



Note

Observations on the text of draft articles on crimes against humanity adopted by International Law Commission on first reading

Introduction

1. At the request of the International Law Commission (hereafter “ILC”), on 11 September 2017 the UN Legal Counsel, on behalf of the Secretary-General, transmitted the text of the draft articles on crimes against humanity adopted by the ILC (A/72/10, Chapter IV, hereinafter “Draft Articles”), inviting Governments, international organizations and others to submit comments and observations.
2. The Draft Articles include 15 operative articles and an annex regulating the cooperation between States. The Draft Articles are accompanied by a commentary discussing the content and rationale of individual provisions (hereafter “Commentary”).
3. This note contains observations on human rights considerations arising from the review of the Draft Articles, in light of the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and other relevant treaties, as well as human rights jurisprudence and applicable international criminal law. The note focuses on some of the most relevant issues addressed by the Draft Articles from a human rights perspective.

Observations

Enforced Disappearance

4. Draft Article 3 (2) (i) defines the underlying criminal act of enforced disappearance of persons as follows:

[...] 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.

The language of this provision and Article 7 (2) (i) 1998 Rome Statute of the International Criminal Court (hereinafter “Rome Statute” and “ICC”) is the same, whereas corresponding Article 2 ICPPED, adopted after the Rome Statute, defines enforced disappearance as

[...] the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law

5. The reference “of removing them from the protection of the law *for a prolonged period of time*” introduces a minimum time requirement for the crime of enforced disappearances in the Draft Articles (also present in the Rome Statute), which cannot be found in the ICPPED or the Declaration on the Protection of All Persons from Enforced

Disappearance, A/RES/47/133 (hereinafter “1992 Declaration”).¹ The ILC’s Commentary (hereinafter “The Commentary”) does not provide a specific comment on this particular issue.²

6. Likewise, the Draft Articles (and the Rome Statute) introduce an additional requirement by establishing that the act(s) should have the “intention” to remove the person from the protection of the law, which cannot be found in the ICPPED and the 1992 Declaration. As stated by the international human rights mechanisms tasked with overseeing the implementation of the 1992 Declaration and the ICPPED, the removal of a person from the protection of the law is a consequence of the enforced disappearance rather than a constitutive element.³ No explanation is provided in the ILC’s Commentary justifying the need for this additional element of “intention” in the definition of enforced disappearance.

7. Although the Draft Articles as a criminal law instrument address enforced disappearances in the context of a widespread or systematic attack directed against a civilian population pursuant to or in furtherance of a State or organizational policy, in light of the foregoing it is recommended the following **amendment to Draft Article 3 (2) (i)** in order to bring it in line with the current definition of enforced disappearance in international human rights law : “[...] whereabouts of those persons, *thereby removing them from the protection of the law.*”

8. The definition of enforced disappearance in ICPPED also includes a reference to “any other form of deprivation of liberty”. It is recommended to amend Draft Article 3 (2) (i) in order to avoid creating a gap of protection in cases of deprivation of liberty or freedom that may not qualify as arrest, detention or abduction, but otherwise meet the definition of enforced disappearance. The relevant part of the **provision should read as follows**: “[...] the arrest, detention abduction *or any other form of deprivation of liberty* of persons by, or with the authorization, support or acquiescence of, a State or a political organization [...].”

Persecution

9. Draft Article 3 (1) (h) defines the criminal act of persecution as following:

persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection

¹ See Committee on Enforced Disappearances (CED), Communication No. 1/2013, *Yrusta v. Argentina*, Views adopted on 11 March 2016, para 10.3; and Working Group for Enforced or Involuntary Disappearances’ (WGEID) General Comment on the definition of enforced disappearance, paras. 7-8 (A/HRC/7/2, pp. 11-12). See also Committee against Torture, Communication No. 456/2011, *Guerrero Larez v. Venezuela*, decision adopted on 15 May 2015, paras. 6.4 and 6.6.

