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Crimes against humanity

Comments and observations received from Governments, international organizations and others

Contents

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I. Introduction

1. At its sixty-ninth session (2017), the International Law Commission adopted, on first reading, the draft articles on crimes against humanity.[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft articles, through the Secretary-General, to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018.[2] The Secretary-General circulated a note dated 11 September 2017 to Governments transmitting the draft articles on crimes against humanity, with commentaries thereto, and inviting them to submit comments and observations in accordance with the request of the Commission. The draft articles and commentaries thereto were also sent to international organizations and others by letters dated 11 September 2017, inviting them to provide comments and observations. By its resolution 73/265 of 22 December 2018, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles adopted on first reading by the Commission at its sixty-ninth session.

2. As of 16 January 2019, written comments had been received from Argentina (29 November 2018), Australia (10 December 2018), Austria (16 January 2018), Belarus (30 November 2018), Belgium (30 November 2018), Bosnia and Herzegovina (28 November 2018), Brazil (5 December 2018), Canada (30 November 2018), Chile (8 December 2018), Costa Rica (30 November 2018), Cuba (13 December 2018), the Czech Republic (3 December 2018), El Salvador (30 November 2018), Estonia (30 November 2018), France (29 November 2018), Germany (30 November 2018), Greece (3 December 2018), Israel (30 November 2018), Japan (30 November 2018), Liechtenstein (1 December 2018), Malta (30 November 2018), Morocco (11 December 2018), New Zealand (30 November 2018), Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (30 November 2018), Panama (30 November 2018), Portugal (7 December 2018), Peru (7 December 2018), Sierra Leone (30 November 2018), Singapore (7 December 2018), Switzerland (28 November 2018), Ukraine (30 November 2018), the United Kingdom of Great Britain and Northern Ireland (29 November 2018), and Uruguay (30 November 2018).

3. As of 16 January 2019, written comments had also been received from the following international organizations and other entities: the Committee on Enforced Disappearances (23 November 2018), the Council of Europe (21 November 2017), the European Union (27 November 2018), the International Criminal Police Organization (INTERPOL) (6 April 2018), the International Organization for Migration (30 November 2018), United Nations Human Rights Council special procedure mandate holders (30 November 2018),[3] the United Nations Human Rights

[1] Report of the International Law Commission on the work of its sixty-ninth session, *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 41.

[2] *Ibid*., para. 43.

[3] Two sets of comments were received from special procedure mandate holders. The first set, which concern the persecutory grounds in draft article 3, was addressed to the Secretariat by the following: Special Rapporteur on extrajudicial, summary or arbitrary executions; Working Group of Experts on People of African Descent; Independent Expert on the enjoyment of human rights by persons with albinism; Special Rapporteur on the situation of human rights in Cambodia; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the right to food; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members; Working Group on the use of mercenaries as a means of violating human

Council Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (30 November 2018), the United Nations Human Rights Council Working Group on Enforced and Involuntary Disappearances (3 December 2018), the United Nations Office of the High Commissioner for Human Rights (3 December 2018), the United Nations Office on Drugs and Crime (1 October 2018), and the United Nations Office on Genocide Prevention and the Responsibility to Protect (19 December 2018).

4. The comments and observations received from Governments are reproduced in Section II below, while the comments and observations from international organizations and others are reproduced in Section III. The comments and observations are organized thematically as follows: general comments and observations; specific comments on the draft preamble, the draft articles and the draft annex; and comments on the final form of the draft articles.[4]

rights and impeding the exercise of the right of peoples to self-determination; Special Rapporteur on the human rights of migrants; Special Rapporteur on the situation of human rights in Myanmar; Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 35/15, 36/23, 28/6, 36/32, 35/6, 32/8, 36/15, 33/9, 33/12, 35/9, 33/4, 34/21, 37/32, 1993/2A, 34/35, 32/2, 31/3, 34/19, 36/7 and 32/4 (“Special procedure mandate holders (persecution)”). The second set of comments, which concern the definition of gender under draft article 3, was addressed to the Secretariat by the following: Special Rapporteur on extrajudicial, summary or arbitrary executions; Working Group of Experts on People of African Descent; Special Rapporteur on the situation of human rights in Cambodia; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the right to food; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on human rights of internally displaced persons; Special Rapporteur on the situation of human rights in the Islamic Republic of Iran; Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members; Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; Special Rapporteur on the situation of human rights in Myanmar; Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on freedom of religion or belief; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity**;** Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on violence against women, its causes and consequences; Working Group on the issue of discrimination against women in law and in practice; and Special Rapporteur on the human rights to safe drinking water and sanitation (“Special procedure mandate holders (gender))”.

[4] In each of the sections below, comments and observations received are arranged by States, international organizations and others, which are listed in English alphabetical order.

II. Comments and observations received from Governments

A. General comments and observations

Australia

[Original: English]

Australia appreciates the purpose of International Law Commission's attention on the subject: to provide a basis for States to consider closing the gap in the current structure of conventions regarding serious international crimes. Unlike genocide, war crimes, and torture, no specific regime governs the prevention and punishment of crimes against humanity.

