

**COMMENTS AND OBSERVATIONS
FROM THE REPUBLIC OF SIERRA LEONE**

**on the International Law Commission's *Draft Articles on Crimes against Humanity*
as adopted by the Commission in 2017 on First Reading**

I. Introduction

1. In accordance with paragraph 43 of the Report of the International Law Commission on the work of its Sixty-Ninth Session (A/72/10), the Republic of Sierra Leone appreciates the opportunity to submit its comments and observations on the Draft Articles on Crimes against Humanity, and accompanying commentaries, which were adopted on first reading in 2017.
2. The people of Sierra Leone experienced the destruction caused by the commission of crimes against humanity during the rebel-initiated war which claimed the lives of thousands of innocent civilians in the decade between March 1991 and January 2002. After several efforts to end the conflict failed, between 1995 and 1999, the government then led by President Ahmad Tejan Kabba requested United Nations assistance to establish the Special Court for Sierra Leone (SCSL). The *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone* (UN-Sierra Leone Agreement), to which was annexed the *Statute of the SCSL* (SCSL Statute), was signed on 16 January 2002.¹
3. The UN-Sierra Leone Agreement, which had been authorized by Security Council Resolution 1315 adopted on 14 August 2000, was the first bilateral treaty to be concluded between the United Nations and one of its member states to pursue a mix of international and domestic crimes committed in the territory of that state. Article 1 of the SCSL Statute mandated the prosecution of "persons who bear the greatest responsibility," *inter alia*, for crimes against humanity (Article 2) committed on Sierra Leonean territory after 30 November 1996. The UN-Sierra Leone Agreement and SCSL Statute entered into force on 12 April 2002. This paved the way for the establishment of the SCSL, which was located in our capital, Freetown. The latter made the SCSL the first modern international criminal court since the Nuremberg and Tokyo Tribunals to be located in the country where the crimes were committed.²
4. Between 2003 and 2013, the SCSL went on to prosecute ten rebel, political and military leaders in the so-called Armed Forces Revolutionary Council, Civil Defence Forces and Revolutionary United Front Trials.³ Nine men were convicted of, among

¹ See the *UN-Sierra Leone Agreement* and the annexed *Statute of the SCSL*, reprinted in 2178 U.N.T.S. at p. 138 and 145. The legislative history of the SCSL is available in *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000.

² For more on the SCSL's contributions, see Charles Jalloh, ed., *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2013).

³ Three individuals belonging to each of the warring parties were indicted. But, due to the untimely death of one of the accused, his case was discontinued and judgments were only rendered in respect of eight suspects, namely,

others, crimes against humanity committed during the latter half of the Sierra Leonean conflict. The convicts were sentenced to long prison terms. They were subsequently sent to Rwanda to serve their sentences. Charles Taylor, who was tried by the SCSL in the Netherlands for security reasons, was also convicted of war crimes and crimes against humanity. He is currently jailed in the United Kingdom.

5. Sierra Leone, having had first-hand experience with the devastating effects of crimes against humanity, is deeply committed to the fight against impunity. That commitment also explains why Sierra Leone is a state party to the *Rome Statute of the International Criminal Court* (Rome or ICC Statute)⁴ as well as one of only 11 signatories to date of the African Union's *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol).⁵ The latter instrument, once it achieves the fifteen ratifications required for entry into force, will give the African Court complementary jurisdiction similar to that of the International Criminal Court (ICC).⁶ The International Criminal Law Section of the African Court will be empowered to carry out investigations and prosecutions of 14 serious international, transnational and other crimes including aggression, crimes against humanity, genocide, war crimes and terrorism. (See Articles 28A to 28M, Malabo Protocol).
6. Against this backdrop, Sierra Leone attaches great importance to the ILC's past and current work on international criminal law. That is why we were pleased to support, along with Chile, the Federal Republic of Germany, the Hashemite Kingdom of Jordan and the Republic of Korea, the side event on the progress on the drafting of a convention on the prevention and punishment of crimes against humanity convened by the Special Rapporteur on the margins of the 16th ICC Assembly of States Parties in New York on 11 December 2017. Similarly, during the 73rd session of the General Assembly and in commemoration of the 20th anniversary of the Rome Statute on 25 September 2018, Sierra Leone joined the delegations of Belgium, Finland, Luxembourg, Slovenia and the United Kingdom to support a side event on prosecuting sexual and gender based crimes at the ICC. We believe that the ILC's contributions on crimes against humanity, when combined with its efforts on related topics such as the immunity of state officials from foreign criminal jurisdiction and hopefully soon "universal criminal jurisdiction",⁷ carry potential to contribute in

Alex Brima, Santigie Kanu, Ibrahim Kamara (AFRC Case); Issa Sesay, Morris Kallon and Augustine Gbao (RUF Case); and Moinina Fofana and Allieu Kondewa (CDF Case). Charles Taylor was the ninth convict.

⁴ 17 July 1998, entered into force 1 July 2002, 2187 U.N.T.S. at p. 91.

⁵ Sierra Leone signed the Malabo Protocol, which had been adopted on 27 June 2014, on 29 January 2016. See African Union Commission, Office of Legal Affairs, *List of Countries that have Signed, Ratified or Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, [://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf](https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf) (last visited 1 December 2018).

⁶ See Articles 11 and 46H of the Malabo Protocol: https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf (last visited 1 December 2018).

⁷ This topic was added to the Commission's long-term programme of work during the 70th session, along with sea level rise in relation to international law. Sierra Leone has already expressed its strong support for both topics, joining the many delegations calling on the ILC to move these two timely topics on to its active agenda. See Sierra Leone's position expressed before the Sixth Committee of the General Assembly during the 73rd session on

significant ways to the ongoing global struggle to counter impunity for serious violations of international law. (See A/73/10, Annex A at 307).

7. Sierra Leone therefore commends the ILC's work on the topic Crimes against Humanity. We noted that the ILC only added the topic to its active agenda and appointed a special rapporteur in 2014. The Commission was nevertheless successful in completing, just three years later, a first reading of the draft preamble together with 15 draft articles and a draft annex along with commentaries. In this regard, we wish to thank the current and former members of the Commission and its Drafting Committee for their valuable input and commitment to the topic. We are deeply grateful to Mr. Sean Murphy, the Special Rapporteur, for his important role in moving the item forward and for his tireless efforts and invaluable contributions. Sierra Leone also appreciates the hard work of the staff of the Codification Division of the Office of Legal Affairs of the United Nations which, *inter alia*, prepared the 2016 memorandum (A/CN.4/698) concerning existing treaty-based mechanisms of relevance to the Commission's deliberations.
8. Sierra Leone generally agrees with the ILC's proposed draft articles on crimes against humanity as adopted on first reading. Among these, we especially welcome the recognition that crimes against humanity threaten the peace, security and well-being of the world (preamble, paragraph 2); that their prohibition bear a *jus cogens* character meaning that, by their very nature, they constitute a norm of general international law from which no derogation is permitted (preamble, paragraph 3); that, like the case for the crime of genocide, states ought to bear distinct duties to prevent and to punish crimes against humanity (Articles 2 and 4); that states should take the necessary measures to ensure crimes against humanity are criminalized under their national laws, and importantly, that such measures cannot be defeated by pleas to procedural bars such as command responsibility, official capacity or statutory limitations (Article 6); that states ought to take the necessary measures to establish their jurisdiction in certain circumstances (Article 7) and should carry obligations to ensure that allegations of crimes against humanity are promptly and impartially investigated by their competent authorities (Article 8); that they have a duty, when an alleged offender is present in their territory, to take preliminary measures such as placing the suspect in custody or taking other legal measures (Article 9), and that thereafter if the circumstances so warrant, they should submit the case to their competent authorities for prosecution unless they extradite that person to another state or an international penal tribunal (Article 10). We also welcome the important clauses on extradition (Article 13) and mutual legal assistance (Article 14).
9. Nonetheless, and considering also that – like most African States – we were unable to participate in the annual Sixth Committee debates since the topic was added to the Long Term Programme of Work, Sierra Leone wishes to express its views regarding the ILC draft articles and commentaries on crimes against humanity. Having

agenda items "Scope and application of the principle of universal jurisdiction" on 10 October 2018 (<http://statements.unmeetings.org/media2/19409626/sierra-leone.pdf>) and on the "Report of the International Law Commission on the Work of its Seventieth Session" on 24 October 2018 (<http://statements.unmeetings.org/media2/20304647/sierra-leone-82-cluster-1.pdf>).

benefited from United Nations and other international community support for the investigation and prosecution of crimes against humanity, through the SCSL, we aim to draw on and to reflect our country's all too intimate familiarity with the widespread commission of such crimes in one of the worst conflicts in recent memory. By addressing our concerns, which could help to strengthen the second reading text that the Commission might submit to the General Assembly, we consider that the ILC's contributions on crimes against humanity specifically and the development of the nascent field of international criminal law more generally could be further strengthened.

II. General Comments on the ILC's Goal for the Crimes against Humanity Project

10. As a preliminary issue, Sierra Leone strongly supports the ILC's stated goal for this project, which as we understand it, is to formulate draft articles that could form the basis for a future convention for the prevention and punishment and crimes against humanity. In this context, as a state party to the Rome Statute and signatory of the Malabo Protocol, we also appreciated the ILC's efforts to ensure that its proposed draft articles avoid potential conflicts with the obligations under the constituent instruments of international or hybrid criminal courts or other tribunals, especially the permanent ICC.
11. The Rome Statute must necessarily be a starting point for the draft articles on crimes against humanity. However, Sierra Leone considers it also desirable for the ILC to ensure that its proposals not only fully respect the integrity of the ICC Statute, which was a negotiated compromise amongst states, but that where necessary, it also progressively develops the law of crimes against humanity. This is important given that, although a possible future treaty would only apply at the horizontal level, it offers a golden opportunity to assist states to bolster the current global legal architecture to prevent, punish and deter crimes against humanity.
12. With a stronger ILC draft instrument on crimes against humanity, it is possible that some States that have not yet domesticated the Rome Statute would be inspired to adapt the ILC proposals such as those on extradition and mutual legal assistance and to incorporate them into their national laws. This, on balance, will likely help fill existing legal gaps and thereby ensure the more effective national prosecutions of crimes against humanity. It will also be consistent with the complementarity principle, which underpins the ICC Statute and emphasizes the primacy of national prosecutions, for one of the most egregious crimes known to international law.
13. Sierra Leone would return to this issue in our comments on specific draft articles, especially in relation to the definition of crimes against humanity, the issue of official capacity, blanket amnesties for crimes against humanity and absence of a proposed monitoring mechanism. Before that, we first offer our views on the Commission's overarching approach to this topic.

III. Comments on the ILC's Approach to the Codification and Progressive Development of Crimes Against Humanity Law

14. Generally, there are aspects of the ILC's first reading draft articles on crimes against humanity that appear to (largely) reflect "codification" of the customary law of crimes against humanity. An example of this would be the definition of the crime. There are other aspects that constitute "progressive development", as both of those terms are defined by Article 15 of the Statute of the Commission. The latter seems to include the provisions on extradition and mutual legal assistance in relation to crimes against humanity specifically. The question might therefore arise whether this approach is sound for this specific topic.
15. Sierra Leone finds it appropriate that the first reading text reflects a mix of progressive development and codification of the law of crimes against humanity for several reasons. First, in our view, the type of subject matter under consideration and the virtually inseparable nature of the tasks of codification from progressive development warrant this approach.⁸ Indeed, as with other ILC projects, the draft crimes against humanity articles will necessarily reflect a combination of the two.
16. Second, although there is considerable practice in the international investigation and prosecution of crimes against humanity starting with the Nuremberg and Tokyo International Military Tribunals through to the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the SCSL and the ICC, there is relatively limited State practice investigating and prosecuting crimes against humanity at the national level within national courts. Reliance on the experience of the international criminal tribunals, even if not state practice as such, becomes especially important to assist in consolidating the law of crimes against humanity.
17. Third, the ILC project was partly justified as a gap filling convention intended to assist states in their efforts to combat crimes against humanity. This required taking into account treaty-based international crimes such as the conventions on genocide, war crimes and torture. It also implied that there could be some value in an examination of relevant transnational crimes treaties. To the extent that the latter could offer model language that might inform the more effective prohibition and punishment of crimes against humanity. Nonetheless, in our view, it is important that the Commission remain mindful of the specificities of crimes against humanity. The distinctive nature of the crime, which also happens to be the crime of widest scope of application compared to genocide and war crimes, should also be taken into account.
18. Fourth, Sierra Leone noted with satisfaction that the ILC has not, and rightly so in our view, elected to flag which of the draft articles on crimes against humanity adopted

⁸ See *Report of the Committee on the Progressive Development of International Law and its Codification, Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1, para. 7* and *Yearbook of the International Law Commission, 1979, vol. II (Part One), document A/CN.4/325, para. 102, and ibid., 1996, vol. II (Part Two), paras. 156 and 157.*

on first reading reflects codification and which reflects progressive development. This approach to the crimes against humanity project seems to be consistent with the Commission's settled practice developed over the decades.⁹ In any case, this also appears more consistent with the expressed aim of developing draft articles based primarily on considerations whether they would likely help accomplish the goals of prevention and punishment of crimes against humanity. After all, the draft articles are means to an end rather than ends in themselves.