² It is also worth noting that in its most recent established jurisprudence, the Human Rights Committee has noted that while the ICCPR does not explicitly use the term “enforced disappearance” in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represent a continuing violation of various rights recognized in the ICCPR. In this regard, when examining alleged violations of article 16 of the ICCPR, the Committee has stated that “the intentional removal of a person from the protection of the law constitutes a refusal of the right to recognition as a person before the law”, without indicating a temporal element or time requirement. See communications No. 2658/2015, *Bolakhe v. Nepal*, Views adopted on 19 July 2018, paras. 7.7 and 7.18; No. 225972013, *El Boathi v. Algeria*, Views adopted on 17 March 2017, paras. 7.4 and 7.10 (see original text in French language); 2164/2012, *Sabita Basnet v. Nepal*, Views adopted on 12 July 2016, paras. 10.4 and 10.9; and No. 2134/2012, *Serna and others v. Colombia*, Views adopted on 9 July 2015, para. 9.4 and 9.5. By contrast, see previous jurisprudence Communications No. 2031/2011, *Bhandari v. Nepal*, 29 October 2014, para. 8.8; 1924/2010, *Boudehane v. Algeria*, Views adopted on 24 July 2014, para. 8.9; 1328/2014, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.8.

³ See CED, Concluding observations on the report submitted by Paraguay under article 29, paragraph 1, of the Convention (CED/C/PRY/CO/1), paras. 13-14; and WGEID’s General Comments on the definition of enforced disappearance, para. 5 (A/HRC/7/2, p. 11) and on the right to recognition as a person before the law in the context of enforced disappearances paras. 1-2 (A/HRC/19/58/Rev.1 p. 10).

with any act referred to in this paragraph or in connection with the crime of genocide or war crimes

10. Relevant Article 7 (1) (h) of the Rome Statute reads the same with the exception of the last part of the provision which states “[...] in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

11. The Draft Article 3, contains, as does the Rome Statute, a “connection” requirement: to amount to a crime under the Draft Articles, persecution needs to be “connected” to a crime under the same article, to the crime of genocide or to any war crime, inasmuch as the underlying acts must constitute a crime falling in at least one of these three categories of crimes. However, neither the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), nor the law establishing the Extraordinary Chambers in the Courts of Cambodia, contain such requirement. In fact, according to ICTY⁴ and ICTR⁵ jurisprudence, under customary international law, persecution as a crime against humanity does not require that its underlying acts constitute crimes under international law, rather that these underlying acts, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under the article on crimes against humanity in the statutes of the two tribunals. It follows that the Rome Statute introduced an additional requirement, which goes beyond customary international law, and constitutes a jurisdiction threshold for the purposes of the ICC. The Draft Articles, on the other hand, should not narrow the definition of persecution as crime against humanity as understood under international customary law.

12. Based on the above, it is proposed the following **amendment to Draft Article 3 (1) (h)**

persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act, whether considered in isolation or in conjunction with other acts, of gravity equal to the act referred to in this paragraph

Meaning of gender

13. Draft Article 3 (3) defines “gender” contained in Draft Article 3(2)(h) as follows:

For the purpose of the present draft articles, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above

14. The language of this provision and Article 7 (3) Rome Statute is the same. However, the definition as it stands falls short to reflect the evolution of international law, in particular international human rights law, which recognizes the notion of gender as a social construct separated from the term sex.

15. The Committee on the Elimination of Discrimination against Women (CEDAW) distinguishes the terms “sex” and “gender”. It states that while the term “sex” refers to biological differences between men and women, the term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences, which result in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.⁶

⁴ See e.g. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Popović et al.*, Appeal Judgement, paras 738 and 766.

⁵ See e.g. International Criminal Tribunal for Rwanda, *Nahimana et al. v. Prosecutor*, Appeal Judgement, para. 985.

⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 28, CEDAW/C/GC/28, para. 5. See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, A/HRC/35/23 (6 June 2017),

16. The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity maintains that the terms “gender” 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.⁷

17. Furthermore, international human rights law recognizes both gender and sex as separated grounds of discrimination based on which an individual might be impeded to exercise his/her human rights, including access to justice and reparations as well as fair trial guarantees. It does so, based on the core principle of non-discrimination, which is embedded in the core international human rights treaties along with a non-exhaustive interpretation of the grounds of discrimination contained therein, aiming at expanding the scope of protection for rights-holders.⁸ For example, in reference to article 2(2) of the International Covenant of Economic, Social and Cultural Rights, which establishes the guarantee of non-discrimination, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. Thereafter, the Committee expressly recognizes sexual orientation and gender identity among the prohibited grounds of discrimination.⁹ Also, CEDAW, has stated that even though “the Convention [on the Elimination of All Forms of Discrimination Against Women] only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women”.¹⁰