Australia notes that the draft articles draw from, and build on, a wide range of international conventions covering not only the aforementioned serious international crimes, but also subject matter including corruption, terrorism, transnational serious and organised crime, trafficking of illicit drugs, extradition and mutual legal assistance. Australia also appreciates the Special Rapporteur's careful regard to a range of national and regional approaches.

Australia considers it appropriate that the draft articles are anchored in the core principle that it is, first and foremost, the primary responsibility of each territorial State to prevent and punish serious international crimes that occur within its jurisdiction. Australia respectfully submits that it would be useful for the draft articles themselves (as distinct from the preamble or commentary) to contain explicit reference to this primary responsibility.

Australia observes that draft article 4 usefully clarifies that States' specific obligation to prevent crimes against humanity can be implemented through cooperation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations.

Australia appreciates that a clear priority in the preparation of the draft articles has been to complement the regime set forth in the 1998 Rome Statute of the International Criminal Court. The definition in draft article 3 mirrors the definition of crimes against humanity in article 7 of that Statute. Australia also appreciates the confirmation, reflected in the general obligation contained in draft article 2, that crimes against humanity can be committed in both peacetime and armed conflict, where such acts are committed as part of a widespread or systematic attack directed against any civilian population.

Australia notes that the Special Rapporteur's reports evince an intention that the *Elements of Crimes* adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court to assist that Court in interpreting and applying the Statute would similarly guide the interpretation of the definition in draft article 3, and respectfully submits that clarification that this is indeed the case would be useful.

Australia observes that in defining the territorial scope of a State's obligations, the draft articles use the phrase "in any territory under its jurisdiction". The draft articles provide that States are to establish effective legislative, administrative, judicial and other preventive measures in any such territory;[5] to domestically criminalise crimes against humanity;[6] and to promptly and impartially investigate whenever there is reasonable ground [sic] to believe that acts constituting crimes

[5] Draft article 4, para. 1 (*a*).

[6] Draft article 6.

against humanity have been or are being committed in any such territory.[7] Accordingly, Australia respectfully submits that it would be useful to clarify that the obligations in draft articles 4, 6, 8 and 9 would not, for example, arise with respect to places of detention outside the territory of the State in circumstances where the State had control over the place of detention but not over the surrounding territory. The position of Australia is that international obligations are primarily territorial, and that a high degree of control over territory is required for territory to be considered under a State's jurisdiction.

Austria

[Original: English]

Austria reiterates its understanding that the term "international criminal tribunals" used in the draft articles includes also hybrid courts.

Belarus

[Original: Russian]

We believe that the observations and comments of States will be of practical benefit to the Commission as it works to ensure that the draft articles (and any future international convention based upon them) are compatible, as far as possible, with national laws applicable to crimes against humanity.

On the whole, the Commission's proposals are compatible with the principles set out in the criminal laws currently in force in Belarus. A number of issues merit further consideration, however.

The Criminal Code of the Republic of Belarus is the only criminal law in force in the country. Any new laws under which criminal responsibility is incurred must be incorporated into the Criminal Code.[8]

As currently drafted, the terminology and structure of the draft articles do not fully correspond to the provisions of the Criminal Code and the Code of Criminal Procedure of Belarus.

In particular, the acts referred to in draft article 3 [3], paragraph 1, only partially correspond to acts for which responsibility is incurred under Belarusian criminal law.[9] Specifically, the draft articles currently differ from the Criminal Code with regard to the list of acts, the identity of the perpetrators and a number of the *indicia* of the acts.

For example, article 135 (Violation of the laws and customs of war) of the Criminal Code provides penalties for coercing persons who have surrendered their weapons or have no means of defence, persons who are wounded, sick or shipwrecked, medical and religious personnel, prisoners of war, civilians living in occupied territory or in an area in which hostilities are taking place, and other persons entitled to international protection during hostilities, to serve in hostile armed forces or to be resettled; for denying them the right to be heard by an independent and impartial court; or for limiting their right of defence in criminal proceedings.

Although the aforementioned acts formally correspond to the individual acts listed in draft article 3 [3], paragraph 1, the purposes of establishing criminal responsibility for all the crimes listed in the draft article cannot be fully achieved

[7] Draft article 8. Australia notes that the commentary confirms this is intended as a general obligation to investigate the situation as such, and is separate from the more granular obligations regarding the potential individual criminal responsibility of specific alleged offenders.

[8] Criminal Code of the Republic of Belarus, art. 1, para. 2.

[9] Criminal Code, Section VI.

under the Criminal Code currently in force in Belarus. Certain acts and *indicia* thereof are absent from the Code, while in other cases the relevant provisions contain different terms from those used in draft article 3 [3].

The list of crimes constituting infringements of sexual autonomy or inviolability set out in draft article 3 [3], paragraph 1 (*g*), is more extensive than the list included in chapter 20 of the Criminal Code of Belarus, because the draft article includes the crimes of forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.