IV. Comments and Observations on Specific Draft Articles

A. Title of the Draft Articles

19. **The ILC's work on the present topic, as adopted on first reading, is entitled "Draft articles on crimes against humanity."**
20. **Comments:** The ILC, in the syllabus presented for this topic in 2013, explicitly declared its intention to undertake a two-pronged project when it stated that: "The objective of the International Law Commission on this topic, therefore, would be to draft articles for what would become a Convention on the *Prevention and Punishment of Crimes against Humanity*". [Emphasis added]. (See Annex B of A/68/10, para. 3). This same position is reflected in the first report of the Special Rapporteur. (A/CN.4/680, para. 13).
21. The subsequent reports of the Special Rapporteur, the ILC plenary debates, the reports of the Chairperson of the Drafting Committee and the Commission's annual reports to the General Assembly all reflect the same assumption regarding the *prevention* and the *punishment* of crimes against humanity. Perhaps even more importantly, the idea that the topic concerns both measures for the *prevention* and measures for the *punishment* of crimes against humanity is expressed in the preamble as well as various substantive draft articles and the commentary.
22. Draft Article 1 on Scope makes this point clear when it provided that the draft articles apply to both prevention and punishment of the crime. Similarly, Draft Articles 2 and 4 respectively address the "general obligation" and the "obligation of prevention" in respect of crimes against humanity. The two provisions would require states to undertake measures ensuring that crimes against humanity are prevented in conformity with international law. Prevention is also implied by Draft Article 5, concerning *non-refoulement*. The commentary to the preamble and the above draft articles put the prevention and punishment objectives of the instrument beyond any doubt.
23. Given the premise of the crimes against humanity study, Sierra Leone suggests that the ILC emphasize both the prevention and punishment aspects of crimes against

⁹ *Yearbook of the International Law Commission*, 1996, vol. II (Part Two), paras. 147(a) and 156-159; and *Yearbook of the International Law Commission*, 1979, vol. II (Part One), document A/CN.4/325, para. 13 and *The Work of the International Law Commission*, 2017, vol. I, 47-49 (noting that the formal distinction drawn by the ILC Statute had proved "unworkable" in practice, for which reason, "the Commission has proceeded on the basis of a composite idea of codification and progressive development"). Indeed, "[i]n practice, the Commission's work on a topic usually involves some aspects of the progressive development as well as codification of international law, with the balance between the two varying depending on the particular topic." See, in this regard, *ibid*, at 7.

humanity in the title as well as in the substance of the draft articles. This would, firstly, better reflect the ILC's own stated objective in the syllabus for the topic and in the commentary to Draft Article 1. Secondly, it would also help signal the equal importance of prevention and punishment. Prevention, which is forward looking, complements punishment, which is backward looking. The two seem equally important. Both would therefore ideally be reflected in the title, preamble as well as the substantive draft articles concerning crimes against humanity. Thirdly, such a change may also help make a future crimes against humanity convention based on an ILC draft more analogous to the treaty addressing the sister crime prohibited by the Convention on the *Prevention and Punishment of the Crime of Genocide*.¹⁰ [Emphasis added]. Lastly, we might note that legal scholars who have studied crimes against humanity and proposed their own draft convention on the same topic have also taken the same approach.¹¹

24. **Suggestions:** For the above reasons, Sierra Leone proposes that the ILC amend the title of the draft articles adopted on first reading as follows: Draft Articles on the Prevention and Punishment of Crimes against Humanity.

B. Draft Article 1 - Scope

Draft Article 1 provides that the “draft articles apply to the prevention and punishment of crimes against humanity.”

25. **Comments:** Regarding scope, *ratione materiae*, the ILC choose a narrow approach for this project. The focus is solely on crimes against humanity. At the same time, considering that the 1948 Genocide Conventions and the Four 1949 Geneva Conventions¹² were concluded half a century ago, they naturally reflected the thinking of the immediate post World War II era. As such, as important as they are in providing definitions for those crimes and specifying various other important obligations for states, they lack a detailed regime of inter-state cooperation similar to that which the ILC has now helpfully proposed for the draft articles on crimes against humanity. It is even possible that the lacuna concerning inter-state cooperation may have contributed to the lag in the investigation and prosecution of the crime of genocide and perhaps even the “grave breaches” of the Geneva Conventions and their two 1977 Additional Protocols¹³ within national courts. (See, in this regard, Articles 49, GC I, Art. 51, GC II, Art. 130 GC III, Art. 147 GC IV).

¹⁰ 78 U.N.T.S. 277.

¹¹ See Leila Sadat, ed., *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011), Appendices I and II at pp. 359-448 containing, in English and French versions, the “*Proposed International Convention on the Prevention and Punishment of Crimes against Humanity*” and “*Proposition de Convention Internationale sur la Prévention et la Répression des crimes contre l’humanité*”.

¹² See *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention III Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; *Geneva Convention IV Relating to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.

¹³ *Protocol 1 Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims in International Armed Conflict*, 8 June 1977, 1125 U.N.T.S. 3 and *Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 609.

26. Given that crimes against humanity, genocide and war crimes are often perpetrated at the same time, Sierra Leone considers that the other core crimes could have also been covered in the ILC's present draft articles. This would have allowed for the extension of the regime of inter-state cooperation, especially the essential mutual legal assistance and extradition clauses contained in Draft Articles 13 and 14, to also encompass the other core crimes condemned by international law. It may be that it is not feasible, given the current stage of the ILC project, to revisit the scope to include the other core international crimes.
27. Sierra Leone notes that the MLA Initiative promoted by Argentina, Belgium, the Netherlands, Slovenia and Senegal seeks to introduce a stronger inter-state cooperation in relation to all the core crimes. This could be a vehicle through which some of our concerns might be addressed in the future. But, as that initiative does not appear to be mentioned anywhere in the entire chapter on crimes against humanity in the 2017 ILC Report, it remains unclear to Sierra Leone the extent to which the Commission and the promoters of the MLA Initiative have liaised with each other. (See Chapter IV of A/72/10, p. 9-127).
28. **Suggestions:** Although there appears to be some areas of divergence, especially as regards their intended scope of application, Sierra Leone considers that closer cooperation between the ILC and the supporters of the MLA Initiative could be further explored. We believe that such consultations and exchange of views could benefit the Commission's work on crimes against humanity. Indeed, great care should be taken to ensure that the outcomes of the two separate processes mutually reinforce each other. This might include inviting technical experts of the MLA process for a two to three day working visit with the ILC during the seventy-first session. In advance of such meetings, any suggestions aimed at furthering the complementarity of the two initiatives could also be taken into account in the final report of the Special Rapporteur.
29. For similar reasons, and consistent with Article 26 of the Commission's Statute, Sierra Leone considers that a technical meeting between the ICC and the ILC could help strengthen the final version of the Commission's draft articles and their commentaries. Such engagement would potentially enable ICC prosecutors, defence lawyers, representatives of chambers and the registry, including victims counsel and others, to share with the ILC valuable practical insights gained from their investigation, prosecution, defence and adjudication of crimes against humanity in multiple situation countries. This could be part of a joint review of the first reading draft articles. The Commission could then take appropriate suggestions into account during the second reading.

C. Draft Article 2 - General obligation

This draft article provides that "[c]rimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish."

30. **Comments:** The first part of this provision is consistent with the customary law of crimes against humanity, which no longer requires a nexus to an armed conflict or any discriminatory intent for proof of this crime. (See, for example, *Eichmann*, District

Court (1968) 36 ILR 5 at 49; *Barbie*, Cour de Cassation, (1990) 78 ILR 124 at 136; ILC Report (1996) A/51/10 at 96); *Tadic*, ICTY, Trial Chamber, (1997), para. 652; Appeals Chamber (1999), paras. 282-305) and Article 7, ICC Statute).

31. Sierra Leone also appreciates that the second part of Draft Article 2, which mandates that whether or not the relevant conduct has been criminalized in national law, crimes against humanity are grave crimes “under international law” and are punishable as such.¹⁴ We particularly welcome the second part of this provision which sets out an explicit duty on states to undertake to prevent and punish crimes against humanity.
32. Paragraph 1 of the commentary explains that Draft Article 2 sets out the general obligation of states to prevent and punish crimes against humanity. The substance of that duty is said to be fleshed out through later draft articles, especially Draft Articles 2, 4 and 5. In Sierra Leone’s view, Draft Article 2 and Draft Article 4 are obviously inter-related. As we understand their current formulation, especially when read together with the commentary, Draft Article 2 sets out two separate undertakings of the State: first, the duty to *prevent*, and second, the duty to *punish* crimes against humanity. Draft Article 4 focuses on the obligation of prevention only. The bulk of the remaining draft articles then elaborate the punishment aspects.
33. Draft Article 2 should be treated as a free-standing and autonomous provision. In our view, if it is to have substantive content, prevention of crimes against humanity must necessarily be understood as a much richer notion that goes well beyond mere criminal prosecutions taking into account evolving doctrines such as the responsibility to protect. We therefore doubt that prevention which links back to paragraph 5 of the general commentary to the preamble is only “advanced by putting an end to impunity for the perpetrators of such crimes”. It may be that this stance is influenced by the manner in which its analogous clause in the Genocide Convention has been interpreted by the International Court of Justice. (See *Bosnia and Herzegovina v. Serbia v. Montenegro*, 26 February 2007, paras. 162-165). This point appears from the framing of current paragraph 1 of the commentary which suggests that “the content of this general obligation [of prevention] is addressed through the various more *specific obligations* set forth in the draft articles that follow, beginning with draft article 4”. [Emphasis added].
34. If this reading is correct, as currently presented, Draft Article 2 might be effectively swallowed by or merged into Draft Article 4. This is because the former could be construed merely as an elaboration of the specific legislative, administrative, judicial or other measures that the state has to pursue to discharge the obligation of prevention of crimes against humanity. In our view, account must be taken of the ICJ’s own caution that it was not purporting to establish “a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts” (*Bosnia and Herzegovina v. Serbia v. Montenegro*, 2007, para. 429). Thus, we consider that the duty to prevent

¹⁴ See *Yearbook of the International Law Commission*, 1996, Vol. II (Part Two), p. 17, para. 40 (art. 1)).

crimes against humanity ought to be enriched by taking into better account the developments in international community efforts to be more proactive in relation to the prevention of atrocity crimes. As with the crime of genocide, when it comes to crimes against humanity, the nature of the acts in issue indicates that care should be taken to reflect the interrelatedness, but also significantly, the independent nature of the two relevant duties and provisions in the commentary.¹⁵

35. **Suggestions:** Regarding the commentary, especially to Draft Article 2, consideration could be given to explaining the meaning of the separate obligation to prevent and the separate duty to punish. In this vein, the ILC might consider elaborating the more general aspects of the scope of the duty to undertake to prevent and to undertake to punish in the commentary to Draft Article 2. That aspect ought to recognise that prevention does not end with prosecution and punishment of perpetrators of crimes against humanity. Some particularities of the obligation of prevention could then be the focus Draft Article 4 and the commentary to it. This would include in relation to how best to promote international and regional cooperation to anticipate and avert crimes against humanity. It might also include whether the duty applies internally as well as externally in relation to other states. In other words, we would suggest a careful review of the commentary to these twin provisions to ensure that there is a clearer separation of the content of the two sets of obligations. It might be useful, in this regard, to examine the approach of the Special Rapporteur's first report (A/CN.4/680, paras. 111-113). Relatedly, we consider that aspects of the current commentary to Draft Article 4 could perhaps be moved up to under Draft Article 2 with the appropriate modifications. This might also assist in addressing the imbalance in the current text whereby the commentary to Draft Article 2 seems short while that to Draft Article 4 is relatively lengthy.

