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We have the honour to address you in our capacity as the United Nations Working Group of Experts on People of African Descent¹ and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance². We write to you about the draft Articles on crimes against humanity that are currently under deliberation by the International Law Commission. We would like to build on the recommendations of the other special procedures of the United Nations. We express our appreciation for your work on these draft Articles and recognize their invaluable contribution to addressing impunity and holding accountable perpetrators of the most serious crimes of international concern.

Additional Relevant Authority to the Draft Articles on Crimes Against Humanity

Durban Declaration and Programme of Action

The Working Group humbly recalls the Durban Declaration and Programme of Action which states, within the ambit of *Sources, causes, forms and contemporary manifestations of racism, racial discrimination, xenophobia and related intolerance*:

¹ For information about the WGEPAD mandate please see:

<https://ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx>

² For information on the mandate of the Special Rapporteur, please see:

<https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx>

Paragraph 13. We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences;

Paragraph 100. We acknowledge and profoundly regret the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, apartheid, genocide and past tragedies. We further note that some States have taken the initiative to apologize and have paid reparation, where appropriate, for grave and massive violations committed;

Paragraph 101. With a view to closing those dark chapters in history and as a means of reconciliation and healing, we invite the international community and its members to honour the memory of the victims of these tragedies. We further note that some have taken the initiative of regretting or expressing remorse or presenting apologies, and call on all those who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so and, to this end, appreciate those countries that have done so;

Paragraph 102. We are aware of the moral obligation on the part of all concerned States and call upon these States to take appropriate and effective measures to halt and reverse the lasting consequences of those practices;

Paragraph 103. We recognize the consequences of past and contemporary forms of racism, racial discrimination, xenophobia and related intolerance as serious challenges to global peace and security, human dignity and the realization of human rights and fundamental freedoms of many people in the world, in particular Africans, people of African descent, people of Asian descent and indigenous peoples;

Paragraph 104. We also strongly reaffirm as a pressing requirement of justice that victims of human rights violations resulting from racism, racial discrimination, xenophobia and related intolerance, especially in the light of their vulnerable situation socially, culturally and economically, should be assured of having access to justice, including legal assistance where appropriate, and effective and appropriate protection and remedies, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, as enshrined in numerous international and regional human rights instruments, in particular the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

(Underscoring is ours)

We respectfully suggest that the above references to the Durban Declaration and Programme of Action be adequately reflected in your work on the draft Articles on crimes against humanity.

Mass Incarceration

On the matter of mass incarceration, we would like to refer to relevant excerpts from the Report of the Working Group of Experts on People of African Descent following its mission to the United States of America, UN Doc A/HRC/33/61/Add.2, 18 August 2016:

74. Mass incarceration has had a disproportionately high impact on people of African descent. The devastating impact of the “War on Drugs” has led to mass incarceration and is compared by African Americans to enslavement, due to the exploitation and dehumanization of African Americans. The costs of mass incarceration practices must be measured in human lives — particularly the generations of young black men and women who serve long prison sentences and are lost to their families and to society at large.

In other countries, the Working Group has observed similarly egregious crimes against people of African descent fuelled by racial profiling, racial violence, acts of racial hatred, racial segregation, racial subordination, and trade in enslaved persons.

Specific Recommendations to the Draft Articles on Crimes against Humanity

Therefore, we recommend the following:

- Expressing the right to reparations for crimes against humanity in language sufficient to include reparations for historical injustices, including the transatlantic slave trade.
- Explicitly recognizing that those who are entitled to reparations include not only those who most directly suffer crimes against humanity but also subsequent generations who live with the consequences of those crimes. Subsequent generations entitled to reparations may be several generations removed from the most direct instances of crimes against humanity, and may include both present and future generations.
- Noting the initiatives taken by some already, the notion of reparations in the draft articles must be understood to include monetary and non-monetary measures. Reparations include, but are not limited to, honouring the memory of the victims of these tragedies, regretting or expressing remorse or presenting apologies and taking appropriate and effective measures to halt and reverse the lasting consequences of those practices. Where crimes against humanity have resulted in forms of racial inequality, discrimination and/or subordination, reparations must seek and accelerate the enjoyment of racial equality.
- Emphasizing the need for a provision on the non-applicability of any statute of limitations for the right to reparations for crimes against humanity. Imprescriptibility for the criminal aspect is referenced in Article 6(5), but there

seems to be no similar provision for imprescriptibility on the matter of reparations.

- In the definition of crimes against humanity, adding to the enumeration in Article 3(1) of the draft Articles: “mass incarceration”.
- In the draft Article 3(1)(c) – “enslavement” – adding: “and trade in enslaved persons”.
- In the draft Article 3(2)(g) – definition of “persecution” – adding the concepts of racial profiling, racial violence, acts of racial hatred, racial segregation, racial subordination.

We appreciate your taking the time to consider this letter alongside the many other inputs you are receiving. We would like to also inform you that this communication will be made available to the public on the website page of the OHCHR Special Procedures webpage and may be included in the periodic communications reports of the Special Procedures to the Human Rights Council.

We also appreciate your commitment to promoting the progressive development of international law and its codification, especially through this important work of elaborating the Draft Articles on crimes against humanity.