18. The definition of “gender” as stated in the ICC Office of the Prosecutor Policy Paper on Sexual and Gender-based Crimes (2014), clearly distinguishes the term “gender” from the term “sex”. The policy states that “ ‘gender’ in accordance with article 7(3) of the Rome Statute (,Statute’) of the ICC, refers to males and females, within the context of society. This

paras. 17-ff. Also, in its In its Guidance Document entitled ‘Addressing the Needs of Women Affected by Armed Conflict’, the ICRC states clearly this differentiation: ‘The term “gender” refers to the culturally expected behaviours of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas “sex” refers to biological and physical characteristics. See: International Committee of the Red Cross (ICRC), *Addressing the Needs of Women Affected by Armed Conflict*, ICRC, Geneva, 2004, p. 7.

- ⁷ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152 (12 July 2018), para. 2. See also para. 6.
- ⁸ As embedded in the nine core international human rights treaties, the principle of non-discrimination, requires that the rights set forth be made available to everyone without discrimination, and that States ensure that their laws, policies and programmes are not discriminatory in impact. See: Report of the United Nations High Commissioner for Human Rights, *Discriminatory Laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, paras. 5-6.
- ⁹ Committee on Economic, Social and Cultural Rights, general comment No. 20 (E/C.12/GC/20), paras. 27 and 32. The Human Rights Committee has held that the reference to “sex” in articles 2(1) and 26 of the ICCPR is to be taken as including sexual orientation; and that the prohibition against discrimination under article 26 of the ICCPR encompasses discrimination on the basis of gender identity, including transgender status. See Communications 2172/2012, *G. v Australia*, Views adopted on 17 March 2017, para 7.12; No. 2216/2012, *C. v. Australia*, Views adopted on 28 March 2017, para. 8.4; No. 941/2000, *Young v. Australia*, Views adopted on 6 August 2003, para. 10.4; and No. 1361/2005, *X v. Colombia*, Views adopted on 30 March 2007, para.7.2; and No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 8.7; and No. 2172/2012, *G. v Australia*, Views adopted on 17 March 2017, para 7.12. See also Reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57 (5 January 2016), para. 7; the Special Rapporteur on trafficking in persons, especially women and children, A/HRC/32/41 (3 May 2016), para. 61; the Special Rapporteur on the human rights of migrants, A/71/285 (4 August 2016), para.123(i); the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, A/73/139 (10 July 2018), para. 7.
- ¹⁰ Committee on the Elimination of Discrimination against Women, general recommendation No. 28, CEDAW/C/GC/28, para. 5.

definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.” It further states that “ ‘Sex’ refers to the biological and physiological characteristics that define men and women.”¹¹

19. In contrast, the definition contained in Draft Article 3(3) appears to equate the terms “gender” and “sex” to social assumptions according to which “women” and “men” should behave according to fixed social roles. Inevitably, this will limit States’ obligations to prevent and punish gender-based crimes, including the crime of persecution against those individuals who do not fit into socially construed identities, attributes and roles of women and men in society; and, thus will result in the denial of the right to access to justice and reparations, as well as in greater impunity.

20. It would be advisable that the Draft Article 3(3) is revised to reflect the evolution of international law, in particular international human rights law, in relation to the social construction of gender; or, alternatively, to remove the definition of gender in the Draft Articles.

Non-state actors committing crimes against humanity

21. Draft Article 3 (2) (a) referring to an attack committed “pursuant to or in furtherance of a State and organizational policy” is understood to extend prosecution (or extradition) for crimes against humanity to non-state actors consistent with the jurisprudence of international criminal tribunals. From an international law of human rights perspective, this is a welcome development. Likewise, Draft Article 6 (8) is also **welcomed and should be maintained**.

Obligation of prevention

22. The elaboration on the duty to prevent crimes against humanity is **one of the major assets of this draft treaty**. It is welcomed in that respect that Draft Article 4 (1) does not limit the obligation of prevention to the State’s territory, but “*to any territory under its jurisdiction*” and that such duty may include “*effective legislative, administrative, judicial or other preventive measures*”. According to the Commentary, failure in relation to this obligation leads to state responsibility.