D. Draft Article 3 - Definition of crimes against humanity

This central provision defining crimes against humanity was borrowed verbatim from Article 7 of the Rome Statute of the International Criminal Court. Mostly stylistic changes were made in Draft Article 3 to accommodate the specificities of the current topic. The only new element, which is highly welcomed, is the "without prejudice" clause incorporated into paragraph 4 of the draft article.

36. **Comments:** The ILC expressed a preference for the ICC's crime against humanity definition because it has been accepted, at least in principle, by many states. It is true that the same definition is also now being used in the adoption or amendment of national legislation on crimes against humanity. These pragmatic reasons seem to also be responsive to the concerns of some states, as expressed in the Sixth Committee debates, regarding the need to avoid possible conflicts between the ILC crimes against humanity topic and the Rome Statute system.

¹⁵ See, for a similar view, Advisory Committee on Issues of Public International Law, *Advisory Report on the ILC Draft Articles on Crimes Against Humanity*, CAVV Advisory Letter No. 32, The Hague, August 2018, p. 5 and William Schabas, "Prevention of Crimes Against Humanity", 26 September 2018, JICJ (forthcoming).

37. Still, although it is true that the Rome Statute definition of crimes against humanity is considered to largely reflect customary international law, in Sierra Leone's view, the Commission should not lose sight of the fact that the ICC definition of crimes against humanity is narrower in some respects than the definition of crimes against humanity under customary international law. For this reason, an important question for us is whether, in adopting in its entirety the Rome Statute definition of the crime, minor adjustments could not be made to improve it – as at least two other states have also suggested.¹⁶ This would reflect the fact that, twenty years after the Rome Statute, case law interpreting the crime contained in Article 7 to concrete cases has begun to accumulate. That same jurisprudence, which will no doubt continue to evolve and should inform future interpretations of this ICC-based definition, has revealed some drafting mistakes that were not evident when the ICC Statute was negotiated in 1998.
38. There is also the separate, but related, concern whether the ILC definition of crimes against humanity should take into account other developments in international law since the Rome Statute was negotiated in May to July 1998. Elements of the definition of the crime, for example in relation to enforced disappearances as a crime against humanity, has since been phrased in a way that is much broader than the definition actually included in Article 7, paragraph 2(i), of the Rome Statute.¹⁷
39. Below, we focus on three issues that appear to arise from the relatively narrower ICC definition of crimes against humanity that the Commission has endorsed with the adoption of Draft Article 3. In relation to the first and second of these, concerning the so-called contextual threshold for crimes against humanity, we suggest that some clarifications to the current commentary could be useful. As to the third, we propose slight adjustments to the definition in the draft article. We do the latter with some caution. This is because, in as much as we would suggest these changes, we would not favour for the Commission to further reopen or radically alter the ICC-based draft definition. To do so could undermine the desired legal certainty. It might also upset the balance that the ILC and many states parties to the ICC might prefer in the otherwise largely identical definition of the crime contained in the present draft articles.

Directed against any civilian population could include persons hors de combat

40. First, Draft Article 3, paragraph 1 defines the prohibited target of crimes against humanity as “any civilian population”. We understand “any” to have the widest possible meaning and the term “civilian”, the content of which has generated some jurisprudential debate over the years, to mean those persons who are not military personnel ought to be the main or primary objects of the attack. However, in line with established ICTY, ICTR, SCSL and some of the ICC jurisprudence, the presence of

¹⁶ See the statements by Croatia and Mexico before the Sixth Committee of the General Assembly in 2015, *22nd meeting (A/C.6/70/SR.22)*, para. 78; and Mexico, *21st meeting (A/C.6/70/SR.21)*, paras. 52–54.

¹⁷ The definition includes the following language that could be removed: “with the intention of removing them from the protection of the law for a prolonged period of time”. See Articles 2 and 5 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, 2716 U.N.T.S. 3, adopted 20 December 2006, entered into force on 23 December 2010. The instrument currently has 98 signatories, including Sierra Leone (6 February 2007), of which 59 are parties.

some combatants in a given civilian population is insufficient to deprive them of protected civilian status. Any doubts in that regard must be resolved in favour of the conferment of such status.

41. "Population" encompasses *some* or part of the population as opposed to the *whole* population. It is therefore sufficient to show that, rather than being against a limited and randomly selected number of individuals, enough individuals were targeted in the course of the attack. Indeed, it has been debated in the tribunal case law whether the terms "civilian population" also include military personnel who are *hors de combat* who have laid down their weapons, either because they have been decommissioned, or are wounded or because they have been detained. Some existing case law suggests that such personnel are covered within the ambit of crimes against humanity. But a somewhat different view has also been expressed.¹⁸
42. **Suggestions:** Sierra Leone welcomes the helpful explanations given by paragraphs 17 to 20 of the commentary to this draft article. We believe that, though it seems implied that the law of crimes against humanity may protect military personnel who are no longer engaged in combat, for whatever reasons, the Commission should consider putting the issue beyond any doubt by making it even clearer that the reference to civilian is intended simply to apply to "non-combatants" and that it could also cover all *persons hors de combat* including peacekeepers. Peacekeepers are considered to be civilians to the extent they fall within the definition of civilians laid down for non-combatants in customary international law. Thus, some clarifications of this point in the commentary might help avoid unnecessary confusion.

A State or Organizational Policy is not required by customary international law

43. Second, in explaining the meaning of the phrase "attack directed against any civilian population" under Draft Article 3, paragraph 2(a) which is what qualifies certain acts as crimes against humanity, the Commission basically follows Article 7 of the Rome Statute which contemplates 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". When combined, with a reading of the ICC Elements of Crimes, which provides that the "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population", a narrower scope is carved out for the crime than under customary international law. This is because the latter formulation re-introduces the State/organizational policy requirement, which according to the ICTY Appeals Chamber in the *Kunarac* Case (2002, paragraph 98), is no longer required under customary international law. Like the ICTY Appeals Chamber, Sierra Leone does not consider the policy element a requirement for proof of crimes against humanity under customary international law.

¹⁸ In *Martic*, the ICTY Appeals Chamber found that the term "civilian" has the same meaning as that under Article 50 of Additional Protocol I. This seemed to suggest that it excludes persons *hors de combat*, for example, prisoners of war. This appears to have contradicted other case law and would remove protections for, say, prisoners of war. See, *Martic*, ICTY, Appeals Chamber, 8 October 2008 at paras. 296-302. Later ICTY, ICTR and SCSL jurisprudence has clarified that this finding has to be further nuanced because former combatants who are not engaged in fighting are covered within the meaning of civilians.

44. The ambiguity of the policy requirement which predated the adoption of the Rome Statute has already caused challenges for interpreters of Draft Article 7(2) (a), including ICC judges. Questions center on the meaning of State or organizational policy to commit such attacks and whether or not only State or State-like entities can commit crimes against humanity. The issue has spawned considerable legal scholarship, with academics lining up on one or the other side of the issue.¹⁹ The same pattern can be found among some ICC judges who are tasked with interpreting the statute. Some of them have given divergent interpretations, including most prominently, in the context of the authorization of the prosecutor's investigation of the Kenyan Situation.²⁰
45. For this reason, Sierra Leone welcomes the ILC's important clarification at paragraphs 22 to 33 in the commentary that crimes against humanity can be committed not only by State actors, but also by State-like organizations. We consider that, contrary to the suggestion of some academics, such acts can also be carried out by non-state actors without any formal affiliation or link to the State and or its organs. This would include organized rebel groups or loose and informal networks of such groups as well as tribes. We would note that the Commission reached a similar conclusion when it concluded, in its preparatory work in relation to what became the Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996, that 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 (or, in today's language, the "widespread or systematic attacks") that may give rise to crimes against humanity.
46. Sierra Leone further considers that the policy requirement is a modest threshold that is aimed at excluding isolated and random acts. Such acts, due to their random nature, are not sufficiently widespread or systematic. They cannot therefore fall within the ambit of crimes against humanity as defined in Draft Article 3. We also consider that it might be useful to stress that a policy is not a formal requirement that there be an official document or instrument of some kind. Rather, policy can be inferred solely from the manner in which the acts occur. We also agree with the ILC's conclusion at paragraph 31 of the commentary to Draft Article 3 that, "[a]s a consequence of the "policy" potentially emanating from a non-State organization, the definition set forth in paragraphs 1 to 3 of draft article 3 does not require that the offender be a State official or agent."

¹⁹ See, for instance, Claus Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision," 23 LJIL 855 (2010); William Schabas, "Prosecuting Dr. Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes," 23 LJIL 847 (2010); Charles Jalloh, "Situation in the Republic of Kenya," 105 AJIL 540 (2011); Gerhard Werle and Boris Burghardt, "Do Crimes Against Humanity Require the Participation of a State or a 'State-like' Organization?," 10 JICJ 1151 (2012); Charles Jalloh, "What Makes a Crime Against Humanity a Crime Against Humanity", 13 AUJLR 381 (2013) and Leila Sadat, "Crimes Against Humanity in the Modern Age", 107 AJIL 334 (2013).

²⁰ 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," ICC, Pre-Trial Chamber, 31 March 2010.

47. **Suggestions:** Sierra Leone has not proposed a deletion of the State or organizational policy requirement from the ICC definition, which has been adopted by the ILC, even though it is not part of customary international law. We consider that this could be too big of a change given the earlier stated preference to maintain general consistency with crimes against humanity in the Rome Statute. However, we would suggest that the Commission emphasize that this requirement in its draft article is without prejudice to the existing customary international law on the matter. The ILC may also wish to consider clarifying in its commentary that this standard ought to be applied flexibly and in accordance with the established rules of treaty interpretation under customary law. As part of this, given the controversy on this issue, it might emphasize that the formal nature of a group and the level of its organization, including whether or not it has an established hierarchy, should not be the defining criterion for proof of crimes against humanity. Instead, the key question ought to be whether the group has the capacity to carry out the underlying prohibited acts amounting to crimes against humanity.

Persecution as a Crime against Humanity does not require link to other core crimes; and if it does, it is missing the crime of aggression

48. Finally, regarding the third example where Draft Article 3 (which is based on ICC Article 7) unnecessarily narrows down customary international law, Sierra Leone considers that the definition of *persecution* as a crime against humanity in paragraph 1(h) of Draft Article 3 stands at odds with customary international law. Most authorities confirm that persecution as a crime against humanity under customary international law does not require an attack against an identifiable group based on one of the defined political, racial, ethnic, cultural or other grounds “in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes.” (See, for example, Article II(1)(c), Control Council Law No. 10 (1945); Article 5(h), ICTY Statute; Article 3(h), ICTR Statute; Article 2(h), SCSL Statute; Article 5; Article 5 ECCC Law and Article 28C(1)(h) of the Malabo Protocol).

49. Even the ILC’s early work on crimes against humanity has long recognised the need to delink the important crime of persecution from other international crimes. Though not initially the case, the previous work of the Commission in relation to the 1954 Draft Code of Offences against the Peace and Security of Mankind²¹ and 1996 Draft Codes of Crimes against the Peace and Security of Mankind,²² many national laws domesticating the Rome Statute, international instruments such as the ICTY and ICTR Statute and case law,²³ all do not reflect this requirement for the crime of persecution to be considered to have been committed. In this regard, as succinctly explained by an ICTY Trial Chamber, “although the Statute of the ICC may be

²¹ See, in this regard Article 2(11), Report of the ILC on the Work of its Sixth session, *Yearbook of the ILC*, 1954, vol. II, and accompanying commentaries at 150 (explaining that the Commission decided to enlarge the scope of the inhumane acts that would constitute crimes against humanity independent of whether or not they are committed in connexion with other offences defined in the draft code).

²² See Article 18(e) of the *Draft Code of Crimes against the Peace and Security of Mankind*, *Yearbook of the ILC*, 1996, vol. II, Part Two.

