such extradition or surrender. Thus, it encompasses the idea expressed in some treaties that the court or tribunal must be one whose jurisdiction the sending State has recognized.<sup>468</sup>

(8) While the term "extradition" is often associated with the sending of a person to a State and the term "surrender" is often used for the sending of a person to a competent international criminal court or 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 vary<sup>469</sup> and, for that reason, the Commission considered that a more general formulation is preferable.

(9) 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 ensure that the normal procedures and standards relating to serious offences are applied. Such authorities retain prosecutorial discretion as they may have under national law, in particular in determining whether there is a reasonable factual or legal basis to proceed with the case. In the context of the Rome Statute, such discretion is informed by whether the information available "provides a reasonable basis to believe that a crime ... has been or is being committed" and by whether prosecution of the person is "in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime".<sup>470</sup> While such discretion may exist, a State that refrains from pursuing prosecution or that conducts a "sham" proceeding solely to shield an alleged offender from accountability has not fulfilled the obligation set forth in draft article 10.

(10) The obligation upon a State to submit the case to the competent authorities may have implications for a State's effort 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

<sup>466</sup> See commentary to draft article 13 below, paras. (31)–(32).

<sup>467</sup> See report of the International Law Commission on the work of its sixty-sixth session (2014), *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, chap. VI, sect. C (final report on the topic of *aut dedere aut judicare*), pp. 155–156, paras. (34)–(35).

<sup>468</sup> See International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 1.

<sup>469</sup> 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, 18 July 2002, p. 1. Article 1 of the framework decision provides: "The European arrest warrant is a 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" (emphasis added).

<sup>470</sup> Rome Statute, art. 53, paras. 1–2.



previously established.<sup>471</sup> 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 armed 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.

(11) With respect to prosecution before international criminal courts or 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”.<sup>472</sup> The instrument establishing the Special Court for Sierra Leone<sup>473</sup> provided that an amnesty adopted in national law is not a bar to its jurisdiction. The instrument establishing the Extraordinary Chambers in the Courts of Cambodia provided that the government shall not request an amnesty for persons investigated for or convicted of crimes against humanity, while leaving to the Extraordinary Chambers to determine the scope of any prior amnesty.<sup>474</sup> Additionally, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia recognized that there is, respectively, a “crystallising international norm”<sup>475</sup> or “emerging consensus”<sup>476</sup> 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. An International Criminal Court Pre-Trial Chamber has found that “granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights”.<sup>477</sup>

(12) With respect to prosecution before national courts, recently negotiated treaties addressing crimes in national law have not expressly precluded amnesties, including treaties addressing serious crimes. 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.<sup>478</sup> 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.<sup>479</sup> Expert treaty bodies have

<sup>471</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009), [HR/PUB/09/1](#), p. 5.

<sup>472</sup> See *Prosecutor v. Furundžija*, Judgment, 10 December 1998 (footnote 302 above), para. 155.

<sup>473</sup> 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”).

<sup>474</sup> Extraordinary Chambers of Cambodia Law, 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 been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers”).

<sup>475</sup> See *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras. 66–74 and 82–84.

<sup>476</sup> 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, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, paras. 40–53.

<sup>477</sup> *Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, 5 April 2019, Pre-Trial Chamber I, International Criminal Court, para. 77.

<sup>478</sup> Report of the inter-sessional 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.

<sup>479</sup> See, for example, *Barrios Altos v. Peru*, Judgment of 14 March 2001, Inter-American Court of Human Rights, Series C, No. 75, paras. 41–44; *Almonacid-Arellano et al. v. Chile*, Judgment, 26

interpreted their respective treaties as precluding a State party from passing, applying or not revoking amnesty laws.<sup>480</sup> Further, the position of the Secretary-General of 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.<sup>481</sup> Since the entry into force of the Rome Statute, several States have adopted national laws that prohibit amnesties and similar measures with respect to crimes against humanity.<sup>482</sup>

September 2006 (see footnote 24 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 a “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, but also indicating: “Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.” See *Marguš v. Croatia*, Application No. 4455/10, Judgment of 27 May 2014, Grand Chamber, European Court of Human Rights, ECHR 2014 (extracts), para. 139.

<sup>480</sup> See, for example, Human Rights Committee, general comment No. 20, para. 15; Human Rights Committee, general comment No. 31, 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. See, for example, Committee against Torture, general comment No. 3 (2012) on the implementation of article 14, 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 violence. 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)*, chap. VII, para. 44, and *CEDAW/C/GC/30*, para. 81 (b).

<sup>481</sup> See, for example, 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 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone 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 Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009), HR/PUB/09/1, p. 11 (“Under various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent 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) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict 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.

<sup>482</sup> 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, art. 14; Burundi, Loi n°1/05 du 22 avril 2009, Code pénal du Burundi, 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 de Paz, 24 November 2016, art. 40; Comoros, Loi 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome, art. 14; Democratic Republic of 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 de Panamá, art. 115, para. 3; Uruguay, Ley 18.026, 4 October 2006, art. 8.



(13) 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.<sup>483</sup> Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in 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 and international humanitarian 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.

## Commentary

(1) Draft article 11 is focused on the obligation of the State to accord to any person, against whom measures are being taken in connection with an offence covered by the draft articles, fair treatment and full protection of his or her rights. Moreover, draft article 11 acknowledges the right of such a person, who is not of the State's nationality but who is in prison, custody or detention, to communicate with and have access to a representative of his or her State.

(2) The title of draft article 11 refers to fair treatment of an "alleged offender", but the scope of the draft article is broader, covering any "person" against whom measures are being taken "at all stages of the proceedings". Thus, measures might be taken in connection with an offence covered by the present draft articles before the person is indicted (such as an investigation), while a person is being extradited or surrendered, or after the person has been convicted (such as imprisonment). In such circumstances, the person might not be regarded as an "alleged" offender. Nevertheless, draft article 11 is intended to cover measures taken at all such stages against persons, recognizing that the rights to which the person is entitled may vary depending on the stage; for example, after conviction there would no longer be a presumption of innocence.<sup>484</sup>

(3) Major human rights instruments seek to specify the standards to be applied, such as those set forth in article 14 of the 1966 International Covenant on Civil and Political Rights, while treaties addressing punishment of crimes within national law typically provide a

<sup>483</sup> See, for example, *Ould Dah v. France*, Application No. 13113/03, Decision on admissibility of 17 March 2009, Fifth Section, European Court of Human Rights, ECHR 2009, para. 49.

<sup>484</sup> Compare, for example, Rome Statute, art. 55 (rights of persons during an investigation) with arts. 66–67 (presumption of innocence and rights of the accused).

broad standard of “fair treatment”.<sup>485</sup> 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 under international law.

(4) Thus, when crafting article 8 of the draft articles on crimes against diplomatic agents, the Commission asserted that the formulation of “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”.<sup>486</sup> 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”.<sup>487</sup>

(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”.<sup>488</sup> Consequently, draft article 11, paragraph 1, refers to fair treatment “including a fair trial”.

(6) In addition to fair treatment, paragraph 1 provides that the person is entitled to the full protection of his or her rights, whether arising under applicable national or international law. With respect to national law, generally all States provide within their law 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 decision. 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”).

(7) With respect to international law, both human rights law and international humanitarian law are of particular relevance. At the most general level, human rights protections are acknowledged in articles 10 and 11 of the 1948 Universal Declaration of Human Rights,<sup>489</sup> while more specific standards binding upon States are set forth in article 14 of the 1966 International Covenant on Civil and Political Rights, in regional human

<sup>485</sup> 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, 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 (New York, 4 December 1989), *ibid.*, vol. 2163, No. 37789, p. 75, 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 (The Hague, 26 March 1999), United Nations, *Treaty Series*, vol. 2253, No. 3511, 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. 8, para. 1.

<sup>486</sup> *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), p. 320, commentary to art. 8.

<sup>487</sup> *Ibid.*

<sup>488</sup> Human Rights Committee, general comment No. 32 (2007) on the 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.