Furthermore, acts such as persecution[10] or other acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, are not regarded as crimes against humanity under the national laws of Belarus.

Article 126 of the Criminal Code applies to deportation, enslavement, abduction followed by disappearance, and torture or acts of cruelty against a civilian population only when carried out on the basis of racial, national or ethnic identity, political opinions or religion. The draft articles contain no such limitation.

In order for any of the acts set out in the draft articles to be classified as a crime against humanity, it must be committed as part of a widespread or systematic attack directed against a civilian population. That *indicium* is also not included in Belarusian law.

The notion of "enforced disappearance"[11] is broader than that of abduction of a person,[12] since it includes such acts as arrest and detention.

Draft article 6 [5], paragraph 2, contains a requirement for the criminalization under national law of crimes against humanity and acts equivalent to such crimes (ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime).

The criminal laws of Belarus provide for responsibility for the attempted commission of a crime[13] and for complicity in a crime.[14] The forms of complicity specifically mentioned are organization, abetting and aiding.

Thus, not all the acts envisaged in draft article 6 [5], paragraph 2, are expressly envisaged in the Criminal Code.

Draft article 6 [5], paragraph 3, covers relationships governed by different institutions of criminal law. The provision raises issues that are reflected in provisions of the Criminal Code pertaining to guilt (arts. 21 to 23), complicity in a crime (art. 16) and circumstances precluding the criminality of an act (art. 40).

Draft article 6 [5], paragraph 4, stipulates that the fact that a crime against humanity was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

Under the criminal law of Belarus, however, the causing of harm to protected interests by a person acting pursuant to an order or instruction that is binding on him or her and is issued in accordance with an established procedure is not a criminal

[10] Draft art. 3 [3], para. 2 (*g*).
[11] Draft art. 3 [3], para. 2 (*i*).
[12] Criminal Code, art. 182.
[13] *Ibid.*, art. 14.
[14] *Ibid.*, art. 16.

offence. Criminal responsibility for causing such harm is borne by the person who issued the unlawful order or instruction.[15]

However, a person who intentionally commits a crime pursuant to an order or instruction bears criminal responsibility under the provisions generally applicable to the crime in question if it was committed with the knowledge that the order or instruction was of a criminal nature.[16]

Draft article 6 [5], paragraph 6, stipulates that crimes against humanity shall not be subject to any statute of limitations.

The national laws of Belarus stipulate that exemption from criminal responsibility on the grounds of expiry of the statute of limitations does not apply in the case of the following crimes against peace, crimes against the security of humankind or war crimes: preparation for or the waging of a war of aggression; acts of international terrorism; genocide; crimes against the security of humankind; production, stockpiling or proliferation of prohibited weapons of war; ecocide; use of weapons of mass destruction; violation of the laws and customs of war; criminal violations of the rules of international humanitarian law during an armed conflict; and failure to act or the issuance of a criminal order during an armed conflict.[17]

Thus, this list does not include all the crimes against humanity set out in the draft articles.

Furthermore, it is for the courts to decide whether to apply a statute of limitations to a person who has committed an offence that is punishable by life imprisonment or the death penalty. If the courts find that the expiry of the statute of limitations does not constitute grounds for exemption from criminal responsibility, neither the death penalty nor life imprisonment may be imposed, and a custodial sentence is to be handed down.[18]

Draft article 6 [5], paragraph 8, stipulates that measures must be taken to establish the liability of legal persons and that, "[s]ubject to the legal principles of the State, such liability ... may be criminal, civil or administrative".

At present, there are no provisions for the criminal liability of legal persons in Belarus. The Code of Administrative Offences of the Republic of Belarus provides for administrative liability,[19] but only in the case of administrative offences, which means wrongful acts for which administrative liability[20] is incurred, that is, acts that are not considered to be crimes.

Therefore, before the Republic of Belarus can agree to be bound by an international convention that comprises the draft articles on crimes against humanity in their current form, an in-depth theoretical and practical analysis would need to be conducted to identify all inconsistencies with national law enforcement practice. In addition, in order for Belarus to implement procedures at the national level, changes would need to be made to the Criminal Code and the Code of Criminal Procedure.

We believe that, if the authors of the draft articles take into consideration, as far as possible, the foregoing considerations relating to the laws of Belarus and also the comments and observations of other States, this will facilitate the conclusion of an

[15] *Ibid.*, art. 40, para. 1.
[16] *Ibid.*, art. 40, para. 2.
[17] *Ibid.*, art. 85.
[18] *Ibid.*, art. 83, para. 5.
[19] Code of Administrative Offences, art. 4.8, para 3.
[20] *Ibid.*, art. 2.1, para 1.

international convention on crimes against humanity and its implementation in national legal systems.

The Republic of Belarus welcomes the Commission's view that "an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation".[21]

Belgium

[Original: French]

From a methodological point of view, it would be useful for the commentaries of the Commission to include an annex setting out all the judicial decisions finding an individual guilty of crimes against humanity. Those decisions are relatively numerous, but not so much as to prevent the compilation of an inventory. What is proposed would simply be a list; but it would be useful and valuable for any research regarding crimes against humanity.