²³ Kupreskic, ICTY, Trial Chamber, 14 January 2000 at para. 581.

indicative of the *opinio juris* of many States, Article 7(1) (h) is not consonant with customary international law.”²⁴ This led that ICTY trial chamber, and another in the case *Kordic v. Cerkez*,²⁵ to explicitly reject the notion that persecution must be linked to other core crimes to meet the contextual threshold of crimes against humanity.

50. Moreover, it makes little sense to retain this connecting requirement between persecution as a crime against humanity and the two other mentioned international crimes. This is because, in the ICC context at the vertical level, the same tribunal would at least have guaranteed jurisdiction over war crimes and genocide. Here, in a setting where the intent is to have a standalone convention applied by states within their national courts, it is entirely possible that an impunity gap would be introduced or left open in relation to the investigation and prosecution of persecution as a crime against humanity. For some states may well be contracting parties to the Genocide and Geneva Conventions, but not necessarily parties to a future crime against humanity convention.²⁶

51. **Suggestions:** As Sierra Leone considers that persecution is a standalone and broader crime against humanity, as defined by customary international law, we propose the deletion of the part of the current definition of the crime that reads “in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes” from Draft Article 3. The definition, as amended, is a technical change with wide implications for the effectiveness of the prohibition of persecution. It would read: “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 recognised as impermissible under international law, ~~in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes~~”.

52. Another concern, with the ILC endorsed definition of persecution as a crime against humanity, is that it excludes another ICC connector crime (i.e. the crime of aggression). This was a substantive change. It seems understandable since, at the time of the adoption of the provisional definition of the crime in 2015, the crime of aggression had not yet been ratified by the requisite number of states required for it to enter into force for the ICC. Nor, importantly, had the prosecution of the crime by the Court been formally activated. Both the number of states required for entry into force and the trigger for potential use of the crime were accomplished only in the past year or so. However, to the extent that the future convention seeks to complement the Rome Statute regime and to be in harmony with it, failing to account for the recent legal developments would further unnecessarily narrow the reach of crimes against humanity. It might even put the ILC instrument on a collision course with the national legislation of states, especially states parties to the ICC that might have

²⁴ Kupreskic, *ibid*, at para. 580.

²⁵ Kordic & Cerkez, ICTY, Trial Chamber, 26 February 2001 at para. 197.

²⁶ As of writing, only 149 of the 193 UN member states are parties to the Genocide Convention. This may not be an issue for the four Geneva Conventions, which currently, each has 196 states parties. It is possible that some concerns might arise in relation to lack of congruence with Additional Protocol I (174 states parties), Additional Protocol II (168 parties), and Additional Protocol III (75 states parties).

adopted implementing legislation incorporating the Rome Statute's exact requirements.

53. Thus, the acts of persecution when committed in the context of the illegal use of force would, unlike war crimes and genocide, fall outside the jurisdiction of the concerned national court. Sierra Leone noted that the Special Rapporteur correctly flagged this issue in a footnote to his first report observing that this language would need to be "revisited" by the Commission. We encourage the Commission not to merely flag the issue for further consideration by States given the ILC's own stated preference to ensure consistency between the definition in the provisionally adopted Draft Article 3 and the definition contained in Article 7 of the Rome Statute. The latter explicitly speaks to "any crime within the jurisdiction of the Court." Any crime within ICC jurisdiction would also, given the stated intention of the ILC Drafting Committee to remain "faithful" to Article 5 of the Rome Statute, include the crime of aggression. (See footnote 422 in A/CN.4/680; Statement of the Chairman of the Drafting Committee, 5 June 2015 at 6).
54. **Suggestions:** So, while the more legally sound approach might be to delete the entire language requiring some type of connection between persecution as a crime against humanity to genocide and war crimes to bring the current definition into line with the broader definition of persecution under customary international law, in the alternative, should the Commission elect to retain the definition of persecution drawn from Article 7 of the Rome Statute, it should amend the definition so that it reads: "in connection with any act referred to in this paragraph or in connection with the crime of genocide, war crimes or the crime of aggression". This would then mirror the definition in the ICC Statute.

The without prejudice clause misses the mark by excluding customary international law

55. Lastly, for reasons that are not entirely clear to Sierra Leone, perhaps because of its origins in Article 1, paragraph 2, of the Convention against Torture,²⁷ the savings clause contained in Draft Article 3, paragraph 4, addresses itself in relation to broader definitions existing under any "international instrument" or national laws. A key omission seems to be the crucial customary law aspect. The latter element may have been simply overlooked. Yet, by pointing to similarities with the savings clause contained in Article 10 of the Rome Statute in the commentary, we can discern that the without prejudice clause included therein was worded much more broadly ("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").
56. **Suggestions:** In our view, it is important for the Commission to amend the saving clause in paragraph 4 which, as currently formulated, provides that "[t]his draft article is without prejudice to any broader definition provided for in any *international instrument* or *national law*". The amended version would, for the same reason it

²⁷ Convention against Torture and Other Cruel, Inhumane or Degrading Treatment and Punishment, 10 December 1984, 1465 U.N.T.S. 85.

rightly preserves any wider definitions available under other *international instruments* or national law, would do the same also in relation to the definition of the crime *under customary international law*.

57. The draft articles and commentary elsewhere recognises this latter scenario. The amended version would, with this amendment, read as follows: “This draft article is without prejudice to any broader definition provided for under customary international law or in any *international instrument* or *national law*”.

E. Draft Article 4 - Obligation of prevention

This two-paragraph provision provides for each state to undertake to prevent crimes against humanity. It is the primary article addressing the duty of states to prevent crimes against humanity, in the draft articles, though it also makes clear that measures taken in that regard must also be in conformity with international law. No exceptional circumstances whatsoever may be invoked as justification of crimes against humanity.

58. **Comments:** Sierra Leone welcomes the text of this provision and most of its commentary. We also appreciate the clarification that, although states are required to take the measures for the prevention of crimes against humanity, those measures must always be in conformity with international law especially in relation to the use of force which must be in accordance with the Charter of the United Nations. The goal of prevention must not be a pretext for intervention in the internal affairs of other states, in violation of international law. We have already offered some observations on aspects of this draft article, under Draft Article 2, and refer the Commission to the relevant sections above. Here, we will start with some specific observations on aspect of the commentaries to this provision before returning to the wider issue about prevention being much broader than just criminal prosecutions.
59. As to paragraph 1 of the commentary, which essentially seeks to make the case for the duty to prevent, the ILC “viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts.” The Commission goes on to note that, “in many instances, those treaties address acts that, when committed under certain circumstances, can constitute crimes against humanity” giving the examples of “genocide, torture, apartheid, or enforced disappearance”. According to the ILC, this means that “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”.
60. Sierra Leone appreciates the thrust of this provision. However, we are concerned that, as presently framed, paragraph 1 could be misread as imposing the duty to prevent crimes against humanity in relation to only a small class of a list of prohibited acts (i.e. torture, apartheid or enforced disappearance). Although it seems to become clear later on, in the commentary, the Commission might wish to clarify up front (preferably in the body, but possibly also in a footnote) that the duty to prevent is not

dependent on the identification of a prior legal instrument setting out such a prevention requirement.

61. In relation to paragraphs 2 to 4, an additional reference could be given to war crimes law. This is because, under Article I common to the four 1949 Geneva Conventions, the requirement on the parties “to respect and ensure respect for the... Convention... in all circumstances” has also been interpreted to derive a general obligation to prevent breaches of international humanitarian law as affirmed by the ICJ.²⁸
62. On paragraph 10, the ICJ had also decided, in the context of the Genocide Convention, that the substantive obligation of prevention in Article I was not necessarily limited by territory. A further clarification would resolve, what might at first blush, seem to be the territorial scope of the measures envisaged in Draft Article 4, paragraph 1 (a). Doing so might simply require adding to the present quotation of the ICJ case “that the obligation of each State ... has to prevent ... is not territorially limited by the Convention”. It is important that it is clarified that there is an external dimension to the duty of prevention, not just an internal one.
63. As regards to paragraph 13 of the commentary, we welcome the explanations given, although we consider that a clearer connection could perhaps also be made between this paragraph’s use of “territory under” with the meaning of that same phrase as explained in paragraph 18 (and, for that matter, even the later occurrences of that language in other draft articles). In any case, we are left with some doubts about the meaning of some key phrases concerning what is required for the duty to prevent to be triggered. Like for the crime of genocide, would the threshold be met where there is a “serious risk” or “some risk” that crimes against humanity are being committed. If so, what would such risk entail? Does it have to be credible or merely plausible? Must the threat be real? What about what has been called the subjective element: for the duty to be activated, must the state party be aware of or know or should have been aware of or have knowledge of the risk of crimes against humanity. How might such an essentially question of evidence be weighed? There is also, in the substance, a seeming close linkage between the content of paragraph 10 and paragraph 18. We would therefore suggest moving the latter further above and perhaps even merging it with the former.
64. Lastly, on paragraph 19 of the commentary, we agree with and support this explanation. The Commission might also consider, in addition to the provisions of the UN Charter mentioned, referring to cooperation between the UN and regional bodies. Indeed, Article 52 of the UN Charter contemplates involvement of regional arrangements or agencies in the peaceful settlement of disputes; whereas Article 53 permits such arrangements to take enforcement action, albeit with the explicit authorization by the Security Council. Finally, Article 54 anticipates regional arrangements or agencies informing the Security Council of their activities for the maintenance of international peace and security such as was the case with the ECOWAS intervention in Liberia. Increasingly, regional bodies are sites of action for

²⁸ Pictet, *Commentary to the Geneva Conventions*, Art. I, 26; *ICJ Reports*, 2004, para. 158.

the maintenance of peace and security. We see, for instance, collaborations between the United Nations and the African Union in circumstances such as the deployment of peacekeeping missions aimed at collectively countering threats to peace and security including the perpetration of crimes against humanity. Articles 52 to 55 of the UN Charter might all be relevant in this regard.

65. On the broader point, beyond the commentary to this draft article, it is not obvious the extent to which, if at all, consideration was given in discussions of this draft article to the preventive aspects of crimes against humanity and the connection between the draft articles with the Responsibility to Protect (“R2P”) doctrine. R2P has been endorsed by states as well as the General Assembly and the Security Council. We consider that, although this is an area where state practice may still be evolving and could well be in its early stages, the Commission’s explanation of the current legal position on the intersection between that duty to prevent crimes against humanity specifically and broader United Nations and regional body efforts to prevent the perpetration of such crimes along could be helpful for states and the international legal community as a whole.
66. Sierra Leone notes that paragraphs 138 and 139 of the 2005 World Summit Outcome (Resolution 60/1, as adopted by the General Assembly on 16 September 2005) recognises and provides the authoritative framework for the United Nations to give effect to the R2P doctrine. Significantly, the Heads of State and Government of UN member states *unanimously affirmed* at the Summit that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”. They also stated that the international community should assist States in exercising that responsibility and in building their protection capacities.
67. The General Assembly has continued to endorse the doctrine. In fact, as recently as 24 September 2018, heads of state and government of the UN member states signaled the importance of this issue by again unanimously adopting a political declaration affirming “the responsibility of each individual state to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” while “recognizing the need to mobilise the collective wisdom, capabilities and political will of the international community to encourage and help states to exercise this responsibility upon their request.” (See GA Resolution 63/308, 14 September 2009; paragraph 4 UNSC Resolution 1674 (2006), reaffirming the provisions of paragraphs 138 and 139; and the second preambular paragraph, UNSC Resolution 1706 (2006); Political Declaration adopted at the Nelson Mandela Peace Summit, paragraph 12).
68. At the regional level, about five years before the adoption of the World Summit Outcome, Article 4(h) of the Constitutive Act of the African Union provided, in article 4 (h), for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity”. This is essentially the same responsibility to protect idea. The underlying idea could have implications as to whether states are limited to a narrow conception of the prevention of atrocity crimes.

69. **Suggestions:** Sierra Leone proposes that the ILC consider the implications of the 2005 World Summit Outcome and developments in the United Nations and regional levels since then (including the Nelson Mandela Peace Summit) for the obligation of prevention of crimes against humanity set forth in Draft Article 4. That wider policy context, in which the draft articles are being prepared, seems highly relevant and therefore ought to also be taken into account. The Commission might wish to address any such links, including to the relevant ICJ jurisprudence on prevention but perhaps going beyond it, in the commentary.