<sup>489</sup> Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, arts. 10–11.

rights treaties<sup>490</sup> or in other applicable instruments.<sup>491</sup> With respect to international humanitarian law, the 1949 Geneva Conventions require minimum basic guarantees of fair treatment, fair trial, and full protection of rights for those who face criminal prosecution in the course of armed conflict, applicable in both international armed conflict and non-international armed conflict.<sup>492</sup> While the scope and application of these guarantees may depend on the form of armed conflict at issue, many, if not all, of these guarantees are seen as customary international law in all forms of armed conflict.<sup>493</sup> Relevant rights under international law include: the right of the accused to be informed of the charges against him or her; the right not to be compelled to incriminate himself or herself; the right to face punishment only for an act that was criminalized by law at the time the act was performed (the principle of *nullum crimen, nulla poena sine lege*); and the right to be presumed innocent until proven guilty.

(8) Paragraph 2 of draft article 11 addresses the State's obligations with respect to a person 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: (a) his or her State of nationality; (b) a State which is otherwise entitled to protect the person's rights or (c) if such person is a stateless person, the State which, at that person's request, is willing to protect that person's rights. 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 concerned. 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.

(9) Such rights are spelled out in greater detail in article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations,<sup>494</sup> which accords rights to both the detained person and to the State of nationality,<sup>495</sup> and in customary international law. Recent treaties addressing crimes typically do not seek to go into such detail but, like draft article 11,

<sup>490</sup> See, for example, American Convention on Human Rights, art. 8; African Charter on Human and Peoples' Rights, art. 7; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6.

<sup>491</sup> See, for example, American Declaration of the Rights and Duties of Man (Bogota, 2 May 1948), adopted by the Ninth International Conference of American States; Cairo Declaration on Human Rights in Islam, Organisation of Islamic Cooperation Resolution No. 49/19-P, annex; Charter of the Fundamental Rights of the European Union, adopted in Nice on 7 December 2000, *Official Journal of the European Communities*, No. C 364, 18 December 2000, p. 1; United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), General Assembly resolution 70/175 of 17 December 2015, annex, rule 62; the Bangkok Rules (footnote 443 above), rule 2, para. 1; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly resolution 67/187 of 28 March 2013, annex, principles 3 and 6.

<sup>492</sup> See, for example, Geneva Convention I, art. 49, para. 4; Geneva Conventions, common art. 3; Additional Protocol I, art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609 (hereinafter "Additional Protocol II"), art. 6; ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 685–686 (on common article 3) and paras. 2901–2902 (on article 49). These include *inter alia*: the obligation to inform the accused of the nature and cause of the offence alleged; the requirement that an accused must have the necessary rights and means of defence; the right to be presumed innocent; the right to be tried in one's own presence; the right not to be compelled to testify against oneself or to confess guilt; the right to be present and examine witnesses; the right not to be prosecuted or punished more than once by the same Party to the same act or on the same charge (*non bis in idem*).

<sup>493</sup> See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules* (footnote 333 above), pp. 352–371 (Rule 100).

<sup>494</sup> Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, art. 36, para. 1.

<sup>495</sup> *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").

paragraph 2, instead simply reiterate that the alleged offender is entitled to communicate with, and be visited by, his or her State of nationality (or, if a stateless person, with the State where he or she usually resides or that is otherwise willing to protect that person's rights).<sup>496</sup> As is the case for paragraph 1, such rights may operate differently in a context where international humanitarian law applies, such as through communications and visits undertaken by a Protecting Power or by the International Committee of the Red Cross.

(10) 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 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<sup>497</sup> and has been included as well in many treaties addressing crimes.<sup>498</sup> The Commission explained this provision in its commentary to what became the 1963 Vienna Convention 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.”<sup>499</sup>

(11) In the *LaGrand* case, the International Court of Justice found that the reference to “rights” in article 36, paragraph 2, of the 1963 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”.<sup>500</sup>

<sup>496</sup> 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, 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, 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; OAU 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.

<sup>497</sup> Vienna Convention on Consular Relations, art. 36, para. 2.

<sup>498</sup> See, for example, International Convention against the Taking of Hostages, art. 6, para. 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; OAU 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.

<sup>499</sup> *Yearbook ... 1961*, vol. II, document A/4843, draft articles on consular relations and commentary, commentary to art. 36, paras. (5) and (7).

<sup>500</sup> *LaGrand* (see footnote 495 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, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, 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 witnesses<sup>501</sup> and, even after the 1980s, most global treaties concerned with terrorism have not addressed the rights of victims and witnesses.<sup>502</sup> Since the 1980s, however, many treaties concerning other crimes have included provisions similar to those appearing in draft article 12,<sup>503</sup> including treaties addressing acts that may constitute crimes against humanity in certain circumstances, such as torture and enforced disappearance.<sup>504</sup> Some of the statutes of international courts and tribunals that have jurisdiction over crimes against humanity, notably the 1998 Rome Statute,<sup>505</sup> have addressed the rights of victims and witnesses, and the General Assembly of

<sup>501</sup> 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.

<sup>502</sup> See, for example, International Convention for the Suppression of Terrorist Bombings; Organization of African Unity (OAU) 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.

<sup>503</sup> See, for example, United Nations Convention against Transnational Organized Crime, arts. 24–25; United Nations Convention against Corruption, arts. 32–33.

<sup>504</sup> See, for example, Convention against Torture, arts. 13–14; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 12 and 24.

<sup>505</sup> See, for example, Rome Statute, art. 68; Rules of Procedure and Evidence of the International Criminal Court, in *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)*, chap. 4, section III.1, rules 86–88 (hereinafter “Rules of Procedure and Evidence of the International Criminal Court”). For other tribunals, see Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21;

the United Nations has provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity.<sup>506</sup>

(3) Most treaties that address the rights of victims within national law do not define the term “victim”, allowing States instead to apply their existing law and practice,<sup>507</sup> provided that it is consistent with their obligations under international law. At the same time, practice associated with those treaties and under customary international law provides guidance as to how the term should be viewed. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance defines “victim” for purposes of that Convention as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”.<sup>508</sup> The Convention on Cluster Munitions defines “cluster munition victims” for purposes of that Convention as “all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation 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”.<sup>509</sup>

(4) 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. In general comment No. 3, the Committee stated:

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.<sup>510</sup>

(5) At the regional level, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms 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.<sup>511</sup> The European Court of Human Rights has found that such “victims” may be harmed either directly or indirectly,<sup>512</sup> and that family members of a victim of a serious human rights violation may themselves be “victims”.<sup>513</sup> While the guarantees contained in

---

Extraordinary Chambers of Cambodia Law, art. 33; Statute of the Special Court of Sierra Leone, art. 16, para. 4; Statute of the Special Tribunal for Lebanon, art. 12, para. 4.

<sup>506</sup> 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, General Assembly resolution 60/147 of 16 December 2005, annex.

<sup>507</sup> See, for example, the General Victims’ Law of Mexico (*Ley General de Víctimas*, *Diario Oficial de la Federación* el 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.

<sup>508</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 1.

<sup>509</sup> Convention on Cluster Munitions (Dublin, 1 August 2010), United Nations, *Treaty Series*, vol. 2688, No. 47713, p. 39, art. 2, para. 1.

<sup>510</sup> Committee against Torture, general comment No. 3, para. 3.

<sup>511</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34.

<sup>512</sup> See, for example, *Vallianatos and Others v. Greece*, Application Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, Grand Chamber, European Court of Human Rights, ECHR 2013 (extracts), para. 47.