Chile

[Original: English]

In full conformity with its unwavering commitment to the protection and promotion of human rights, the Government of Chile would like to commend the Special Rapporteur, professor Sean Murphy, for its outstanding and rigorous work. His effort has resulted in an excellent project that coherently articulates the main international obligations arising from the customary prohibition of crimes against humanity, namely, the duty of states to prevent them and to punish them. The project provides welcome clarity on the scope of these obligations, and also intends to bolster the prosecution of these crimes at the national level, an objective which is plainly consistent with the complementarity principle governing the system of the International Criminal Court.

The project should be praised for its both comprehensive and responsible formulation, which follows the definition of crimes against humanity enshrined in the Rome Statute of the International Criminal Court, and which draws on provisions from widely ratified treaties in order to shape the content of its obligations. Such an approach will enable these draft articles to gain widespread international acceptance, and hopefully, will also allow them to become the basis of a multilateral convention on the topic. In any event, this project is called to play a key role in preventing impunity for these heinous crimes, the occurrence of which constitutes an offence perpetrated against humankind as a whole.

Czech Republic

[Original: English]

We followed the drafting of articles on crimes against humanity very closely and we note with satisfaction that the whole set of draft articles with commentaries was adopted on first reading last year. The absence of a convention on prevention and punishment of crimes against humanity and on judicial cooperation among States in prosecuting these crimes has been debated for a long time, but only conventions regarding certain crimes which form part of definitions of crimes against humanity have been concluded so far. The Czech Republic would like to express its support for the elaboration of the convention on crimes against humanity which if concluded

[21] Report of the International Law Commission on the work of its sixty-ninth session (see footnote 1 above), para. (41) of the commentary to draft article 3.

would fill the legal gap and complement other conventions on prosecution of the most serious crimes under international law.

We note with appreciation that the draft articles are elaborated in a complex manner and include both the substantive and procedural aspects of investigation and prosecution of these crimes. In particular, we welcome the inclusion of the provisions on the protection of victims and witnesses, fair treatment of the alleged offenders and promotion of broad cooperation among States.

France

[Original: French]

First, France wishes to express its satisfaction with the general efficiency of the draft articles adopted on first reading by the International Law Commission. The methodology and approaches adopted have led to an excellent outcome that will be of practical relevance to States. Thus, France is hopeful that these draft articles may eventually serve as the basis for the conclusion of an international convention on the prevention and punishment of crimes against humanity, and thereby help to strengthen the international criminal justice system.

Second, it should be recalled that the International Criminal Court, the first permanent, universal international criminal court, plays a central role in the prosecution of the most serious crimes of concern to the international community as a whole, while entrusting States with the primary responsibility, under the principle of complementarity, to prosecute crimes committed by or against their nationals or in their territories.

France is therefore pleased that the draft articles are based on the Rome Statute of the International Criminal Court and reflect, in part, its provisions. In this regard, the draft preamble is appropriate, being largely inspired by the preamble of the Statute and containing an explicit reference to the definition of the crime provided by the Statute. There is some doubt, however, as to the desirability of qualifying the prohibition of crimes against humanity as a peremptory norm of general international law, since the Commission is currently working on the topic "Peremptory norms of general international law (*jus cogens*)", and since the preamble of the Rome Statute of the International Criminal Court itself does not refer to them.

…

Contrary to the original draft submitted by the Special Rapporteur, the draft articles adopted on first reading by the Commission do not include a provision on the relationship between the draft articles and the international obligations of States in respect of international courts. Such a provision is absolutely necessary to avoid uncertainties and jurisdictional conflicts. France therefore calls for the verbatim replication of draft article 15, as contained in the third report of the Special Rapporteur, which read as follows:

> "Draft article 15. Relationship to competent international criminal tribunals
>
> "In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail."

France wishes to reiterate its support for the decision taken by the Special Rapporteur and the Commission not to include a provision on immunities and amnesty, in particular because of the Commission's current work on the topic of the immunity of State officials from foreign criminal jurisdiction.

Germany

[Original: English]

As a staunch supporter of international criminal law, Germany attaches great importance to the topic at hand. It acknowledges that there is no general multilateral framework governing the prosecution of crimes against humanity and is convinced of the usefulness of the adoption of a specialized Convention on Crimes against Humanity. The Convention would not only complement treaty law on core crimes, but would foster inter-state cooperation with regard to their investigation, prosecution and punishment. A future Convention on Crimes against Humanity ought to provide further impetus to end impunity for atrocity crimes.

The Rome Statute of the International Criminal Court regulates the relations between States and the International Criminal Court and addresses the prosecution of crimes falling under its jurisdiction. The Statute is not focused on steps that States should be taking to prevent and punish crimes against humanity. A Convention on Crimes against Humanity would in this respect close a gap in the existing international legal framework.

Germany believes that a Convention on Crimes against Humanity would contribute to the implementation of the complementarity provisions of the Rome Statute of the International Criminal Court by encouraging national prosecutions. Ultimately, the convention would serve to encourage the wider acceptance of the International Criminal Court's jurisdiction and promote the universality of the Statute.