F. Draft Article 5 - *Non refoulement*

This draft article mandates that no state shall expel, return, surrender or extradite a person to territory under the jurisdiction of another state in certain circumstances where there are substantial grounds to believe that he will be in danger of being subjected to crimes against humanity.

70. **Comments:** Sierra Leone agrees with the absolute nature of this rule. We welcome the decision of the ILC not to introduce an exception to the principle of *non-refoulement* under customary international law. We further observe that, although this draft article was based on the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the provision has been modified from Article 16 to add the term “territory under” in paragraphs 1 and 2. This new language limits the scope of the obligation vis-à-vis the convention that inspired it. The focus ought to be on the change of jurisdiction which may coincide with but is not necessarily co-extensive with territory.

71. For example, in the context of an occupation or peacekeeping mission, an occupying or peacekeeping force may be requested to arrest and handover a person to another peacekeeping force or even the forces of the occupied state. This could all take place in the same territory. And it is possible to envisage scenarios where some of those forces could violate the rule against non-refoulement by deporting or transferring that person where he could be exposed to crimes against humanity.

72. Moreover, as to the meaning of “another State” in paragraph 1 of Draft Article 5, it seems to us that this notion was well explained in the Special Rapporteur’s third report. In particular, we agree with him and hope that this same clarity will be brought at an appropriate section of the present commentary, “that the use of the phrase “to another State” would not limit the provision to situations where an official of a foreign Government may commit the crime against humanity; rather, the danger may alternatively exist with respect to non-State actors in the other State.” (See A/CN.4/704, para. 106).

73. **Suggestions:** In light of the above, Sierra Leone suggests the deletion of the terms “territory under” in both paragraphs of Draft Article 5. Alternatively, we recommend clarifying further its meaning in paragraphs 13 and 18 of the commentary as well as in other related draft articles where the same formulation is used. We also consider

that it might be useful to have a further explanation of the meaning of “another State” in the commentary.

G. Draft Article 6 - Criminalization under national law

This draft article requires, *inter alia*, states to take the necessary measures to ensure that crimes against humanity constitute offences under their criminal laws.

74. **Comments:** While Sierra Leone generally welcomes this provision, especially the obligation contained in paragraph 1, we are concerned about several aspects. First, on paragraph 2, we note as a general matter that the ILC appears to have cherry picked from the various forms of criminal participation that are widely established in state practice at the national and international levels. It has thus included some inchoate crimes, such as attempts, but left out other forms such as conspiracy. The same is true of “incitement” as a mode of liability, which was also deleted from the forms of participation expressly set out in paragraph 2 of Draft Article 6.

Incitement and conspiracy as forms of criminal participation

75. Incitement as a form of accessory liability is well established in customary international law. It is an important form of criminal participation in relation to the crime of genocide, and given the systemic nature of such core crimes, also in relation to crimes against humanity. This mode of criminal participation is reflected in state practice²⁹ and in the practice of international criminal courts that have prosecuted crimes against humanity. It is even present in the work of the ILC itself, which in the 1954 Draft Code, recognised “direct incitement”.³⁰ Interestingly, the ILC departs from its earlier work by omitting incitement from the draft crimes against humanity articles. The Commission has explained, in its commentary, that it had based the terms used in Draft article 6, paragraph 2, on the relevant provision of the Rome Statute. It also noted that, in various international instruments, the related concepts of “soliciting”, “inducing” and “aiding and abetting” the crime were generally thought to include planning, instigating, conspiring and even directly inciting another person to engage in the act that constituted the offence. We do not agree with this reading.
76. **Suggestions:** Based on the foregoing considerations, it is proposed that “inciting” be added, possibly to the list of forms of participation mentioned in sub-paragraph (c) of paragraph 2 of Draft Article 6. Consideration could also be given to adding the element of “conspiracy” to commit crimes against humanity. Even if changes are not implemented to separately add “inciting” and “conspiring”, which we would prefer because it clarifies the legal situation and brings the ILC draft into harmony with the Rome Statute and state practice, the ILC might consider adding a clarification to the effect that its policy choice should not in any way be interpreted as limiting the evolution of modes of liability under customary international law.

²⁹ See, in this regard, the similar concern expressed in the Statement of Iceland: <http://undocs.org/A/C.6/71/SR.24>.

³⁰ Article 2 of the *Draft Code of Crimes against the Peace and Security of Mankind* provided for different forms of criminal participation for crimes, including crimes against humanity, including where a person “[d]irectly and publicly incites another individual to commit such a crime”.

Official position

77. In relation to paragraph 5 of Draft Article 6, Sierra Leone welcomes the addition of this important paragraph. We therefore commend the Commission for restating, in the present draft articles, a well-established rule of customary international law found in the Nuremberg Principles: “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”. As framed, regrettably, this paragraph does not address the question of procedural immunity despite the ILC’s clear and well-reasoned position in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, which was obviously also intended for application at the national level, that “[T]he author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility”.
78. Sierra Leone also notes the decision of the SCSL Appeals Chamber in the case involving former Liberian President Charles Taylor. It may be relevant in regard to the question of immunities. (See *Taylor*, SCSL, Appeals Chamber, 31 May 2004 at paras. 44-57; holding that, on the basis of among other things, Nuremberg Principle 7 which is part of customary international law that the official position of Taylor as an incumbent Head of State at the time when the SCSL’s criminal proceedings were initiated against him was not a bar to his prosecution).
79. Second, it seems that at the time of the preparation of the third report of the Special Rapporteur, the ILC was separately studying the question of immunity *ratione materiae* of state officials from foreign criminal jurisdiction. From this perspective, as a procedural matter, the ILC did not consider the issue of immunity in the crimes against humanity study since it was being taken up in another topic. The issue has since been addressed through the adoption of Draft Article 7, as reported in the 2017 ILC Report. That draft article indicates that “immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of”, among others, “crimes against humanity” alongside genocide, war crimes and other crimes. We wonder what the implications of this development might be for the crimes against humanity draft articles.³¹

³¹ Sierra Leone acknowledges that Draft Article 7 was controversial within the ILC during its adoption in the Sixty-Ninth Session. The relatively small group of states that have since spoken to the issue, in the Sixth Committee of the General Assembly, seem to also be divided. However, the controversy appears to relate more to whether the proposal of the Special Rapporteur, which was in the end supported by a large majority of the Commission, reflected a “trend” or binding customary international law or represented an exercise in progressive development. That concern may not be relevant here. This is because, besides codifying the law of crimes against humanity, the ILC – in accordance with its statute and practice – may on the basis of the “progressive development” prong of Article 15 of its statute advance recommendations to states. It has even done so in the present project.

80. Sierra Leone understands that, instead of the formulation in paragraph 5 of Draft Article 6, some members of the ILC proposed the inclusion of the equivalent of Article 27 of the Rome Statute of the ICC in the draft articles on crimes against humanity to enhance the complementarity between the draft articles and the Rome Statute. We would support this proposal because, as noted above in Part III (see above), the Commission's task is not limited to codification of existing law but explicitly contemplates that it could also submit proposals for progressive development. It would then be for the states negotiating a future convention to decide whether to follow such a recommendation. We might here note that the ILC has submitted proposals for progressive development in its past work, including in the present draft articles. It has even been suggested that, given their heinous nature, procedural and substantive immunities should not be available for crimes as heinous as crimes against humanity, war crimes and genocide. This issue might therefore require further consideration during the final reading.
81. Sierra Leone considers that the proposal to reproduce Article 27 of the Rome Statute in full could make a future convention more consistent with the obligations of the 123 states parties to the ICC. Crucially, appropriate safeguards to prevent political abuse and manipulation would then need to be proposed as well. We also do not consider that the absence of an irrelevance of capacity provision in transnational crimes conventions is helpful in determining propriety for the current draft articles. Transnational crimes treaties, as important as they are, do not stand in the same category as crimes against humanity. The latter are *sui generis*, especially given their gravity. The Genocide Convention, in fact, provides for the punishment of all persons who commit genocide irrespective of whether they are constitutionally responsible rulers, public officials or private individuals under Article IV. We consider that the latter convention a closer relative to crimes against humanity. For this reason, even if the Commission would not make other amendments to this provision to incorporate fully the entire Article 27 of the Rome Statute, we consider it should not provide less than the minimum required by the Genocide Convention.
82. **Suggestions:** Sierra Leone suggests that Article 27 of the Rome Statute could be incorporated into the proposal for a crimes against humanity convention. Alternatively, given their rough parity and grave nature, the ILC might consider adopting with the appropriate modifications the text contained in Article IV of the Genocide Convention to replace the current Draft Article 6 paragraph 5 with the following: "Persons committing [crimes against humanity] or any of the other acts enumerated in Article 3 shall be punished, whether are they constitutionally responsibility rulers, public officials or private individuals"]. This would more appropriately bring the draft articles on crimes against humanity into harmony with the Genocide Convention position on the matter.

Appropriate penalties

83. Regarding the obligation in Draft Article 6, paragraph 7, as explained by paragraphs 37 to 40 of the commentaries, Sierra Leone underlines that states, in line with the

practice concerning other crimes treaties, enjoy a wide margin of discretion to take measures “to ensure that, under its criminal law, the offences referred to” in the draft articles “shall be punishable” by appropriate penalties. This requires that they provide for punishment of persons found guilty of such crimes.

84. In determining such penalties, we agree that factors such as the gravity of the crime and the individual circumstances of the convicted person should be taken into account. Additional factors could include the leadership position held by the accused, the extent of the damage caused, in particular to the victims and their families, the means employed to execute the crime and the degree of participation and criminal intent of the perpetrator(s). It might also be useful for the Commission to clarify that, although a margin of discretion is available to states, both aggravating and mitigating factors should be taken into account at the sentencing stage in fixing the penalty that is appropriate.
85. One omission that the ILC commentary might wish to address is to the effect that an appropriate penalty should not include the imposition of the “death penalty”. Such a position would be fully consistent with the Rome Statute regime, which under Article 77, provides for imprisonment for a specified number of years not exceeding 30 years or a term of life imprisonment when that is justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Importantly, such an explanation would generally reflect the trend in state practice whereby approximately 160 member states of the UN are said to have either abolished the death penalty or no longer practice it. (See, this regard, A/69/288 at para. 7 discussing the trends and relevant General Assembly resolutions).

Liability of legal persons significant to deter crimes against humanity

86. With regard to paragraph 8 of Draft Article 6, Sierra Leone welcomes this important provision. We laud the ILC decision to include such a provision on the liability of legal persons for crimes against humanity. Especially so given the known involvement of legal or artificial persons in fermenting the commission of international crimes in certain parts of the world. Numerous resource driven conflicts have originated or been fueled by corporate greed. Sierra Leone has been a victim of such conduct. “Blood diamonds” provided a cover for shady entrepreneurs and companies to profit from the suffering of our people and the plunder of our natural resources. This might partly explain why African States, within the framework of the Malabo Protocol, have taken the significant step, which Sierra Leone fully supports, to recognise criminal liability for crimes against humanity and other core crimes committed or aided and abetted by legal persons. We believe that, until such measures are taken by all states to tighten the noose and punish the true beneficiaries of contemporary resource wars, a huge global impunity gap will remain. We fear it would continue to undermine the effectiveness of the fight against impunity.

H. Draft Article 7 - Establishment of national jurisdiction

This provision provides for each state to take the necessary measures to establish its jurisdiction over the offences covered by the draft articles in certain circumstances, notably, when the offence is committed in any territory under its jurisdiction; when the alleged offender is a national or a habitually resident stateless person; when the victim is a national; and where the alleged offender is present but without excluding the exercise of any criminal jurisdiction established by a state in accordance with its national law.