<sup>513</sup> The European Court of Human Rights has stressed that whether a family member is a victim depends on the existence of special factors that give 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.*

the 1969 American Convention on Human Rights are restricted to natural persons,<sup>514</sup> the Inter-American Court of Human Rights has also recognized both direct and indirect individual victims, including family members,<sup>515</sup> as well as victim groups.<sup>516</sup> The African Charter on Human and Peoples' Rights (Banjul Charter) does not use the term "victim", but the African Commission on Human and Peoples' Rights, in its general comment No. 4, stated that "[v]ictims are persons who individually or collectively suffer harm, including physical or psychological harm, through acts or omissions that constitute violations of the African Charter".<sup>517</sup> Further, the Commission concluded that an "individual is 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".<sup>518</sup> Under all such treaties, the term "victim" is not construed narrowly or in a discriminatory manner.

(6) Likewise, while the statutes of international criminal courts and 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",<sup>519</sup> which is understood as including both direct and indirect victims,<sup>520</sup> while rule 85 (b) extends the definition to legal persons provided such persons have suffered direct harm.<sup>521</sup>

---

*Turkey*, Application No. 23657/94, Judgment of 8 July 1999, Grand Chamber, European Court of Human Rights, ECHR 1999-IV, para. 98; *Elberte v. Latvia*, Application No. 61243/08, Judgment of 13 January 2015, Fourth Section, European Court of Human Rights, ECHR 2015, para. 137.

<sup>514</sup> American Convention on Human Rights, art. 1.

<sup>515</sup> 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.

<sup>516</sup> 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.

<sup>517</sup> African Commission on Human Rights, general comment No. 4 (2017) on the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (art. 5), para. 16.

<sup>518</sup> *Ibid.*, para. 17.

<sup>519</sup> Rules of Procedure and Evidence of the International Criminal Court, 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 Congo*, Case No. ICC-01/04, public redacted version of decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, 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. See *Situation in the Democratic Republic of 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.

<sup>520</sup> See *Situation in the Democratic Republic of 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. In the context of crimes against humanity involving cultural heritage, an International Criminal Court Trial Chamber identified persons "affected" by the crime as "not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community". *Prosecutor v. Ahmad Al Faqi Al Madhi*, Case No. ICC-01/12-01/15, Reparations Order, 17 August 2017, Trial Chamber VIII, International Criminal Court, para. 51. The Chamber, however, limited its assessment for the purpose of reparations "only to the harm suffered by or within the community of Timbuktu, i.e. organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack". *Ibid.*, para. 56.

<sup>521</sup> Rules of Procedure and Evidence of the International Criminal Court, 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

(7) 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 international treaties, including the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>522</sup> and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.<sup>523</sup>

(8) 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.

(9) 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.

(10) 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,<sup>524</sup> the 2003 United Nations Convention against Corruption,<sup>525</sup> and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.<sup>526</sup> Protective measures for these persons are required not just under treaties addressing crimes in national law, but also in the statutes of international criminal courts and tribunals.<sup>527</sup>

(11) Subparagraph (b) of paragraph 1 requires that the listed persons be protected from “ill-treatment and intimidation” as a consequence of any complaint, information, testimony

---

monuments, hospitals and other places and objects for humanitarian purposes”). Paragraph 8 of the 2005 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 of the General Assembly provides: “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.” For a similar definition, see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 1–2.

<sup>522</sup> Convention against Torture, art. 13.

<sup>523</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 12.

<sup>524</sup> United Nations Convention against Transnational Organized Crime, art. 24, para. 1.

<sup>525</sup> United Nations Convention against Corruption, art. 32, para. 1.

<sup>526</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 1.

<sup>527</sup> See, for example, Rome Statute, art. 68, para. 1; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21; Extraordinary Chambers of Cambodia Law, art. 33; Statute of the Special Court of Sierra Leone, art. 16; Statute of the Special Tribunal for Lebanon, art. 12.



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.<sup>528</sup>

(12) 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;<sup>529</sup> measures designed to protect the privacy and identity of witnesses and victims;<sup>530</sup> *in camera* proceedings;<sup>531</sup> withholding evidence or information if disclosure may lead to the grave endangerment of the security of a witness or his or her family;<sup>532</sup> the relocation of victims and witnesses;<sup>533</sup> and protective measures with respect to children.<sup>534</sup>

(13) 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.<sup>535</sup>

(14) 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 clauses “in accordance with its national law” and “appropriate stages” provide flexibility to the State as to implementation of the obligation, allowing States to tailor the requirement to the unique characteristics of their criminal law system. For example, in some jurisdictions this obligation might be fulfilled by allowing the victim to deliver an impact statement at the time of sentencing. Although 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.

(15) Examples of a provision such as paragraph 2 may be found in various treaties, such as: the 1998 Rome Statute;<sup>536</sup> the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;<sup>537</sup> the 2000 United Nations Convention against Transnational Organized Crime;<sup>538</sup> the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,

<sup>528</sup> See, for example, Rome Statute, art. 68, para. 1.

<sup>529</sup> 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).

<sup>530</sup> 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); Extraordinary Chambers of Cambodia Law, art. 33.

<sup>531</sup> See, for example, Rome Statute, art. 68, para. 2; Extraordinary Chambers of Cambodia Law, art. 33.

<sup>532</sup> See, for example, Rome Statute, art. 68, para. 5.

<sup>533</sup> 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).

<sup>534</sup> See, for example, United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, General Assembly resolution 69/194 of 18 December 2014, annex, measures VI, VIII, XII; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (footnote 491 above), principles 4–5 and guidelines 7 and 10; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20 of 22 July 2005, annex.

<sup>535</sup> 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.

<sup>536</sup> Rome Statute, art. 68, para. 3.

<sup>537</sup> 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.

<sup>538</sup> United Nations Convention against Transnational Organized Crime, art. 25, para. 3.

supplementing the United Nations Convention against Transnational Organized Crime,<sup>539</sup> and the 2003 United Nations Convention against Corruption.<sup>540</sup>

(16) 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.<sup>541</sup> At the same time, for any given situation of crimes against humanity, the State or States that must implement such measures will depend upon the context. The States concerned are those: (a) to which the acts constituting crimes against humanity are attributable under international law; and (b) that exercise jurisdiction over the territory where the crimes were committed.

(17) 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”.<sup>542</sup> Thus, the right to an “effective remedy” may be found in the 1948 Universal Declaration of Human Rights,<sup>543</sup> the 1966 International Covenant on Civil and Political Rights,<sup>544</sup> and in some regional human rights treaties.<sup>545</sup> The 1984 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”.<sup>546</sup> The 2006 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”.<sup>547</sup>

(18) 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 1984 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

<sup>539</sup> 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.

<sup>540</sup> United Nations Convention against Corruption, art. 32, para. 5.

<sup>541</sup> 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, principles 12 to 23.

<sup>542</sup> 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, art. 14, para. 2, and art. 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.

<sup>543</sup> Universal Declaration of Human Rights, art. 8.

<sup>544</sup> International Covenant on Civil and Political Rights, art. 2, para. 3. See also Human Rights Committee, general comment No. 31, paras. 16–17.

<sup>545</sup> See, for example, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13; American Convention on Human Rights, arts. 25 and 63. See also Organization of African Unity, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Ouagadougou, 10 June 1998), Office of the United Nations High Commissioner for Refugees (UNHCR), *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, *Regional Instruments, Africa, Middle East, Asia, Americas*, Geneva, UNHCR, 2007, p. 1040, at p. 1045, art. 27.

<sup>546</sup> Convention against Torture, art. 14, para. 1.

<sup>547</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 4.

provision as a whole embodies a “comprehensive reparative concept”,<sup>548</sup> 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.<sup>549</sup>

(19) This movement towards a more comprehensive concept of reparation has led to some treaty provisions that list various forms of reparation. For example, the 2006 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 only 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”.<sup>550</sup>

(20) 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 moveable 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.

(21) 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. Even so, the State concerned must implement this obligation in good faith and not abuse its flexibility so as to avoid appropriate reparation. Paragraph 3 is without prejudice to other obligations of States that exist under international law.