Germany sees the orientation towards the language of the Rome Statute of the International Criminal Court as a precondition for the success of the project. A Convention on Crimes against Humanity must avoid conflicts with the Statute and ensure consistency with existing rules and institutions of international criminal law, foremost the definitions of crimes against humanity contained in the Statute.

Germany welcomes the fact that the Commission as a result of the first reading does not propose any institutionalised mechanism under the draft Convention as this would bear the danger of creating space for different interpretations.

Greece

[Original: English]

Greece attaches great importance to the fight against impunity for the most heinous crimes of international concern, including the crimes against humanity. In this it welcomes the adoption on first reading of the Draft Articles which, independently of the outcome of future discussions within the Sixth Committee on their final legal form, could, with some further adjustments, contribute significantly to the prevention of such crimes and the strengthening of accountability by providing useful guidance to those States which have not yet adopted legislation regarding the criminalization and prosecution of such crimes at the domestic level.

[See also comments under final form]

Israel

[Original: English]

In general terms, Israel is of the view that a comprehensive treatment of the prohibition on crimes against humanity would benefit the international community. It further believes that in order to secure the broadest acceptance of such a project, it is

preferable that it would reflect widely accepted principles on the subject and, equally important, contain safeguards against their potential abuse, as suggested below.

It is important for the draft articles to accurately reflect well-established principles of international law so as to attract wide acceptance and make the most effective contribution. In certain respects, however, the Draft Articles and the commentary thereto appear to stray from such principles.

…

One of the most fundamental principles of international criminal law is that States have the primary sovereign prerogative to exercise jurisdiction in their national courts over crimes against humanity that have been committed either in their territory or by their nationals. This principle is consistent with the notion that the State with territorial or active personality jurisdiction is usually best suited to effectively prosecute crimes and it is in the interest of justice, with due consideration to the interests of victims, the rights of the accused and other similar considerations, that local jurisdictions with clear jurisdictional links would be given primacy. Only when such States are unable or unwilling to exercise jurisdiction, alternative mechanisms should be considered. Israel believes that various safeguards must be included in the draft articles in order to reflect and promote this basic principle.

Safeguards should also be adopted in order to prevent the initiation of inappropriate, unwarranted, or ineffective legal proceedings; proceedings where proper standards of due process cannot be met, in particular in cases in which the forum State does not have sufficient access to witnesses and other evidence; and/or proceedings where the incident in question has already been examined by another State with close jurisdictional links.

In line with existing practice common in key jurisdictions, such safeguards should therefore include, for example, a requirement that any initiation of legal proceedings would be conducted only with the prior approval of high-level legal officials in the executive branch at the earliest stage; assertion of universal jurisdiction should be regarded as a measure of last resort in appropriate circumstances only; adherence to the principle of subsidiarity; and a requirement that prior to issuing requests for mutual legal assistance, provisional arrest, or extradition, States take appropriate measures to determine whether the party that filed the complaint has filed complaints about the alleged incident or suspect in other fora, and if so, whether an investigation has taken place or is ongoing there.

Japan

[Original: English]

Japan respects the current work of the Commission and welcomes the codification of “Crimes against humanity”. The international community should work together in order to suppress such crimes as they compose “the most serious crimes of concern to the international community as a whole”. In addition to the Rome Statute of the International Criminal Court, which regulates “vertical relationships” between the Court and its States Parties, the current work, which creates “horizontal relationships” among states, will lead to a strengthening of the effort of the international community for preventing those crimes and punishing their perpetrators.

Japan believes that the current work should avoid any legal conflicts with the regime of the existing international criminal tribunals, including the International Criminal Court. We are of the view that the procedural framework of the current work is consistent with that of the Rome Statute of the International Criminal Court.

The definition of crimes against humanity in the current work is identical with the text of Article 7 of the Statute. Japan supports the language of Article 7 as an appropriate basis for defining these crimes, considering that said article has been accepted by more than 120 States Parties to the Statute. Japan recognizes that, in order to avoid the fragmentation of the definition of the crime, this is a realistic approach and should be welcomed.

Liechtenstein

[Original: English]

Article new – Reservations

No reservations may be made to this ~~Statute~~ *Convention*. [Art. 120 Rome Statute of the International Criminal Court]

Arguments: Ensure that all State Parties assume the same obligations in repressing these heinous crimes and to ensure consistency with the Rome Statute of the International Criminal Court; prevent undermining the convention's integrity and effectiveness; alternative of relying on other States to raise objections according to the Vienna Convention on the Law of Treaties provisions is "inappropriate to address the problem of reservations to human rights treaties" because maybe no interest to do so; alleviates the shortcomings of not having a treaty monitoring body; creates certainty about the extent of obligations.

Article new – Territorial scope of ~~treaties~~ *the Convention*

Unless a different intention ~~appears from the treaty or~~ is ~~otherwise~~ established, ~~a treaty~~ *this Convention* is binding upon each party in respect of its entire territory. [Art. 29 Vienna Convention on the Law of Treaties]

Argument: Constructive with regard to federal States.