87. **Comments:** Sierra Leone welcomes this provision requiring states to take the necessary measures to establish their jurisdiction over the offences covered by the draft articles when the crime occurs on any territory under their jurisdiction; where the person is a national of the state or a stateless person who is habitually resident (which we understand to mean continuous residence); or on an optional basis, when the victim of the crime is a national of that state.
88. We also welcome paragraph 2, establishing the duty to take the necessary measures in cases where the alleged offender flees to any territory under its jurisdiction and it does not extradite or surrender the person.
89. On paragraph 3, we welcome the non-exclusion of the “exercise of any criminal jurisdiction established by a state in accordance with its national law”. This is an important safeguard for the application of the domestic laws of the state concerned. It is also more consistent with the sovereign exercise of adjudicative, prescriptive and enforcement jurisdiction on national territory.
90. Sierra Leone notes that, following the analysis contained in the Special Rapporteur’s report, the draft articles did not seem to predicate jurisdiction for the draft articles on the basis of universal jurisdiction. We wonder what the reasons for this were. In particular, we have had reference to the ILC’s 1996 Draft Code. There, the Commission provided for a wider jurisdictional basis for all crimes against the peace and security of mankind, including crimes against humanity, when it stated that “each state party shall take such measures as may be necessary to establish its jurisdiction over the crimes irrespective of where or by whom those crimes were committed”. In its commentary to Article 8, the ILC explained that it “considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts”. Furthermore, according to the Commission, “The phrase “irrespective of where or by whom those crimes were committed” is used in the first provision of the article to *avoid any doubt as to the existence of universal jurisdiction for those crimes*”. This approach has support in other international instruments, and in the national legislation of many states. [*Yearbook of the International Law Commission, 1996, vol. II, Part Two, at 29, para. 7*].
91. Be that as it may, like the case for genocide, Sierra Leone considers that universal jurisdiction already exists for crimes against humanity under customary law. For this reason, we stress that it would have been within the scope of the ILC’s mandate to

make such a recommendation to states in the present draft articles on crimes against humanity. Indeed, contrary to what seems implied, states might well prove to be prepared to accept the existence of universal jurisdiction for crimes against humanity. This would put the crime on the same footing as its sister core crimes. Such a conclusion would be consistent with the jurisprudence of many courts.

92. Regarding draft article 7, paragraphs 1(a) and 2(a) on the obligation of States to investigate acts constituting crimes against humanity “in any territory under their jurisdiction”, Sierra Leone seeks clarity on the phrase “in any territory under its jurisdiction” since it could contemplate situations where there is both *de jure* and *de facto* exercises of such jurisdiction. In our view, the state’s obligation to investigate the crimes could potentially encompass acts amounting to crimes against humanity by organs of the state such as the armed forces of the state or by its members or those acting at their behest in foreign territory. Since this issue of the extraterritorial reach of obligations been controversial, especially in the cognate human rights context, it would potentially be useful for the ILC to clarify the matter.
93. Sierra Leone notes that Draft Article 7, paragraph 1(b) uses the terms “stateless person”, as does Draft Article 11, paragraph 2(a)). Several references are also made to the phrase in the commentary. But no definition of the term has been offered. The ILC could consider either defining the term, which was provided in Article 1 of the Convention relating to the Status of Stateless Persons.³² The latter is now considered part of customary international law. The ILC could refer to this in a footnote to eliminate doubts that may arise. That would be consistent with the Commission’s position when it adopted the Draft Articles on Diplomatic Protection in 2006. (See in this regard *Yearbook of the International Law Commission*, 2006, vol. II, Part Two at para. 3).
94. **Suggestions:** Sierra Leone suggests that the draft articles for a future crimes against humanity convention could, in line with the ILC’s previous work, require states to prosecute persons for crimes against humanity even where the crimes are committed outside their territories and are not necessarily linked to the state through active or passive personality jurisdiction or other harm to the state’s national interest.

I. Draft Article 8 - Investigation

Under this provision, each state shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that the acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

³² The convention was adopted at New York, on 28 September 1954, and entered into force on 6 June 1960. It has 91 states parties, including Sierra Leone, which acceded to it on 9 May 2016. Its definition of statelessness, according to the ILC, “can no doubt be considered to have acquired a customary nature”. See the *Report of the International Law Commission on the work of its Fifty-Eight Session*, 2006, Vol. II, part 2, page 36 at para. 3. This definition is also said to be the convention’s “most significant contribution to international law”. See Text of the Convention Relating to Status of Stateless Persons, with an Introductory Note by the Office of the United Nations High Commissioner for Human Rights, p. 3: <http://www.unhcr.org/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html>.

95. **Comments:** Sierra Leone agrees with the ILC that, when crimes against humanity are committed, it is the duty of a state and its competent authorities to proceed to a prompt and impartial investigation.
96. The Commission does not define the meaning of “state” generally or in relation specifically to this draft article. Nor does it explain what is meant by the terms “competent authorities.” It seems implied that the latter would include the organs of the state that have responsibility for the conduct of criminal investigations. This would be the police in common law systems such as that of Sierra Leone. It could even be the judiciary in civil law systems. If so, this appears to leave an open question whether a state might be considered to have fulfilled this obligation if, instead of its competent law enforcement organs carrying out the investigations, it establishes a credible ad hoc special mechanism within its national system to carry out investigation or even through a separate body such as a hybrid court.
97. Furthermore, as state practice suggests that it is possible for “a prompt and impartial investigation” of crimes against humanity to be carried out not just by law enforcement agencies or judicial authorities, it would be useful for the ILC commentary to clarify whether quasi-judicial investigations might be sufficient to meet the obligations envisaged by Draft Article 8.³³ Though the demands of different situations will vary, depending on the specific context, we have in mind the types of credible investigations that could well be carried out by independent commissions of inquiry, truth and reconciliation commissions or national human rights institutions.
98. As to content. We believe that this duty entails two temporal dimensions, as indicated by the language of “have been” (for conduct that has occurred in the past) and “or are being” committed (for acts that are ongoing). In the former scenario, that is wherever the acts have already taken place, the duty to investigate is automatically triggered. The second scenario covers situations where crimes against humanity are in the process of taking place (“are *being* committed”). These two temporal dimensions would overlap where crimes have already occurred and continue to occur until they are no longer taking place. To Sierra Leone, the duty to proceed to an investigation should turn solely on the facts. We thus welcome the clarification that its discharge does not require that a complaint first be filed by victims or their representatives. The state’s duty to ensure its competent authorities investigate should be automatically triggered as soon as it becomes aware of the commission of the crimes.
99. Relatedly, we understand that the duty to investigate would be activated when the low threshold of “reasonable ground to believe” that “acts” constituting crimes against humanity have been or are being committed “in any territory under its jurisdiction”. As to the threshold of a “reasonable ground to believe”, this language was sourced from Article 12 of the 1984 Convention against Torture. It is said to

³³ See, for an expression of similar concerns, Sarah Nouwen, “Is there Something Missing in the Proposed Convention on Crimes Against Humanity?: A Political Question for States and a Doctrinal One for the International Law Commission”, 28 September 2018, JICJ (forthcoming).

impose a more general duty, distinct from that regarding an inquiry in specific cases for states parties to that convention under Article 6, paragraph 2 of that convention. For a more general inquiry like this, regarding whether crimes against humanity have been or are being committed, Sierra Leone considers that this should be interpreted as a low evidentiary standard. This will be appropriate given that, in line with ICC jurisprudence on the similarly phrased “reasonable basis to proceed standard”, the nature of this early stage of the investigation would essentially require the competent authorities to merely become satisfied that there exists a *sensible* or *reasonable justification for a belief* that a crime against humanity has been or is being committed.

100. Turning to the nature of the “acts” that would give rise to the duty to investigate, we note that unlike torture, “crimes against humanity” by definition involve the commission of certain inhumane acts, such as murder or extermination or enslavement, in the wider context of widespread or systematic attacks against any civilian population. It is the latter that elevates what would otherwise be ordinary crimes exclusively within the jurisdiction of the concerned state warranting the application of the draft articles. Though written in plural (“acts” rather than “act”), it could be clarified that even a single prohibited crime such as the prohibited crime of “murder” as defined in Article 3, paragraph 1 (a), would amount to a crime against humanity so long as it occurs in the right context (i.e. a “widespread or systematic attack against any civilian population”).
101. **Suggestions:** As regards the text of Draft Article 8, Sierra Leone believes that it could be amended to make clear that the competent authorities are to proceed to a “prompt, thorough and impartial investigation” rather than only a “prompt and impartial investigation” as currently worded. This would help address potential loopholes whereby a state could carry out a sham investigation while undermining the essence of its obligations under this clause. That investigations of crimes against humanity and grave human rights violations ought to be “thorough”,³⁴ in addition to being prompt and impartial”, has been endorsed by states as well as by international bodies.
102. As to the commentary, clarification could be given concerning knowledge or potential knowledge that is required on the part of the state. Furthermore, it might be helpful to indicate that the concerned state must carry out the investigations in “good faith.” The consequences of failing to do so should also be addressed. Indeed, a sham or unduly delayed investigation or an investigation carried out in bad faith solely for the purpose of shielding the person concerned from potential criminal responsibility may have to be deemed a failure to ensure that its competent authorities discharge the duty to promptly and impartially investigate in Draft Article 8. A reference to the jurisprudence concerning Article 17 of the Rome Statute could be useful in this regard. Moreover, as the Human Rights Committee has observed in relation to the

³⁴ See, for instance, General Assembly Resolutions 2583 (XXIV) adopted 15 December 1969, preamble and para. 1; Resolution 2712 (XXV), adopted 15 December 1970, preamble and para. 5; and Resolution 2840 (XXVI), adopted 18 December 1971, preamble as well as decisions of human rights treaty bodies such as the Human Rights Committee, Communication No. 1832/2008, Views adopted by the Committee at its 108th session (8-26 July 2013), 4 September 2013, UN Doc. CCPR/C/108/D/1832/2008, para. 7.6.

ICCPR, “[a] failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.” The same would presumably be true of a future crime against humanity convention. This aspect should therefore be further explained in the commentary since a failure to bring to justice the perpetrators could also give rise to a similar breach under Draft Article 10. (See *General Comment 31, Nature of the General Legal Obligation of States Parties to the Covenant*, 2004, paras. 15 and 18).

J. Draft Article 9 - Preliminary measures when an alleged offender is present

This provision requires *inter alia* that, after an examination of the available information, and the circumstances so warrant, a state in the territory under whose jurisdiction a person is alleged to have committed an offence covered by the draft articles shall take the person into custody or take other legal measures to ensure his presence.

103. **Comments:** Sierra Leone noted that this provision is based on Article 6 of the Convention against Torture. The provision, which also seems fitting for the present crimes against humanity draft articles, establishes three inter-related obligations: 1) the duty to take the person into custody or take other legal measures to ensure his presence; 2) the duty to immediately make a preliminary inquiry; and 3) the duty to notify other states.

104. **Suggestions:** Sierra Leone considers that the ICJ’s authoritative interpretation of the equivalent provision of the Convention against Torture applies *mutatis mutandis* to Draft Article 9. (See *Belgium v. Senegal*, ICJ, 2012). That said, given the relatively brief nature of the commentary in the first reading text, Sierra Leone is left with a number of doubts. We therefore consider whether it might not be useful for states if the Commission were to further explain the intended meaning of the following phrases: “upon being satisfied” (which is a conditional phrase), “after an examination of information available to it” (including the meaning of an “examination” and the nature of the information contemplated as part of such assessment), “that the circumstances so warrant” (which seems discretionary, and if so, what that discretion entails), “in the territory under whose jurisdiction” (linked to the interpretation of the same phrase in other draft articles, under which, it would also apply to circumstances of both *de facto* and *de jure* exercise of jurisdiction/control by the state) and “a person alleged”.

105. On the latter, the ILC might wish to explain whether the notion of allegation against a person is to be understood in its ordinary sense instead of a formal charges sense of issuance of an indictment, information or other formal accusatory instrument. This is because, as we understand it, the state could still be at an initial inquiry stage in Draft Article 9 and the suspicions about the persons concerned may or may not (yet) have been corroborated.

106. It might also be helpful to explain the meaning of “immediately make” and of a “preliminary inquiry” in paragraph 2 of Draft Article 9. Delays that allow for

evidence to be lost or destroyed could also defeat or undermine the obligation. In the same vein, it may also be worth considering whether the obligation in paragraph 3 of Draft Article 9 is only triggered when the state concerned has actually arrested or “taken” the person “into custody”, or whether (or not) (given the apparently alternative language in paragraph 1), it is required to also notify others when it adopts “other legal measures to ensure his or her presence”.