(22) Paragraph 3 provides that such reparation may be “on an individual or collective basis”. 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. Measures to preclude any statute of limitations on civil claims should be considered in appropriate circumstances. In some situations, however, only collective forms of reparation may be feasible or preferable, such as the building of

<sup>548</sup> Committee against Torture, general comment No. 3, para. 2; *Urra Guridi v. Spain*, communication No. 212/2002, decision adopted on 24 May 2005, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 44 (A/60/44)*, annex VIII, sect. A, p. 147, para. 6.8.

<sup>549</sup> Committee against Torture, general comment No. 3, para. 5.

<sup>550</sup> International Convention for the Protection of All Persons from Enforced Disappearance, arts. 24, paras. 4–5.

monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship. This may be especially the case where a State is grappling with the aftermath of a period of large-scale human rights abuses, necessitating creative transitional justice mechanisms. In still other situations, a combination of individual and collective reparations may be appropriate.

(23) Support for this approach may be seen in the approach to reparations taken by international criminal courts and 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.<sup>551</sup> Yet, when establishing other international criminal courts and 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.<sup>552</sup> 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.<sup>553</sup> 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.<sup>554</sup>

(24) Specification of the rights set forth in draft article 12 should not be read as excluding the existence of other rights for victims, witnesses or others under international or national law. For example, while treaties addressing human rights do not explicitly contain an obligation of the State to provide information to victims of serious human rights abuses, nevertheless a “right to information” or “right to truth” for victims has been inferred from such treaties by some bodies. For example, the Human Rights Committee has inferred such a right from the 1966 International Covenant on Civil and Political Rights as a way to end or prevent the occurrence of psychological torture of families of victims of enforced disappearances or secret executions.<sup>555</sup> The Committee also has found that, to fulfil its obligation to provide an effective remedy, a State party should provide information about the violation or, in cases of death of a missing person, the location of the burial site.<sup>556</sup> Likewise, the European Court of Human Rights has inferred from the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, as part of the right to be free from torture or ill-treatment, the right to an effective remedy and the right to an effective investigation and to be informed of the results.<sup>557</sup> The African Commission on Human and Peoples’ Rights has followed a similar approach with respect to the African Charter on Human and Peoples’ Rights.<sup>558</sup> The Inter-American Commission on Human Rights has

<sup>551</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 3; Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 3.

<sup>552</sup> 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, principle 13.

<sup>553</sup> Rules of Procedure and Evidence of the International Criminal Court, rule 97, para. 1.

<sup>554</sup> Internal Rules of the Extraordinary Chambers in the Court of Cambodia (Rev. 9) as revised on 16 January 2015, rules 23 and 23 *quinquies*.

<sup>555</sup> See, for example, *Lyashkevich v. Belarus*, Communication No 887/1999, Views adopted on 3 April 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. II, annex V, appendix P, para. 9.2.

<sup>556</sup> *Ibid.*, para. 11.

<sup>557</sup> See, for example, *Kurt v. Turkey* (footnote 435 above), paras. 130–134 and 140; *Taş v. Turkey*, Application No. 24396/94, Judgment, 14 November 2000, European Court of Human Rights, paras. 79–80 and 91; *Cyprus v. Turkey*, Application No. 25781/94, Judgment, Grand Chamber, European Court of Human Rights, ECHR 2001-IV, paras. 156–158.

<sup>558</sup> *Amnesty International v. Sudan*, communications No. 48/90, 50/91, 52/91, 89/93, decision of 15 November 1999, African Commission on Human and Peoples’ Rights, para. 54. See also African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Union document DOC/OS(XXX)247, principle C, para. (b)

characterized such a right in the American Convention on Human Rights as not just for the benefit of the victims, but for society as a whole, since ensuring rights for the future requires a society to learn from the abuses of the past.<sup>559</sup>

### **Article 13** **Extradition**

1. This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto.

9. 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.

10. 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.

---

(providing that “the right to an effective remedy includes: ... 3. access to the factual information concerning the violations.”).

<sup>559</sup> Inter-American Commission, *Case of Ignacio Ellacuría et al. v. El Salvador*, Case No. 10.488, Report No. 136/99 of 22 December 1999, paras. 221–228.

11. 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.

12. A requested State shall give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred.

13. Before refusing extradition, the requested State shall consult, as appropriate, 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 multilateral<sup>560</sup> or bilateral treaty,<sup>561</sup> although not all States require the existence of a treaty for an extradition to occur.

(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.<sup>562</sup> 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)<sup>563</sup> 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".<sup>564</sup>

(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

<sup>560</sup> See, for example, European Convention on Extradition (Paris, 13 December 1957), United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273; Inter-American Convention on Extradition (Caracas, 25 February 1981), United Nations, *Treaty Series*, vol. 1752, No. 30597, p. 177. See also Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (Luxembourg, 2002), *Official Journal of the European Communities*, No. L 190, vol. 45 (18 July 2002), p. 1.

<sup>561</sup> The 1990 United Nations 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).

<sup>562</sup> General Assembly resolution 3074 (XXVIII) of 3 December 1973.

<sup>563</sup> 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.

<sup>564</sup> *Ibid.*, para. 2.

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 court or 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 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, unless the person is extradited or surrendered to another State (or competent international criminal court or tribunal). 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, which is the purpose of draft article 13.

(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 of crimes against humanity. Moreover, the provisions of article 44 are well understood by the 186 States parties (as of mid-2019) to the 2003 United Nations Convention against Corruption, especially through the detailed guides and other resources developed by the United Nations Office on Drugs and Crime.<sup>565</sup>

*Application of the draft article when an extradition request is made*

(6) Draft article 13, paragraph 1, provides that the draft article applies to the offences covered by the present draft articles whenever a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of the requested State. The language is modelled on article 44, paragraph 1, of the 2003 United Nations Convention against Corruption.

(7) As noted above, the draft articles do not contain any obligation for a State to extradite a person to another State. Rather, pursuant to draft article 10, whenever an alleged offender is present in a State, that State is obliged to submit the matter to prosecution, *unless* the person is extradited or surrendered to another State (or competent international criminal court or tribunal). Thus, extradition is an option that a State may choose to exercise if so requested by another State. When such a request occurs, then the provisions of this draft article become relevant.

*Inclusion as an extraditable offence in existing and future extradition treaties*

(8) Draft article 13, paragraph 2, is modelled on article 44, paragraph 4, of the 2003 United Nations Convention against Corruption. It obligates a requested State, to regard the offences covered by the present draft articles (see draft article 6, paragraphs 1 to 3, above) as extraditable offences in any existing extradition treaty between it and the requesting

<sup>565</sup> See, for example, United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption; Technical Guide to the United Nations Convention against Corruption* (New York, United Nations, 2009); and Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption. The United Nations Office on Drugs and Crime 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 *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).



State, as well as any such treaties concluded by those States in the future.<sup>566</sup> This provision is commonly included in other conventions.<sup>567</sup>

*Exclusion of the “political offence” exception to extradition*

(9) Paragraph 3 of draft article 13 excludes the “political offence” exception as a ground for refusing an extradition request.

(10) 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 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”.<sup>568</sup> Similarly, article 1 of the Additional Protocol to the 1957 European Convention on Extradition provides that the list of war crimes contained in the 1949 Geneva Conventions cannot be considered to amount to political offences and be exempted from extradition on that basis.<sup>569</sup> There are similar reasons not to regard crimes against humanity as a “political offence” so as to preclude extradition.<sup>570</sup> The United Nations 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”.<sup>571</sup> 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”.<sup>572</sup>

(11) Contemporary bilateral extradition treaties often specify particular offences that should not be regarded as “political offences” so as to preclude extradition.<sup>573</sup> Although

<sup>566</sup> 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, pp. 319–320; and article 10 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook...1996*, vol. II (Part Two), p. 32.

<sup>567</sup> 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, 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 art. 10, para. 1, that, “[t]o the extent that [genocide, crimes against humanity, crimes against the 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”. *Yearbook...1996*, vol. II (Part Two), p. 32.

<sup>568</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. VII.