Immunity of heads of State, head of government or minister of foreign affairs from foreign criminal jurisdiction

23. The Draft Articles do not regulate any issues related to the immunity of heads of state, head of government, ministers of foreign affairs or other State officials from foreign criminal jurisdictions. While Draft Article 6 (5) provides that the fact that the offence was committed “by a person holding an official position” does not exclude criminal responsibility, the Commentary makes it clear that this provision only covers the prohibition of a substantive defence based on the official position, and does not address immunity.

24. Article 27 (2) Rome Statute explicitly states that “*Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*” While this provision regulates the vertical relationship between the ICC and the State Parties, it does not establish jurisdiction over the horizontal relationship among the State Parties, rather is the issue of immunities governed by the applicable legal regime within public international law.

25. The Human Rights Committee has stated that where public officials or State agents have committed certain violations of the Covenant rights, such as torture, and similar cruel, inhuman and degrading treatment, summary and arbitrary killing, and enforced disappearance, including when committed as part of a widespread or systematic attack on a civilian population, the States Parties concerned may not relieve perpetrators from personal

¹¹ The Office of the Prosecutor, International Criminal Court, Policy paper on Sexual and Gender-based crimes, June 2014, p. 3.

responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.¹² The Committee has also stated that immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.¹³

26. While acknowledging that immunity of heads of state, head of government, ministers of foreign affairs or other State officials from foreign criminal jurisdictions is governed by conventional and customary international law and the ongoing work by the ILC on the immunity of state officials from foreign criminal jurisdiction,¹⁴ it is recommended that the Draft Articles provide that such immunities do not constitute in practice a barrier to a general system of accountability and to the obligation to provide effective remedies to the victims of crimes against humanity, including criminal investigations and prosecutions.

Aut dedere aut judicare

27. Draft Article 10 states that “*The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. 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.*”. This language defers from Article 7 (2) CAT according to which authorities must “take their decision in the same manner as in the case of *any ordinary offence of a serious nature*” under domestic law. Nonetheless, **no adverse practical implications** appear to derive from it. Draft Article 10 is **welcomed and should be retained**.

Amnesties

28. The Commentary notes that the instruments establishing the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia provide that an amnesty adopted in national law is not a bar to their respective jurisdictions; and that these courts have recognized that there is a “crystallising international norm” or “emerging consensus”. The Commentary further identifies a trend in regional human rights courts and bodies are finding “amnesties to be impermissible or as not precluding accountability under regional human rights treaties”, treaty bodies are interpreting “their respective treaties as precluding a State party from passing, applying or not revoking amnesty laws” and several States have adopted domestic legislation prohibiting amnesties for crimes against humanity.¹⁵ The Commentary also highlights that the UN Secretariat’s position is not to recognize and condone amnesties for genocide, war crimes, crimes against humanity and gross human rights violations for UN-endorsed peace agreements, and that since the entry into force of the 1998 Rome Statute, several States have adopted national laws that prohibited amnesties and similar measures with respect to crimes against humanity (pages 87-88), noting that: *[...]an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence. Within the State that has adopted the amnesty, its permissibility would need to*

¹² Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, para. 18. See also Human Rights Committee, Concluding observations on the fifth periodic report submitted by Yemen, CCPR/C/YEM/5, para. 6.

¹³ Human Rights Committee, General Comment No. 36 on the right to life, CCPR/C/GC/36, para. 27.

¹⁴ See for a status and summary of the ILC’s work on the issue, http://legal.un.org/ilc/summaries/4_2.shtml, last accessed 10 October 2018.

¹⁵ See also footnotes n° 12 and 13 above, and Human Rights Committee, Concluding observations on the initial report of Sierra Leone, CCPR/C/SLE/CO/1, para. 17, and on the second periodic report of The former Yugoslav Republic of Macedonia, CCPR/C/MKD/2, para. 12 on the fifth periodic report submitted by Yemen, CCPR/C/YEM/5, para. 6. Furthermore, Article 18 (1) of the 1992 Declaration states: “*Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction*”.

be evaluated, inter alia, in the 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." (see Commentary, pages 87-88).