107. On the other hand, it is also possible that, in some situations, the state might be willing to investigate and to prosecute perpetrators but after the passage of some time for security, stability or other public order reasons. This provision appears to suggest that there is little or no discretion remaining for states finding themselves in the latter situation. A failure to contemplate such scenarios could prove problematic. This is because there are many legitimate conflict and post conflict challenges that may be faced by states that have experienced the widespread commission of crimes against humanity, and in some cases, over the course of many years.

108. Sierra Leone notes that this provision is also related to Draft Article 10 and wonders whether the Commission might find it appropriate to insert cross references.

109. On paragraph 5 of the commentary, the reference made to the Convention against Torture and the ICJ jurisprudence interpreting it indicate that the purpose of preliminary measures undertaken under this provision would be to enable proceedings to be brought against the suspect. While that might be a good objective, in the context of single or small incidences of torture carried out by state officials, we wonder whether it is a viable expectation for states that have experienced crimes against humanity in a mass atrocity context. Such contexts are often characterized by the widespread commission of such crimes. Moreover, in some situations, the transition from war to peace might be made that more difficult if individualized criminal prosecutions have to take place in each case, and importantly, *immediately* after hostilities cease.

K. Draft Article 10 - *Aut dedere aut judicare*

This article provides for the state in the territory under whose jurisdiction the alleged offender is present to submit him to competent authorities for the purposes of prosecution, unless it extradites or surrenders the person to another state or competent international criminal tribunal.

110. **Comments:** Sierra Leone understands the Commission’s decision to refer to the duty, contained in Draft Article 10, using its more common description (*aut dedere aut judicare*). Nonetheless, despite the convenience of this nomenclature, we understand that the actual obligation on states would be for them to submit the relevant case to their competent authorities for the purpose of the conduct of credible investigations, and if sufficient evidence is uncovered, to thereafter submit the case for prosecution if deemed appropriate. Submission of the case to competent authorities does not mean that those national authorities’ discretion to decide whether or not to proceed with formal charges or a trial is taken away. Such decisions would necessarily have to be

made, as in the normal course in any criminal proceedings, based on the available evidence and their assessment of all relevant factors including the interests of justice and the likelihood of securing a conviction. A measure of prosecutorial discretion might necessarily have to be retained to also permit, depending on the national system, for plea arrangements and such.

111. On a related note, Sierra Leone notes that the ILC draft articles on crimes against humanity do not include an explicit clause precluding grants of amnesties or pardons for crimes against humanity. Rather, the issue of amnesty is only implicitly addressed through paragraphs 8 to 11 of the commentary to Draft Article 10. The ILC commentary explains that the ability of a state to implement an amnesty might not be compatible with the obligation to submit the case to the competent authorities for investigation and possible prosecutions. We agree with this assessment. We also have the further concern regarding whether grants of amnesties might not undermine or conflict with other provisions of the draft articles, including Draft Articles 8, 9 and 12.
112. Sierra Leone considers that the Commission could better distinguish between blanket and unconditional amnesties and narrow and conditional amnesties. As regards the former, it has been suggested that there may be sufficient state practice at the national, regional and international levels confirming the existence of a rule that blanket amnesties are not compatible with and are thus impermissible for core crimes under international law such as crimes against humanity, genocide and war crimes. The prohibition of such crimes and of their peremptory character (*jus cogens*) may be a factor in this regard.
113. It seems also relevant that the practice of the United Nations, which began in the context of the Lomé Peace Accord from July 1999 containing such an amnesty, has not been disputed by member states to our knowledge. The caveat entered by the special representative of the UN Secretary-General at the ECOWAS and UN-sanctioned peace talks proved to be important concerning the SCSL's later creation. It was helpful to the Court's assessment of the legal effects of that amnesty for crimes under international law. This is because Article 10 of the SCSL Statute had provided that an amnesty granted to any person could not operate as a bar to his subsequent prosecutions for war crimes, crimes against humanity and other serious violations of international humanitarian law before the SCSL.³⁵
114. Based on Sierra Leone's experience, we appreciate and underscore that these are complex issues. There are no easy answers or one size fits all solutions. Nonetheless, since the purpose of the present draft articles include the goal of putting an end to impunity for the perpetrators of crimes against humanity and thus to the prevention of such crimes, as stated in preambular paragraph 5, we consider that an express clause on the impermissibility of blanket amnesties might have been a useful corollary of the whole instrument. At the same time, we accept that state practice may

³⁵ On the other hand, Sierra Leone considers that customary international law may not, at present, prohibit the conferment of limited amnesties in *certain* circumstances. This is especially so where the conditional amnesties form part of a regionally or internationally supported negotiated peace settlement aimed at ending intractable civil wars and stemming the further commission of international crimes.

still be in the process of being crystallized in relation to conditional or qualified amnesties. Yet, the legal position might be clearer in relation to blanket amnesties which other states or international tribunals may not in any event be obligated to recognise. (See, in this regard, *Kallon*, SCSL, Appeals Chamber, 13 March 2004 at paras. 71 and 68 holding “that the amnesty granted by Sierra Leone cannot cover crimes under international law”, since one “State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember”; also, *Kondewa*, SCSL, Appeals Chamber, 25 May 2004 at para. 47 affirming that there is “a substantial body of cases, comments, rulings and remarks which denies the permissibility of amnesties in international law for crimes against humanity and war crimes”.)

115. **Suggestions:** Sierra Leone would have appreciated an ILC provision explicitly stating that persons suspected of involvement with the commission of crimes against humanity may not benefit from grants of blanket amnesties. It matters little whether such a proposal is framed as an exercise in progressive development or codification. Since it will ultimately be up to states to decide if and how to act on such a recommendation. In any case, better account could be taken of the complex and rich body of jurisprudence on amnesties from international, regional and national courts and tribunals than is currently the case in the ILC commentary. We note also that there is a wealth of academic literature on the issue.

K. Draft Article - 11 Fair treatment of the alleged offender

This draft article provides for the fair treatment of any person against whom measures are being taken in connection with a covered offence by providing that all such persons shall be guaranteed fair treatment, including a fair trial, and full protection of his rights under applicable national and international law.

116. **Comments:** Sierra Leone welcomes the provision on fair treatment of persons. Far too often, in international criminal law, the rights of suspects and defendants are not taken seriously.
117. To us, the language of the draft article and its commentary may carry some ambiguity. On the one hand, it suggests that it is intended to ensure the “fair treatment” of “any person”³⁶ against whom measures are being taken in connection with crimes against humanity covered by the draft articles “at all stages of the proceedings”. We understand the latter could include preliminary investigations against a suspect in line with Draft article 9, paragraph 2, through to actual

³⁶ Sierra Leone noted that, although under international law, refugees are persons who are outside of their countries of nationality unwilling to return to their country of origin due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, the draft articles on crimes against humanity assume that the state of nationality would be willing to step in. This fails to address the challenges that might arise for the individual, who in some circumstances, may not even wish to have his whereabouts known by his state of nationality let alone seek its protection. What then would this mean for him to take advantage of the obligations contained in Draft Article 11 (2) and (3). In some cases, in relation to the paragraph 2(a) obligation, interested intergovernmental organizations such as the ICRC or a regional human rights body such as a commission or court could prove willing to help the person protect that person’s rights, in conjunction with any interest expressed by his state. We suggest contemplating such a possibility.

commencement of criminal proceedings when the target of the investigation is then denied liberty through actual arrest or detention.

118. On the other hand, the draft article emphasizes “full protection” of the person’s rights under applicable national and international law. The commentary then explains that all states provide for some protection for persons “they investigate, detain, try or punish for a criminal offence”. The Commission notes with a special emphasis that the “specific rights possessed by an alleged offender” for fair treatment includes “fair trial” guarantees generally recognised “to a detained or accused person” along the lines of Article 14 of the ICCPR. Sierra Leone notes that the distinction between the *rights of suspects*, and those of *accused persons* has been recognised in international criminal law for many years. Perhaps the best example may be found in Article 55 of the Rome Statute, which addresses the “rights of persons during an investigation” and separately sets out the “presumption of innocence” and the “rights of the accused” in Articles 66 and 67 respectively. The rights discussed in each of those clauses could serve as examples to between distinguish between those sets of rights for the purposes of elucidating the commentary.
119. Sierra Leone further notes that, although it seems implied, there is no specification in the draft articles that the fair treatment provision (and for that matter several others such as Draft Article 9, 11 and 12) only apply to natural (not also legal) persons). The Commission may wish to clarify this since some national laws could in future provide for the prosecution of corporate actors for crimes against humanity. Any provisions in that regard must be consistent with the national law of the state concerned. At the same time, since a corporate body is a mere legal fiction through which human beings act, it would presumably not be entitled to the same fair trial rights as those enjoyed by a natural person.
120. **Suggestions:** Sierra Leone believes that it would be useful for the ILC commentary to separate out and explain the duties on the part of states to ensure fair treatment of natural persons. In this regard, while of course recognizing that these are typically subject to national laws, the Commission may wish to distinguish between the fair treatment of persons while they are *targets* or *suspects* in a preliminary investigation and rights that would attach in relation to persons who have actually been charged with specific crimes and whose status as *accused persons* have been formally confirmed. The latter, which are founded in national constitutions and reflected in Article 14 of the ICCPR, are fundamental and can be appropriately emphasized even if a measure of latitude seems sometimes permitted in relation to the former.
121. Relatedly, the Commission might also wish to consider amending the title of this draft article to either read “fair treatment of persons” or “fair treatment of suspects and alleged offenders”. This would be a much broader formulation. It would capture both persons who may be mere suspects and those who are formally charged, thereby warranting the description of “alleged offenders”.

L. Draft Article 12 - Victims, witnesses and others

This provision provides, among other things, 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; provides for protective measures for complainants, victims, witnesses and others who participate in any investigation, prosecution, extradition or other proceeding; and requires states to ensure that victims of a crime against humanity have the right to obtain reparation for material or moral damages.

122. **Comments:** Sierra Leone considers that the rights of victims under international law are of paramount importance. We noted that the Commission has provided for a broad provision, addressing participation and reparation for persons alleged to be victims of crimes against humanity.
123. We appreciate that the Commission has, after some debate, decided not to define the term “victims”. Sierra Leone sees some merit in not defining the term “victims”. One advantage might be that, as a result of this, some states would give a broad definition of the concept. This could mean a larger number of persons would fall within the class of victims of crimes against humanity in those states. Equally, however, some states might give a much narrower or restricted meaning to the term victims. Since the draft articles are intended to form the basis of a future crimes against humanity convention, it may on balance be more appropriate for a common standard of victimhood to be provided. In other words, as the very idea of a “victim” is basic to the protections that the future convention could be expected to offer under this clause, Sierra Leone agrees with the members of the ILC who suggested that “victims” should be defined. The term should not be left open ended. Otherwise, its meaning could be left to the vagaries of the divergent practices of states at the national level.
124. **Suggestions:** The future crimes against humanity treaty could set out minimum standards for the treatment of victims of crimes against humanity. In order to reduce a patch work system for the recognition of “victims” of universal crimes against all of humanity, we consider that it might be useful to states for the Commission to provide a definition of victims. This will provide the necessary guidance for states that might in the future join a convention negotiated or based on an ILC draft. In addition, we consider that there are many useful international instruments, decisions from national, international and regional courts and tribunals, human rights treaty bodies and others for the ILC to fashion a balanced definition of “victims” of crimes against humanity. This definition, which the Commission could also make clear would constitute a floor rather than a ceiling, could be inspired by one or more of those existing definitions. So long as the appropriate criminal law context is taken into account.