<sup>569</sup> Additional Protocol to the European Convention on Extradition (Strasbourg, 15 October 1975), United Nations, *Treaty Series*, vol. 1161, No. 5146, p. 450, art. 1.

<sup>570</sup> 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 (“[I]f the act complained of is of such heinous nature that it is a crime against humanity, it is necessarily outside the political offense exception”).

<sup>571</sup> United Nations Office on Drugs and Crime, *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*, para. 45.

<sup>572</sup> Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/22 on international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, para. 3.

<sup>573</sup> See, for example, the Extradition Treaty between the Government of the United States of America and the Government of South Africa (Washington, 16 September 1999), United Nations, *Treaty*



some treaties addressing specific crimes do not address the issue,<sup>574</sup> many contemporary multilateral treaties addressing specific crimes contain a provision barring the political offence exception to extradition for that particular crime.<sup>575</sup> For example, article 13, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides:

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.

(12) The Commission viewed the text of article 13, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance as an appropriate model for draft article 13, paragraph 3. Paragraph 3 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 11. The final clause of paragraph 3 “on these grounds alone” signals that there may be other grounds that the State may invoke to refuse extradition (see paragraphs (18) to (20) and (27) to (30) below), provided such other grounds in fact exist.

*States requiring a treaty to extradite*

(13) Draft article 13, paragraphs 4 and 5, address the situation where a requested State requires the existence of a treaty before it can extradite an individual to the requesting State.

(14) Paragraph 4 provides that, in such a situation, the requested State “may” use the present draft articles as the legal basis for the 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”.<sup>576</sup> The same or a similar provision may be found in numerous other treaties,<sup>577</sup> and the

---

*Series*, [vol. not published yet], No. 50792, 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, 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”); 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, art. IV, subpara. (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”).

<sup>574</sup> See, for example, International Convention against the Taking of Hostages; Convention against Torture.

<sup>575</sup> 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.

<sup>576</sup> United Nations Convention against Corruption, art. 44, para. 5.

<sup>577</sup> 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;

Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.<sup>578</sup>

(15) Paragraph 5 is modelled on article 44, paragraph 6, of the 2003 United Nations Convention against Corruption. Paragraph 5 (a) obliges 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.

(16) Draft article 13, paragraph 5 (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.<sup>579</sup>

*States not requiring a treaty to extradite*

(17) Draft article 13, paragraph 6, applies to States that do not make extradition conditional on the existence of a treaty. With respect to those States, paragraph 6 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 2003 United Nations Convention against Corruption.<sup>580</sup> Similar provisions may be found in many other treaties addressing crimes.<sup>581</sup> The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.<sup>582</sup>

*Requirements of the requested State's national law or applicable treaties*

(18) Draft article 13, paragraph 7, 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 global<sup>583</sup> and regional<sup>584</sup> treaties.

---

Convention against Torture, 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.

<sup>578</sup> *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").

<sup>579</sup> 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.

<sup>580</sup> 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").

<sup>581</sup> 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, 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.

<sup>582</sup> *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").

<sup>583</sup> 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, art. 8, para. 2; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 2; International Convention for the Suppression of

This paragraph is modelled on article 44, paragraph 8, of the 2003 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”.<sup>585</sup> The Commission was of the view that reference to minimum penalty requirements was inappropriate in the context of allegations of crimes against humanity.

(19) This paragraph states the general rule that, while the extradition is to proceed in accordance with the rights, obligations and procedures provided for 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.<sup>586</sup> 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 limitations in contravention of draft article 6, paragraph 6, or may be impermissible under other rules of international law.

(20) 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 case to its competent authorities for the purpose of prosecution, pursuant to draft article 10.

*Expedition of extradition procedures and simplification of evidentiary requirements*

(21) Draft article 13, paragraph 8, provides that the requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto. This text is modelled on article 44, paragraph 9, of the 2003 United Nations Convention against Corruption. The Working Group on International Cooperation of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime has evaluated and recommended methods for expediting such procedures and simplifying such requirements.<sup>587</sup>

*Deeming the offence to have occurred in the requesting State*

(22) Draft article 13, paragraph 9, addresses the situation where a requested State, under its national law, may only extradite a person to a State where the crime occurred.<sup>588</sup> To facilitate extradition to a broader range of States, paragraph 9 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

Terrorist Bombings, art. 9, para. 2; International Convention for 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.

<sup>584</sup> See, for example, Inter-American Convention to Prevent and Punish Torture, art. 13; Inter-American Convention on Forced Disappearance of Persons, art. V; Council of Europe Criminal Law Convention on Corruption, art. 27, para. 4.

<sup>585</sup> 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”).

<sup>586</sup> See, for example, the United Kingdom Extradition Act, sect. 17.

<sup>587</sup> See, for example, Report on the meeting of the Working Group on International Cooperation held in Vienna on 16 October 2018 (CTOC/COP/WG.3/2018/6); Challenges faced in expediting the extradition process, including addressing health and safety and other human rights issues, as well as litigation strategies utilized by defendants to delay the resolution of an extradition request (CTOC/COP/WG.3/2018/5).

<sup>588</sup> See *Yearbook ... 1996*, vol. II (Part Two), p. 33, para. (3) of the commentary to draft 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”).

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<sup>589</sup> and has been used in many treaties addressing crimes.<sup>590</sup>

(23) 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, the cross-reference in draft article 13, paragraph 9, 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.

(24) 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,<sup>591</sup> 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 broader approach is consistent with the general obligation of every State party to establish its jurisdiction over [those] crimes".<sup>592</sup>

*Enforcement of a sentence imposed upon a State's own nationals*

(25) Draft article 13, paragraph 10, 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 10 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 2000 United Nations Convention against Transnational Organized Crime<sup>593</sup> and the 2003 United Nations Convention against Corruption.<sup>594</sup>

(26) 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 any sentence imposed by the requesting State. Such a provision may be found in the 2000 United Nations Convention against Transnational Organized Crime<sup>595</sup> and the 2003 United Nations Convention against Corruption.<sup>596</sup> The Commission deemed such a situation as falling within the scope of conditions that may be applied under draft article 13, paragraph

<sup>589</sup> International Convention for the Suppression of the Financing of Terrorism, art. 11, para. 4.

<sup>590</sup> 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, 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; International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>591</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 4 ("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").

<sup>592</sup> *Ibid.*, p. 33 (para. (3) of the commentary to draft article 10).

<sup>593</sup> United Nations Convention against Transnational Organized Crime, art. 16, para. 12.

<sup>594</sup> United Nations Convention against Corruption, art. 44, para. 13.

<sup>595</sup> United Nations Convention against Transnational Organized Crime, art. 16, para. 11.

<sup>596</sup> United Nations Convention against Corruption, art. 44, para. 12.

7, of the present draft articles and therefore decided that an express provision on this issue was not necessary.

*Extradition requests based on impermissible grounds*

(27) Draft article 13, paragraph 11, 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 multilateral<sup>597</sup> and bilateral treaties,<sup>598</sup> and in national laws,<sup>599</sup> that address extradition generally, and appears in treaties addressing extradition with respect to specific crimes.<sup>600</sup>

(28) Paragraph 11 is modelled on article 16, paragraph 14, of the 2000 United Nations Convention against Transnational Organized Crime, and article 44, paragraph 15, of the 2003 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 2, paragraph 1 (h). Further, the term "membership of a particular social group" was added to the list, as in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.<sup>601</sup> Paragraph 11 may be considered as one aspect of guaranteeing to the alleged offender, at all stages, full protection of his or her rights under international law, as required by draft article 11, paragraph 1. Indeed, there may be other

<sup>597</sup> See, for example, European Convention on Extradition, art. 3, para. 2; Inter-American Convention on Extradition, art. 4, para. 5.

<sup>598</sup> See, for example, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic (Paris, 24 January 2003), art. 3, para. 3; Extradition Treaty between the Government of the United States of America and the Government of the Republic of South Africa, art. 4, para. 3; Treaty on Extradition between Australia and the Republic of Korea (Seoul, 5 September 1990), art. 4, para. 1 (b); Treaty of Extradition between the Government of the United Mexican States and the Government of Canada, art. IV (b). The United Nations Model Treaty on Extradition 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".