Morocco

[Original: Arabic]

It should be noted that the work of the Commission is intended to fill some practical gaps in the international legal framework, and that the draft articles are inspired by the Rome Statute of the International Criminal Court and the Convention on the Prevention and Punishment of the Crime of Genocide.

In the draft articles, the Commission adopts an expansive definition of crimes against humanity; it states that such crimes can be committed both in time of armed conflict and at other times.

States are not merely obligated to refrain from any actions that could constitute a crime against humanity: they are also required to put in place reasonable measures to prevent their commission, to criminalize crimes against humanity in national legislation, and to provide for appropriate penalties commensurate with the grave nature of such crimes so that the perpetrators can be prosecuted by the national judicial system.

The draft articles also state explicitly that, in accordance with international custom, crimes against humanity are not subject to any statute of limitations.

They state that jurisdiction *ratione loci* and positive and negative jurisdiction *ratione personae* are the minimum requirement to establish jurisdiction.

Under the draft articles, every State is obligated to investigate in order to determine whether crimes against humanity have been or are being committed in any

territory under its jurisdiction, to intervene immediately to prevent their continuation, and to prosecute the alleged perpetrators in a prompt and impartial manner.

Draft article 5, paragraph 1, provides that no State shall expel, return, surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

The draft articles also state that anyone suspected of committing the crimes listed therein has a right to a fair trial.

With regard to requirements for extradition, the draft articles clearly draw particular inspiration from the United Nations Convention against Corruption, in that they consider separately the rights and obligations of States and the proceedings for extradition from one State to another in respect of crimes against humanity.

Draft article 14 provides that States should afford one another the widest measure of mutual legal assistance in investigations, prosecutions and proceedings in relation to crimes against humanity.

New Zealand

[Original: English]

As a general comment, New Zealand is pleased to observe that the Draft Articles have been formulated in a way which complements the Rome Statute of the International Criminal Court.

Peru

[Original: Spanish]

Peru believes that the future Convention would complement the existing legal framework, in particular in the area of international humanitarian law, international criminal law and international human rights law. In that regard, it would strengthen aspects regulated by, for example, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948,[22] the Geneva Conventions and their additional Protocols,[23] the Rome Statute of the International Criminal Court of 1998,[24] and the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.[25]

In that connection, we welcome the fact that the draft articles address inter-State cooperation in the prevention of crimes against humanity, in other words, before such crimes are committed, as well as in the investigation, apprehension, prosecution, extradition and punishment in national legal systems of persons who commit such crimes, an objective consistent with the Rome Statute of the International Criminal

[22] Adopted on 9 December 1948, entered into force on 12 January 1951 and ratified by Peru on 24 February 1960.

[23] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II), Geneva Convention relative to the Treatment of Prisoners of War (Convention III), and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), adopted on 12 August 1949. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), adopted on 8 June 1977, ratified by Peru in 1990. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III).

[24] Adopted on 17 July 1998, entered into force on 1 July 2002 and ratified by Peru on 10 November 2001.

[25] Adopted on 20 December 2006, entered into force on 23 December 2010 and ratified by Peru on 26 September 2012.

Court. The obligation to cooperate would encompass, inter alia, mutual legal assistance, extradition and recognition of evidence.

…

A key element that should be included in the draft articles, despite certain practice to the contrary (for example, in the International Convention for the Protection of All Persons from Enforced Disappearance), is the prohibition of general amnesties for crimes against humanity. In this regard, although transitional justice mechanisms could be contemplated in the wake of some types of conflict, under no circumstances should amnesties be permitted for crimes against humanity, which by their very nature are horrendous crimes of concern to the international community as a whole and which by their very existence violate a peremptory norm of general international law (*jus cogens*).

To support the above, note should be taken of the jurisprudence of the Inter-American Court of Human Rights[26] and consideration given to the fact that failing to include a specific prohibition on general amnesties could run counter to the object and purpose of a future Convention on the Prevention and Punishment of Crimes against Humanity, because specific cases of impunity could arise that would be contrary to the purpose of punishing and preventing crimes against humanity.

Looking ahead, and in the hope that the International Law Commission's draft articles could lead to a future Convention on the subject, it would be advisable to include a rule, like article 120 of the Rome Statute of the International Criminal Court, to the effect that reservations would not be admitted or would only be permitted in relation to some provisions of the annex.

Such a rule would be fully consistent with the object of the future treaty, as reflected in draft article 1, on its scope. In that vein, it is worth recalling that in its Advisory Opinion of 28 May 1951 on *Reservations to the Convention on Genocide*, the International Court of Justice stated that: "The disadvantages which result from this possible divergence of views are real. They could have been remedied by an article on reservations."[27]

Portugal

[Original: English]

In our understanding, the draft articles on "Crimes against humanity" provide a solid and strong basis for the discussion about a future convention covering both the substantive and procedural aspects of this topic. Such an instrument could be one more step to fighting impunity and ensuring accountability where these crimes are concerned.