125. Turning to paragraph 2, of Draft Article 12, Sierra Leone is of the view that while apparently expressing a firm obligation for states, the flexibility of “in accordance with its national law” must necessarily mean that it is up to the state to determine how best to implement this obligation. This would not require, for example, conferring a separate right to victims to participate in criminal proceedings. This is because, under our national law, as is the case in many other common law systems, the views and concerns of victims of a crime are taken into account and presented by our relevant prosecuting authorities.
126. Sierra Leone’s biggest concern is with paragraph 3 of Draft Article 13. In our view, it imposes too stringent an obligation to provide that the state must ensure that the victims of a crime against humanity have the right to obtain reparation for material and moral damages on an individual or collective basis. While we are grateful to the Commission for caveating this expansive duty, with the language of “consisting, as appropriate, of one or more of the following forms” of reparation and through the further explanation in the commentary at paragraphs 14 to 21, Sierra Leone’s experience with the mass commission of crimes against humanity suggests this could still be problematic.
127. Over the course of a decade of brutal war, nearly two-thirds of our population of 5 million people were displaced from their homes. Many lost lives, limbs and all their property. Hundreds of thousands sought refuge in neighbouring countries. In such a context, when the war eventually ended, Sierra Leone relied on external assistance to help resettle its people and to rebuild. It took many years for our nation to recover from a decade of experiencing atrocity crimes. We ask the ILC to deliberate further whether, in such a context, this might not be imposing too ambitious a burden on conflict-torn societies like Sierra Leone had we then been a party to a draft crimes against humanity convention containing this article.
128. This commendable idea, which may be appropriate where a small number of persons are victims of rights violations, seems hardly apposite for a mass atrocity crimes context. Such contexts would of course vary, but often, would include thousands if not hundreds of thousands of victims of crimes against humanity. Indeed, even after the atrocities have ended, the resources may simply be unavailable and the number of victims too large for the state to satisfy the demands of Draft Article 13 (3). Moreover, many crimes against humanity contexts indicate that the state would typically be facing many other competing national priorities to disarm, demobilize, rebuild and reintegrate former combatants and to address the needs of the population. In such circumstances, Sierra Leone is doubtful about the inclusion of such a provision in the ILC’s draft articles.
129. **Suggestions:** In light of the above concerns, Sierra Leone encourages the Commission to reconsider this provision especially paragraph 3. Should the ILC choose to keep the proposed provision, it would be important for the qualifications incorporated in the relevant areas of the commentary to be inserted into a new paragraph 4 of Draft Article 12. A new draft paragraph 4 loosely based on Article 4, paragraph 1, of the International Covenant on Civil and Political Rights, could be one

way to limit the obligation in paragraph 3: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, a state may take measures derogating from their obligations in paragraph 3 of the present draft article to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations to victims under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

M. Draft Article 13 - Extradition

This crucial provision contemplates a detailed regime for extradition by providing for the rights, obligations and procedures applicable to the extradition of an alleged offender under the crimes against humanity draft articles.

130. **Comments:** Sierra Leone considers that, along with Draft Article 14 on Mutual Legal Assistance, this is one of the most important provisions of the entire draft articles on crimes against humanity as adopted by the Commission on first reading. We therefore highly welcome it as it would help fill an important gap.
131. We appreciate the ILC’s conclusion that, although they frequently occur in political contexts and are sometimes perpetrated for political gain, core international crimes such as genocide, crimes against humanity and war crimes are not to be regarded as “political offences” for the purposes of denying extradition. This principle is enshrined in Article VII of the Genocide Convention. Equally, though not found in the 1949 Geneva Conventions, it is consistent with the more recent state practice when concluding multilateral treaties addressing specific international and transnational crimes.³⁷ Thus, in our submission, its inclusion would likely help crystallize state practice and consolidate customary international law.
132. Sierra Leone notes that Draft Article 13, paragraph 1, provides for “each of the offences covered by the present draft articles” to be deemed extraditable offences. There seems to be some ambiguity with regard to scope of application. One plausible reading is that this only applies to Draft Article 3, which defines crimes against humanity, and is the object of the entire draft articles. Another reading is that it would additionally include Draft Article 6 requiring states to take the necessary measures to ensure that various other acts (such as attempting or ordering and soliciting crimes against humanity) are also offences under their national criminal laws.
133. Furthermore, even assuming both aspects are covered, because crimes against humanity implicate a list of prohibited acts when committed in a certain context (the *chapeau* requirements that form part of the contextual threshold), we presume that Draft Article 13 on extradition will not apply when only the individual underlying acts are in issue. So, for instance, rape as an ordinary crime under national law would

³⁷ See, in this regard, Article 20 of the 1999 *Second Protocol to the Hague Convention for the Protection of Cultural Property*, Article 20 of the 2006 *Convention on Enforced Disappearance* and Article XI of the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*.

not be an extraditable offence under the present draft article although an act of rape that is perpetrated as part of a “widespread or systematic attack” against “any civilian population” would certainly qualify as a crime against humanity. It would thus be an extraditable offence. The Commission may wish to clarify these issues in the commentary. Such explanation may have to include in relation to the meaning of the second sentence of paragraph 1 which reads: “States undertake to include *such offences as extraditable offences* in every extradition treaty to be concluded between them.” [Our emphasis].

134. Sierra Leone supports the Special Rapporteur’s initially proposed paragraph 4 of Draft Article 13. His suggestion of a default rule providing for the use of the draft articles as a basis for extradition, unless the State notifies the depository otherwise, rightly takes into account the challenges faced by States. Experience with the equivalent notification requirement under Article 44(6) of the Convention on Corruption, to which Sierra Leone became party as of 20 September 2004, seems instructive. The fact that two-thirds of states have not been able to fulfill this requirement seems to be an important consideration. As Sierra Leone has been one of those states that have not filed this notification, this suggests to us that there may be a burden that the current proposed provision would place on future states parties to a future draft crimes against humanity convention. As we were unable to find any explanation motivating this change in the report of the Drafting Committee, the Commission might consider returning to this issue. All the more so because of our impression that the Special Rapporteur’s initial proposal seems more realistic for the purposes of effectiveness of the extradition regime contemplated by the crimes against humanity draft articles.
135. Should the Commission prefer to retain the current draft, Sierra Leone considers that current paragraph 4 could be further strengthened by providing, like the clause on which it was modeled, that the state file the notification “at the time of deposit of its instrument of ratification, acceptance or approval of or accession.” With the otherwise open-ended current formulation, the risk remains that even less than the one third of states that have filed such a notification in the corruption convention context might do so for crimes against humanity.
136. **Suggestions:** For the above reasons, Sierra Leone would have welcomed the original proposal of the Special Rapporteur, in view of his third report and data on the experiences of states with the United Nations transnational organized crimes and corruption conventions, the additional clause providing that “States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence referred to in draft article [6].”
137. Lastly, on the dual criminality requirement, we agree with and support the ILC’s approach that, as a general matter, this element would ordinarily be fulfilled as regards crimes against humanity as they are defined in Draft Article 3. The same should be true for the other offences covered by the draft articles under Draft Article 6. Nonetheless, in view of the commentary contained in paragraph 33, it might again

be useful to make unequivocal whether the inchoate forms of criminal participation mentioned in Draft Article 6, paragraphs 1 to 3, themselves constitute “offences” separate and apart from crimes against humanity as defined by Draft Article 3.

N. Draft Article 14 - Mutual legal assistance

This provision provides, among other things, that states shall afford another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings concerning crimes against humanity.

138. **Comments:** Sierra Leone already noted that, like the clause on extradition contained in Draft Article 13, this detailed provision on mutual legal assistance is fundamental to the regime that would be established by a future crimes against humanity convention based on the ILC draft.

139. Sierra Leone therefore appreciates the wide scope of paragraph 1 and its applicability to the different forms of “investigations”, “prosecutions” and “judicial proceedings”. On paragraph 3, which sets out types of assistance that may be sought, Sierra Leone appreciates the clarification that the list contained therein is not intended to be exhaustive. We note that requests for mutual assistance may also be made for more than one of the purposes mentioned.

140. **Suggestions:** For this reason, it might be worth amending the *chapeau* of this provision to read “Mutual legal assistance to be afforded in accordance with this draft article may be requested for [one or more *instead of any*] of the following purposes”.

141. At a more general level, since the present draft article was based on provisions contained in two transnational crimes conventions, we wondered whether the Commission took into sufficient account the specific challenges faced in the context of prosecuting crimes against humanity. Though the vertical context in which they addressed crimes against humanity differs, the experiences of the ICTY, ICTR, the SCSL and the ICC (especially Part 9, including articles 90 and 93) could be analyzed with the view to identifying the practical obstacles to the regime of cooperation under those tribunals. This might allow the Commission to draw some additional lessons that would further inform the revisions to the current draft article.

O. Draft Article 15 - Settlement of disputes

This provision would obligate states to endeavour to settle disputes concerning the interpretation or application of the crimes against humanity draft articles through negotiations, and failing that, by seizing the ICJ of the matter unless the concerned states agreed to submit the dispute to arbitration.

142. **Comments:** Sierra Leone considers that the dispute settlement clause, which borrows heavily from the transnational crimes context, may be unworkable for a crimes against humanity convention. First, Sierra Leone is not entirely convinced that

a three-tier model of dispute settlement is desirable in the context of commission of one of the worst crimes known to international law. Among the reasons for this is the first paragraph requirement to settle disputes concerning interpretation and application of the future convention through negotiations. Would a state that might be under accusation of crimes against humanity against its own population be willing to negotiate with another state party, and if so, would it do so in good faith?

143. Second, Article 15 contemplates a system of opting in and opting out that may be appropriate for conventions that are truly reciprocal in nature. The prohibition of crimes against humanity, like genocide, is driven by more humanitarian impulses. Experience suggests that states do not often act against other states solely to preclude the commission of such crimes. All the more so if the officials of the other state are themselves implicated in the commission of the crimes. Already, in the last seven decades of having a dispute settlement clause for the genocide context, only a relatively small number of single or joint cases based on that dispute settlement clause have been actually initiated by states. This suggests that many states might not invest the political and other capital required to initiate disputes against other states even where crimes against humanity are being committed.

144. Lastly, and this to us is extremely important, the current dispute provision provides lesser than what the other true international crime codified in the 1948 Genocide Convention provides for. It not only fails to address the issue of state responsibility for crimes against humanity, it ignores the responsibility to protect and other emerging norms. Since the crimes against humanity treaty would be more comparable to the Genocide Convention, Sierra Leone considers that draft article 15 on settlement of disputes should at least establish the compulsory jurisdiction of the ICJ along the same lines contemplated by Article IX of the Genocide Convention. This would put a potential crimes against humanity convention on the same plane as the Genocide Convention.

145. **Suggestions:** Sierra Leone suggests the following dispute settlement clause contained in Article IX of the Genocide Convention text with minor stylistic changes be inserted as the new Draft Article 15:

“Disputes between [States] relating to the interpretation, application or fulfilment of the present [draft articles], including those relating to the responsibility of a State for [crimes against humanity] or for any of the other acts enumerated in [draft] article [3], shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

P. Lack of a Specialized Treaty Monitoring Body

146. Sierra Leone noted that the Special Rapporteur, and subsequently the Commission itself, did not advance any proposals for a monitoring body. We understand from a review of the plenary debates that a number of ILC members were strongly in favor of including such a mechanism. We agree with them.

147. Sierra Leone is of the view that, though states could later choose to include such a monitoring mechanism, it would be helpful for the ILC, as a technical body comprised of learned jurists, to consider the available precedents in order to propose a carefully tailored monitoring body for crimes against humanity. Relevant precedents would include the Human Rights Committee and the Committee against Torture. Such a body should reflect the lessons learned and best practices developed by such bodies to lessen reporting burdens on states. It should, of course, be comprised of independent experts serving in their personal capacities. That might better assist in the proper monitoring and implementation of a future crimes against humanity convention.

V. Concluding Remarks

148. As noted at the outset, Sierra Leone generally agrees with and deeply appreciates the ILC's proposed draft articles on crimes against humanity as adopted on first reading. These draft articles already represent a significant contribution to present global thinking on the prevention and punishment of crimes against humanity. We have tried to reflect our country's experience with the realities of crimes against humanity in these comments and observations. We hope that they will be of assistance to the work of the Commission as it advances to the second reading stage of the draft articles on the prevention and punishment of crimes against humanity.

149. In closing, Sierra Leone again wishes to pay tribute to the Commission, its special rapporteur for this topic, and entire membership for their outstanding work and dedication in the preparation of the present draft articles. Sierra Leone is hopeful that, as with the Commission's draft statute for a permanent ICC and contributions in other areas, this set of draft articles will in the future be viewed favourably by states and the General Assembly. We equally hope that they will in due course join the pantheon of remarkable ILC contributions to the progressive development of international law and its codification.

-End.