<sup>599</sup> See, for example, the 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"); and the 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").

<sup>600</sup> 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.

<sup>601</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 7.

reasons relating to full protection the alleged offender's human rights that would preclude extradition.

(29) Given that the present draft articles contain no obligation to extradite any individual, paragraph 11, strictly speaking, is not necessary for an extradition occurring solely pursuant to the present draft articles. Under the present draft articles, a State may decline to extradite for any reason, so long as it submits the case to its own competent authorities for the purpose of prosecution. Nevertheless, the paragraph may be of relevance if an extradition is being requested pursuant to a State's extradition treaties or national law and if such treaties or law require extradition in certain circumstances. Paragraph 11 helps ensure that any provision in such treaties or law that precludes extradition in circumstances such as those described in paragraph 11 will remain unaffected by the present draft articles. As such, the Commission considered it appropriate to include such a provision in the present draft articles.

(30) Paragraph 11 is to be distinguished from draft article 5 on *non-refoulement*. The latter provision broadly addresses *any* transfer of a person from one State to another. Such transfers may well occur in a context where the person is not alleged to have committed crimes against humanity or to have committed any crime at all. The focus of draft article 5 is on ensuring that the person is not transferred to a State if by doing so he or she would be in danger of being subjected to a crime against humanity. To the extent that there is overlap between draft article 5 and draft article 13, paragraph 11, with respect to the extradition of a person, the difference between the two provisions may be explained as follows. Draft article 5 is focused on preventing the extradition of any person for any alleged crime to a place where he or she would be in danger of being subjected to a crime against humanity. Draft article 13, paragraph 11, is focused on the extradition of a person alleged to have committed a crime against humanity, and makes clear that the draft articles impose no obligation on the requested State to extradite if it is believed that the request is being pursued on grounds that are impermissible under international law.

*Due consideration to the request of the State where the offence occurred*

(31) Draft article 13, paragraph 12 requires that "due consideration" be given by the requested State to a request for extradition from the State in the territory under whose jurisdiction the alleged offence has occurred.

(32) The State where the alleged offence has occurred may be best placed to proceed with a prosecution if it is the principal location of the victims, witnesses or other evidence relating to the offence. In that regard, it has been observed that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is focused on prosecution of alleged offenders "by a competent tribunal of the State *in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".<sup>602</sup> Additional Protocol I to the 1949 Geneva Conventions contains a provision reading:

Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.<sup>603</sup>

Moreover, the complementarity system of the Rome Statute,<sup>604</sup> in practice, often accords deference to the State where the crime occurred (or the State of nationality of the alleged offender, which is often the same) if that State is able and willing to exercise jurisdiction.

<sup>602</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. VI (emphasis added).

<sup>603</sup> Additional Protocol I, art. 88, para. 2.

<sup>604</sup> Rome Statute, art. 17, para. 1 ("[T]he Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution ...").

*Consultations prior to refusal to extradite*

(33) Draft article 13, paragraph 13, 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 when the requested State is refusing extradition but consultation is not appropriate, for example when the requested State has decided to submit the case to its own competent authorities for the purpose of prosecution, or when consultations are not possible 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.

(34) Paragraph 13 is modelled on the 2000 United Nations Convention against Transnational Organized Crime<sup>605</sup> and the 2003 United Nations Convention against Corruption,<sup>606</sup> 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”.

*Multiple requests for extradition*

(35) 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”.<sup>607</sup>

(36) 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, other than the obligation of “due consideration” set forth in paragraph 12. Even so, when such a situation occurs, a State may benefit from considering various factors in exercising its discretion. 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”).<sup>608</sup> 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”.<sup>609</sup>

*Dual criminality*

(37) 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.<sup>610</sup> Such a requirement is also sometimes included in treaties on a particular type of

<sup>605</sup> United Nations Convention against Transnational Organized Crime, art. 16, para. 16.

<sup>606</sup> United Nations Convention against Corruption, art. 44, para. 17.

<sup>607</sup> United Nations Model Treaty on Extradition, art. 16.

<sup>608</sup> Código Orgánico Integral Penal, section 405.

<sup>609</sup> See, for example, Council framework decision of 13 June 2002, art. 16, para. 1.

<sup>610</sup> See, for example, United Nations Office on Drugs and Crime, *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. 10, para. 20 (“The requirement of double criminality

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 2003 United Nations Convention against Corruption establishes both mandatory<sup>611</sup> and non-mandatory<sup>612</sup> offences relating to corruption.

(38) 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 impose a dual criminality requirement. While there may be some marginal differences as between two States in the manner by which their national laws have incorporated the crime, imposing a dual criminality requirement is still unnecessary since that requirement allows for such differences, so long as the crime in substance exists in both jurisdictions. A further rationale is that treaties focused on a particular type of crime 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.

(39) The present draft articles on crimes against humanity define crimes against humanity in draft article 2 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.<sup>613</sup> 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 2003 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. 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, 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.
3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

---

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”).

<sup>611</sup> United Nations Convention against Corruption, arts. 15, 16, para. 1, and arts. 17, 23 and 25.

<sup>612</sup> *Ibid.*, arts. 16, para. 2, and arts. 18–22 and 24.

<sup>613</sup> Draft article 2, paragraph 3, 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 2, paragraphs 1 and 2, however, would not be based on an offence covered by the present draft articles.



- (a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
  - (b) taking evidence or statements from persons, including by video conference;
  - (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 between the States in question.

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.

9. States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity.

### **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 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 State. For example, certain treaties have

provisions relevant to mutual legal assistance with respect to the prosecution of war crimes.<sup>614</sup>

(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, where they exist, bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally (referred to as mutual legal assistance treaties). While mutual legal assistance relating to crimes against humanity can occur through such treaties, in many instances there will be no mutual legal assistance treaty between the requesting and requested States.<sup>615</sup> 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. Paragraphs 1 to 8 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 and the draft annex both apply to the requesting and requested States if there exists no mutual legal assistance treaty between them. If there does exist a mutual legal assistance treaty between them, then that treaty applies, except that: (a) if particular paragraphs of draft article 14 require the provision of a higher level of assistance than is provided for under the other mutual legal assistance treaty, then those paragraphs shall be applied as well; and (b) the draft annex additionally applies if the requesting and requested States agree to use it 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 recent conventions addressing specific crimes. While there is also precedent for less detailed provisions,<sup>616</sup> 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.<sup>617</sup> The negotiating States decided early on,<sup>618</sup> 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.<sup>619</sup> The result was the detailed provisions of article 18 of the 2000 United Nations Convention against Transnational Organized Crime, which were reproduced almost in their entirety in article 46 the 2003

<sup>614</sup> See, for example, Additional Protocol I, art. 88, para. 1 (“The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol”); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 19, para. 1 (“Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings”). See also ICRC, *Commentary on the First Geneva Convention*, 2016, paras. 2892–2893 (on article 49).

<sup>615</sup> See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (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”).

<sup>616</sup> See, for example, Convention against Torture, 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.

<sup>617</sup> 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.

<sup>618</sup> *Ibid.* (suggestions of Australia and Austria).

<sup>619</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7.

United Nations Convention against Corruption. Comparable provisions may also be seen in the 1999 International Convention for the Suppression of the Financing of Terrorism.<sup>620</sup>

(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.<sup>621</sup> 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 mid-2019, the 2000 United Nations Convention against Transnational Organized Crime has 190 States parties and the 2003 United Nations Convention against Corruption has 186 States parties. No State party has made a reservation 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 the United Nations Office on Drugs and Crime.<sup>622</sup>

(6) Draft article 14 and the draft annex are modelled on article 46 of the 2003 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 relevant whether or not the two States concerned had in place a mutual legal assistance treaty, while placing in the draft annex provisions that only apply when there is no such treaty (although, even if there is, application of the draft annex might be 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 automatically 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 2003 United Nations Convention against Corruption,<sup>623</sup> 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.