Nonetheless, we are still of the opinion that the Commission should take a careful approach when it comes to the adoption or adaptation of solutions that have proved to be successful for other types of crimes. We should resist the temptation of simply transposing already existing regimes that were not designed for the specific context and legal nature of crimes against humanity. Thus, we consider that the draft articles may benefit if this issue is revisited upon the second reading of the draft articles.

Portugal has always considered the study on this topic should be conducted resorting to the existing rules and practice so as to prevent entering into conflict with

[26] For example, see *Barrios Altos* v. *Peru, Judgment of 14 March 2001 (Merits)*, Inter-American Court of Human Rights, paras. 41–44 and 51.4.

[27] *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 1948–1991*, United Nations publication (ST/LEG/SER.F/1), 1992, p. 20.

the already existing legal framework dealing with crimes against humanity. In this sense we are pleased to notice that the Rome Statute of the International Criminal Court and the language contained therein are key references of International Law Commission's work and that the relations between these draft articles and the Statute were taken into account by the Commission.

Sierra Leone

[Original: English]

Sierra Leone generally agrees with the International Law Commission'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).

…

The Rome Statute of the International Criminal Court must necessarily be a starting point for the draft articles on crimes against humanity. However, Sierra Leone considers it also desirable for the International Law Commission to ensure that its proposals not only fully respect the integrity of the Rome Statute of the International Criminal Court, 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.

With a stronger International Law Commission draft instrument on crimes against humanity, it is possible that some States that have not yet domesticated the Rome Statute of the International Criminal Court would be inspired to adapt the Commission's 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 Statute and emphasizes the primacy of national prosecutions, for one of the most egregious crimes known to international law.

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.

Generally, there are aspects of the International Law Commission'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.

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.[28] Indeed, as with other International Law Commission projects, the draft crimes against humanity articles will necessarily reflect a combination of the two.

Second, although there is considerable practice in the international investigation and prosecution of crimes against humanity starting with the International Military Tribunal established at Nürnberg and the International Military Tribunal for the Far East through to the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court, 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.

Third, the International Law Commission 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.

Fourth, Sierra Leone noted with satisfaction that the International Law Commission has not, and rightly so in our view, elected to flag which of the draft articles on crimes against humanity adopted 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.[29] In any case, this also appears more consistent with the expressed aim of

[28] See the report of the Committee on the Progressive Development of International Law and its Codification (document A/331), *Official Records of the Second Session of the General Assembly, Sixth Committee, Legal Questions*, annex 1, p. 175, para. 7; and *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, p. 210, para. 102, and *ibid., 1996*, vol. II (Part Two), p. 86, paras. 156–157.

[29] *Ibid.*, p. 84, para. 147 (*a*), and pp. 86–87, paras. 156–159; and *ibid., 1979*, vol. II (Part One), document A/CN.4/325, pp. 187–188, para. 13, and *The Work of the International Law Commission*, vol. I, 9th ed., 2017 (United Nations publication: Sales No. E.17.V.2), pp. 47–49 (noting that the formal distinction drawn by the statute of the International Law Commission had proved "unworkable" in practice, for

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.

…

The International Law Commission, 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).

The subsequent reports of the Special Rapporteur, the Commission's 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.

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.

Given the premise of the crimes against humanity study, Sierra Leone suggests that the International Law Commission emphasize both the prevention and punishment aspects of crimes against humanity in the title as well as in the substance of the draft articles. This would, firstly, better reflect the Commission'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. Third, such a change may also help make a future crimes against humanity convention based on a Commission draft more analogous to the treaty addressing the sister crime prohibited by the Convention on the *Prevention* and *Punishment* of the Crime of Genocide (emphasis added).[30] 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.[31]

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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" (*ibid.*, at p. 7).

[30] United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[31] See L. N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011, appendices I–II, pp. 359–448 containing, in their 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*.

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

….

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 members of the International Law Commission were strongly in favor of including such a mechanism. We agree with them.

Sierra Leone is of the view that, though States could later choose to include such a monitoring mechanism, it would be helpful for the International Law Commission, 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.

As noted at the outset, Sierra Leone generally agrees with and deeply appreciates the Commission'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.

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 international criminal court 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 International Law Commission contributions to the progressive development of international law and its codification.

[See also comments under final form]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic Countries refer to our previous comments made in statements in the Sixth Committee.

…

Finally, the commentaries to the draft articles describe the related treaty instruments and international case law in a helpful and analytical manner. It is worth noting that especially the international case law on punishability largely concerns acts committed in connection to armed conflicts, whereas the set of International Law Commission draft articles would apply to crimes against humanity as provided in draft article 2, regardless of whether the relevant crime was committed during an

armed conflict or not. Accordingly, it would be beneficial if the commentaries would pay increased attention to the application of the elements of crime in situations without an armed conflict. In this context, it is important that the positions stated on the interpretation indicate a sufficiently narrow scope of application of the elements of crime.