29. While noting that the Commentary suggests that a State adopting an amnesty might be in violation of Draft Articles 10 and 12, it would be advisable that, in light of the foregoing, the Draft Articles explicitly prohibit amnesties for crimes against humanity.

Special and military tribunals

30. The Draft Articles do not contain any specific provision on military tribunals. Draft Article 11(1) states that "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."

31. United Nations Human Rights treaties bodies have found that a trial of a civilian in a military court may constitute a fair trial violation. The Human Rights Committee has noted that while the ICCPR does not prohibit the trial of civilians in military or special courts, "it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. [that] the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned [and that] trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials."¹⁶ The Committee on Enforced Disappearances has stated that "Taking into account the provisions of the Convention and the progressive development of international law in order to assure the consistency in the implementation of international standards, the Committee reaffirms that military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance".¹⁷ In addition, Article 16 (2) of the 1992 Declaration indicates that persons alleged to have committed an enforced disappearance "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts". Indeed, some national laws prohibit trying allegations of crimes against humanity before military tribunals.¹⁸

32. 4. In his Second Report, the Special Rapporteur states that: "While such developments at the national and international levels remain ongoing, they may suggest an emerging view

¹⁶ Human Rights Committee, General Comment 32 on ICCPR Article 14, para. 22. In the last decade, however, the Human Rights Committee has recommended several States Parties to ensure that civilians are not tried by military courts, and that the jurisdiction of military courts does not extend to cases of human rights violations. See Human Rights Committee, Concluding observations on Lebanon, CCPR/C/LBN/CO/3 (April 2018), paras. 43, 44; Cameroon, CCPR/C/CMR/CO/5 (November 2017), paras. 37(b), 38(d); the Democratic Republic of the Congo, CCPR/C/COD/CO/4 (November 2017), paras. 37, 38(e); Pakistan, CCPR/C/PAK/CO/1 (July 2017), paras. 23, 24; Rwanda, CCPR/C/RWA/CO/4 (Mar 2016), paras. 33, 34(d); Chile, CCPR/C/CHL/CO/6 (Jul 2014), para. 22; Sudan, CCPR/C/SDN/CO/4 (Jul 2014), para. 19; Tajikistan, CCPR/C/TJK/CO/2 (Jul 2013), para. 19; Peru, CCPR/C/PER/CO/5 (Mar 2013), para. 17; and Mexico, CCPR/C/MEX/CO/5 (Mar 2010), para. 18.

¹⁷ See Report of the Committee on Enforced Disappearances on its Eight Session, para. 10, https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_SED_8_23242_E.pdf, last accessed on 10 October 2018.

¹⁸ A 2004 report of the International Commission of Jurists acknowledges that military personnel who have committed human rights violations are often tried in military courts, but identifies a global trend towards abolition or at least reform of military courts. Reforms aim at achieving consistency with the rules of procedure used in civilian courts and at legislation barring use of military courts to try civilians). See *Military Jurisdiction and International Law*, International Commission of Jurists, 2004, p. 160, <https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf>, last accessed on 10 October 2018.

that the guarantee of a ‘fair trial’ means that a military court, tribunal, or commission should not be used to try persons alleged to have committed crimes against humanity, unless the alleged offender is a member of the military forces and the offence was committed in connection with an armed conflict” (para. 192).

33. In light of the foregoing, it is recommended that, as a matter of policy, crimes against humanity should not be tried by military courts. Accordingly, it is suggested that the Draft Articles include a provision prohibiting that persons accused of crimes against humanity be tried by military courts.

Treaty Monitoring Body

34. The Draft Articles do not provide for the establishment of a body to monitor the implementation of the Convention on Crimes against Humanity, unlike core human rights instruments.

35. Treaty monitoring bodies have proven to be an effective tool to keep treaties alive. They guarantee that States regularly review their implementation of the obligation to take steps to ensure that everyone under their jurisdiction can enjoy the rights set out under the relevant treaty.

36. The Convention on Crimes against Humanity as a core human rights ought to function, both, as a human rights and criminal justice tool. Thus, in addition to provisions on the implementation by States of the obligations within their criminal justice system, it is **important to have an international body monitoring a State Party’s compliance.**