(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.

<sup>620</sup> The mutual legal assistance provisions in the International Convention for the Suppression of the Financing of Terrorism are scattered among several articles, many of which concern both mutual assistance and extradition. See International Convention for the Suppression of the Financing of Terrorism, art. 7, para. 5, and arts. 12–16. More commonly, mutual legal assistance provisions are aggregated in a single article.

<sup>621</sup> See United Nations Office on Drugs and Crime, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (New York, United Nations, 2nd ed., 2017), pp. 221–225.

<sup>622</sup> See United Nations Office on Drugs and Crime, *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*, para. 45.

<sup>623</sup> 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.

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 2003 United Nations Convention against Corruption,<sup>624</sup> but for three changes. First, the final clause of article 46, paragraph 2, is moved up to the beginning of draft article 14, paragraph 2, so as to make clear at the outset that this paragraph concerns mutual legal assistance in relation to legal persons. Second, the cross-reference in that clause has been adjusted as needed for these draft articles. Third, the words “and other” have been added in “investigations, prosecutions, judicial *and other* proceedings”. This third 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. The phrase “any of the following purposes” means one or more of such purposes. These types of assistance are drafted in broad terms and, in most respects, replicate the types of assistance listed in many multilateral<sup>625</sup> and bilateral<sup>626</sup> mutual legal assistance 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 2003 United Nations Convention against Corruption. Under that Convention, any existing bilateral mutual legal assistance treaty 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”.<sup>627</sup> 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.

<sup>624</sup> 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 2000 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 2003 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 United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Corruption* (New York, United Nations, 2010), pp. 374–377, footnote 5. By the second negotiating meeting, that proposal was dropped from consideration (*ibid.*, p. 378, footnote 7), leading ultimately to the adoption of paragraph 2 of article 46.

<sup>625</sup> See, for example, Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75, art. 7; Association of Southeast Asian Nations (ASEAN) Treaty on Mutual Legal Assistance in Criminal Matters (Kuala Lumpur, 29 November 2004), United Nations, *Treaty Series*, vol. 2336, No. 41878, p. 271, 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.

<sup>626</sup> See, for example, United Nations Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990 (as subsequently amended by General Assembly resolution 53/112 of 9 December 1998), 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.

<sup>627</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 170, para. 605 (advising also that under some national legal systems, amending legislation may be required to incorporate additional bases of cooperation).

(12) In that regard, 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 such persons, while the phrase “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 video conferencing for purposes of obtaining testimony or other evidence from persons. This modification 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.<sup>628</sup> 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 grave sites) 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 list contained in the 2003 United Nations Convention against Corruption;<sup>629</sup> that list 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 2003 United Nations Convention against Corruption – at subparagraphs (j) and (k)<sup>630</sup> – 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 2003 United Nations Convention against Corruption lists together “[e]xecuting searches and seizures, and freezing”,<sup>631</sup> the Commission deemed it appropriate to move the word “freezing” to subparagraph (h), which deals with proceeds of the 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 2003 United Nations Convention against Corruption<sup>632</sup> and similar language appears in other multilateral and bilateral treaties on mutual legal assistance.<sup>633</sup> 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

<sup>628</sup> Paragraph 16 permits a State to allow a “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”. This paragraph is based on paragraph 18 of article 46 of the 2003 United Nations Convention against Corruption.

<sup>629</sup> 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”).

<sup>630</sup> *Ibid.*, 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”).

<sup>631</sup> *Ibid.*, art. 46, para. 3 (c).

<sup>632</sup> See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, pp. 171, paras. 611–12; *State of Implementation of the United Nations Convention against Corruption*, pp. 228–229.

<sup>633</sup> 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, art. 4, para. 2; ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, art. 3, para. 5.

“bank” secrecy, the provision is intended to cover all financial institutions whether or not technically regarded as a bank.<sup>634</sup>

(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 2003 United Nations Convention against Corruption,<sup>635</sup> 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,<sup>636</sup> 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 “without prejudice to national law”. In practice, States frequently engage in such informal exchanges of information.<sup>637</sup>

(18) In both the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption, there is a further provision providing more detail as to the treatment of transmitted information.<sup>638</sup> 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 between the States in question”. In other words, the obligations contained in any other mutual legal assistance treaty in place between the two States continue to apply,<sup>639</sup> notwithstanding the existence of draft article 14. At the

<sup>634</sup> The 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, 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, *State of Implementation of the United Nations Convention against Corruption*, pp. 183–184.

<sup>635</sup> United Nations Convention against Corruption, art. 46, para. 30. See 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.

<sup>636</sup> United Nations Convention against Transnational Organized Crime, art. 18, para. 4.

<sup>637</sup> *State of Implementation of the United Nations Convention against Corruption*, p. 227–228.

<sup>638</sup> 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”. See *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)*, para. 37.

<sup>639</sup> Para. (1) of the commentary to art. 10, *Yearbook...1972*, vol. II, p. 321 (asserting that, with respect to a similar provision in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons: “Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral

same time, if particular paragraphs of draft article 14 require the provision of a higher level of assistance than is provided for under the other mutual legal assistance treaty, then the obligations set forth in those paragraphs shall be applied as well.<sup>640</sup> This provision draws upon the language of earlier treaties addressing crimes.<sup>641</sup>

(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 2003 United Nations Convention against Corruption,<sup>642</sup> provides that the draft annex applies when there exists no mutual legal assistance treaty between the requesting and requested State. As such, the draft annex does not apply when there exists a mutual legal assistance treaty between the requesting and requested State. 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) Draft article 14, paragraph 9, provides that “States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity”. A precedent for addressing cooperation between States and the United Nations in situations where serious crimes are being committed can be found in Additional Protocol I to the 1949 Geneva Conventions.<sup>643</sup> While paragraph 9 is not concerned with the “horizontal” mutual legal assistance between States that is the primary focus of draft article 14, such cooperation regarding punishment is important and would complement the cooperation between States and international organizations addressed in draft article 4 in the context of prevention. It has been noted that some States require statutory authority or a formal framework in order to cooperate with such international mechanisms.<sup>644</sup> Paragraph 9 encourages States to consider concluding agreements or arrangements in order to allow for such cooperation. Like paragraph 5 of this draft article, however, paragraph 9 does not obligate States to take any particular action in this regard.

(22) Paragraph 9 is not directed at the cooperation of States with international criminal courts or tribunals, which have a mandate to prosecute alleged offenders. Such cooperation remains governed by the constituent instruments of, and the legal relationship of any given State to, those courts or tribunals.

(23) 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 2003 United Nations Convention against

---

treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article”).

<sup>640</sup> See, for example, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 184, para. 7.20 (regarding article 7, paragraph 6: “[W]here 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.”).

<sup>641</sup> 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.

<sup>642</sup> See 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*, p. 185, para. 7.23; *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 171, para. 608.

<sup>643</sup> Additional Protocol I, art. 89 (“In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”).

<sup>644</sup> See Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (A/73/295), para. 39.

Corruption.<sup>645</sup> As previously noted, the present draft articles on crimes against humanity define crimes against humanity in draft article 2 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.<sup>646</sup> 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,<sup>647</sup> *ne bis in idem*,<sup>648</sup> *nullum crimen, nulla poena sine praevia lege poenali*<sup>649</sup> and the legality of amnesty provisions.<sup>650</sup>

<sup>645</sup> United Nations Convention against Corruption, art. 46, para. 9. See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 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”).

<sup>646</sup> For example, crimes against humanity arose before the International Court of Justice in the context of counter-claims 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, they fell outside the scope of the Court’s jurisdiction. *Ibid.*, pp. 320–321, para. 30.

<sup>647</sup> *Streletz, Kessler and Krenz v. Germany*, Application Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, Grand Chamber, European Court of Human Rights, ECHR 2001-II (concurring opinion of Judge Loucaides); and *K.-H. W. v. Germany*, Application No. 37201/97, Judgment of 22 March 2001, Grand Chamber, European Court of Human Rights, ECHR 2001-II (extracts) (concurring opinion of Judge Loucaides).

<sup>648</sup> *Almonacid-Arellano*, Judgment, 26 September 2006 (see footnote 24 above), para. 154.

<sup>649</sup> *Kolk and Kislyiy v. Estonia*, Application Nos. 23052/04 and 24018/04, Decision on admissibility of 17 January 2006, Fourth Section, European Court of Human Rights, ECHR 2006-1.

<sup>650</sup> *Barrios Altos v. Peru*, Judgment of 14 March 2001 (see footnote 479 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 479 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.<sup>651</sup> The *travaux préparatoires* relating to the comparable provision of the 2000 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”.<sup>652</sup>

(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 negotiation<sup>653</sup> and not simply protest the conduct of the other State.<sup>654</sup> 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.<sup>655</sup> 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.<sup>656</sup>

<sup>651</sup> 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.

<sup>652</sup> 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.

<sup>653</sup> 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 23 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, 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”).

<sup>654</sup> 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.

<sup>655</sup> 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, 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.

<sup>656</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. IX. See also OAU Convention on the Prevention and Combating of Terrorism, art. 22, para. 2.

(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.<sup>657</sup> For example, article 66, paragraph 3, of the 2003 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, as of mid-2019 there are 186 States parties to the 2003 United Nations Convention against Corruption; of those, more than 40 States parties have communicated that they do not consider themselves bound by paragraph 2 of article 66.<sup>658</sup>

(5) Treaties containing such a provision typically specify that the declaration may be made no later than at the time of the expression by the State of consent to be bound by the treaty. 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 in the present draft articles language characteristic of treaties (for example, that such a declaration shall be made by a State party no later than at the time of the State’s ratification, acceptance, approval, or accession to the convention).

(6) 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 national law and that provide for inter-State dispute settlement also contain such a provision.<sup>659</sup> For example, article 66, paragraph 4, of the 2003 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”.

## 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

<sup>657</sup> 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, 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.

<sup>658</sup> 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”.

<sup>659</sup> 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.

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.

**Commentary**

(1) As indicated in draft article 14, paragraph 8, both draft article 14 and the draft annex apply to the requesting and requested States if there exists no mutual legal assistance treaty between them. If there does exist a mutual legal assistance treaty between them, then the draft annex additionally applies only if the requesting and requested States choose to apply it so as to facilitate 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.<sup>660</sup> This paragraph is based on article 46, paragraph 13, of the 2003 United Nations Convention against Corruption.<sup>661</sup> As of 2017, all but eight States parties to that convention had designated a central authority.<sup>662</sup>

*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 2003 United Nations Convention against Corruption.<sup>663</sup>

(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 2003 United Nations Convention against Corruption.<sup>664</sup>

(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.<sup>665</sup> This paragraph is based on article 46, paragraph 16, of the 2003 United Nations Convention against Corruption.<sup>666</sup>

<sup>660</sup> See *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)*, para. 40.

<sup>661</sup> 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.

<sup>662</sup> *State of Implementation of the United Nations Convention against Corruption*, p. 231.

<sup>663</sup> 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. See also *State of Implementation of the United Nations Convention against Corruption*, p. 234–235.

<sup>664</sup> 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*, pp. 189–190, para. 7.30–7.33.

<sup>665</sup> See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 189–190, para. 7.34.

<sup>666</sup> 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.

*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 2003 United Nations Convention against Corruption.<sup>667</sup>

(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 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 2003 United Nations Convention against Corruption.<sup>668</sup>

(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 2003 United Nations Convention against Corruption.<sup>669</sup> 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).<sup>670</sup>

(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

<sup>667</sup> 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.

<sup>668</sup> See also United Nations Convention against Transnational Organized Crime, art. 18, para. 24.

<sup>669</sup> 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 (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185, art. 2; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 1. For commentary, see Council of Europe, Explanatory report to the European Convention on Mutual Assistance in Criminal Matters, document 20.IV.1959, pp. 4–5; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 194–196, paras. 7.46–7.51. See also *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)*, para. 42.

<sup>670</sup> See *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)*, para. 42.

exist not just for that particular request but also for future requests. This paragraph is based on article 46, paragraph 23, of the 2003 United Nations Convention against Corruption.<sup>671</sup>

(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 2003 United Nations Convention against Corruption.<sup>672</sup>

(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 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.<sup>673</sup> The 2000 United Nations Convention against Transnational Organized Crime, however, expanded the application of this provision to cover refusals of assistance as well.<sup>674</sup> This approach was replicated in article 46, paragraph 26, of the 2003 United Nations Convention against Corruption,<sup>675</sup> 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 2003 United Nations Convention against Corruption.<sup>676</sup>

#### *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.

<sup>671</sup> 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, art. 4, para. 5.

<sup>672</sup> 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; United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 3.

<sup>673</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17.

<sup>674</sup> United Nations Convention against Transnational Organized Crime, art. 18, para. 26.

<sup>675</sup> 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”).

<sup>676</sup> See also United Nations Convention against Transnational Organized Crime, art. 18, para. 29.



This paragraph is based on article 46, paragraph 19, of the 2003 United Nations Convention against Corruption.<sup>677</sup>

(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 2003 United Nations Convention against Corruption.<sup>678</sup>

*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 traveling 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 2003 United Nations Convention against Corruption.<sup>679</sup>

(21) Paragraph 16 of the draft annex addresses testimony by witnesses through video conferencing, a cost-effective technology that is becoming increasingly common. While testimony by video conference 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 video conference. 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 2003 United Nations Convention against Corruption.<sup>680</sup> The 2017 implementation report for the 2003 United Nations Convention against Corruption indicates that the use of this provision is widespread:

[T]he hearing of witnesses and experts by videoconference is generally recognized as a useful tool in saving time and costs in the context of mutual legal assistance in criminal matters, as well as in overcoming practical difficulties, such as when the person whose evidence is sought is unable or unwilling to travel to the foreign country to give evidence. Videoconferencing is permissible under the domestic law of the majority of States parties ...<sup>681</sup>

<sup>677</sup> 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*, p. 193, para. 7.43.

<sup>678</sup> See also United Nations Convention against Transnational Organized Crime, art. 18, para. 20; Model Treaty on Mutual Assistance in Criminal Matters, art. 9.

<sup>679</sup> 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; United Nations Model Treaty on Mutual Assistance in Criminal Matters, 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*, pp. 197–198, para. 7.55.

<sup>680</sup> See also United Nations Convention against Transnational Organized Crime, art. 18, para. 18; *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)*, para. 41; *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, pp. 174–175, para. 629.

<sup>681</sup> *State of Implementation of the United Nations Convention against Corruption*, p. 236.

*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.

(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 2003 United Nations Convention against Corruption.<sup>682</sup>

(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 2003 United Nations Convention against Corruption.<sup>683</sup>

(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 2003 United Nations Convention against Corruption.<sup>684</sup>

*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 2003 United Nations Convention against Corruption.<sup>685</sup>

(27) Various interpretive 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:

<sup>682</sup> 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; *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), para. 39.

<sup>683</sup> 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.

<sup>684</sup> 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.

<sup>685</sup> 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; United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 20.

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.<sup>686</sup>

- (28) A footnote to the United Nations Model Treaty on Mutual Assistance in Criminal Matters indicates that:

For example, the requested State would meet the ordinary costs of fulfilling the request for assistance except that the requested 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.<sup>687</sup>

- (29) An interpretative note to the 2000 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 video conferencing] 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.<sup>688</sup>

- (30) Finally, according to the *travaux préparatoires* of the 2003 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.<sup>689</sup>

<sup>686</sup> *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 198, para. 7.57.

<sup>687</sup> United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 20, footnote 27.

<sup>688</sup> *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)*, para. 43.

<sup>689</sup> *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.