[See also comments under final form]

Switzerland

[Original: French]

Switzerland wishes first of all to commend the high quality of the Commission's work and welcomes the fact that the draft articles are concise and limited to essential matters.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom would like to stress that it is supportive of the draft articles subject to the comments it makes here.

The United Kingdom also reiterates its view that the expansion of the scope of this work into issues such as civil jurisdiction, amnesty and immunity would be unhelpful to the goal of a widely accepted convention and appreciates the fact that there has been no such expansion to date. In particular, the United Kingdom is clear that there is no conflict between *jus cogens* rules and the rule of State immunity, as the rules address different matters.[32] The United Kingdom therefore takes the view that it would not be appropriate for the draft articles to deal with the immunities of State officials. such immunities are in any event being dealt with under another topic on the International Law Commission's current programme of work.

[See also comments under final form]

Uruguay

[Original: Spanish]

Exception to the *nullum crimen sine lege* principle in criminal law

The future convention should contain a specific provision based on article 15, paragraph 2, of the International Covenant on Civil and Political Rights ("Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"), in order to ensure that none of its provisions undermines the investigation, trial and punishment of any person for any act or omission which, at the time when it was committed, was a crime against humanity according to the general principles of international law.

Non-applicability of statutory limitations

Uruguay suggests the inclusion of a draft article on the non-applicability of statutory limitations to crimes against humanity, as set out in article 29 of the Rome Statute of the International Criminal Court.

[32] See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 140, para. 93.

Similarly, the non-applicability of statutory limitations should apply to civil or criminal proceedings in which victims of these crimes seek full reparation.

Prohibition of amnesties and similar measures

Uruguay suggests the inclusion of a specific provision prohibiting any declaration of extinguishment by commutation, amnesty, pardon or any other measure of clemency, sovereign or similar, that might have the effect of preventing the prosecution of suspects or the effective serving of sentences by convicted persons.

Exclusion of special jurisdiction

The future convention should stipulate that crimes against humanity may not be deemed to have been committed in the exercise of military functions and that the alleged perpetrators shall only be tried before the competent ordinary civil courts of each State, the use of military jurisdiction for that purpose being excluded.

…

Prohibition of reservations

On the basis of article 120 of the Rome Statute of the International Criminal Court, the future convention should establish that no reservations may be made to any of its provisions.

B. Specific comments on the draft preamble, the draft articles and the draft annex

1. Draft preamble

Belgium

[Original: French]

In the third paragraph of the draft preamble, it is rightly stated that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*). It would be useful for the Commission to specify what are the implications of the peremptory character of that prohibition for the immunity from criminal jurisdiction of an individual accused of crimes against humanity.

In *Jurisdictional Immunities of the State*, the International Court of Justice referred to its judgment in *Arrest Warrant of 11 April 2000*, in which,

> without express reference to the concept of *jus cogens*, [the International Court of Justice had held] that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess[ed] the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf.[33]

Does the Commission consider that a mere procedural rule could trump a *jus cogens* rule? If so, on what grounds?

State practice, several General Assembly resolutions[34] and the draft code of crimes against the peace and security of mankind[35] all show that States have an obligation under customary law to prosecute crimes against humanity.

[33] *Ibid.*, p. 141, para. 95.

[34] General Assembly resolutions 3 (I) of 13 February 1946; 95 (I) of 11 December 1946; and 3074 (XXVIII) of 3 December 1973, para. 1.

[35] See *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), pp. 30–32, art. 9.

As stated in the first preambular paragraph of the draft articles, crimes against humanity "deeply shock the conscience of humanity", and the obligation to prosecute such crimes has a customary, universal and peremptory character. Accordingly, the commentary to the preambular provisions that call for measures to prevent impunity by, *inter alia*, "enhancing international cooperation" [36] ought to emphasize international organizations are also required to cooperate in such prosecution, for instance by imposing sanctions on States that cover up or commit crimes against humanity. By failing to do so, international organizations would fall short of their duty with regard to international cooperation. In view of the gravity of those crimes and the need for international cooperation in order to combat them, such failure to act would also give rise to the international responsibility of those organizations.

Brazil

[Original: English]

Preliminarily, it is noteworthy that the Rome Statute of the International Criminal Court inspired much of the draft articles, which is generally advisable as a means to ensure consistency within the international law system. The preamble of the draft articles, however, includes a paragraph ("*[R]ecognizing* that crimes against humanity threaten the peace, security and well-being of the world") that cannot be read in isolation from other preambular clauses of the Rome Statute of the International Criminal Court that are currently absent from the draft articles. Hence, Brazil recommends the inclusion of the following paragraphs in the preamble:

(i) *Reaffirming* the purposes and principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;

(ii) *Emphasizing* in this connection that nothing in the present draft articles shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State;

Cuba

[Original: Spanish]

Cuba suggests the following wording for the fifth preambular paragraph of the draft articles: "*Determined* to join forces to combat impunity for the perpetrators of these crimes and thus to contribute to the prevention and punishment of such crimes". The phrase "put an end to" in the draft article seems very ambitious, considering the objectives of the draft articles, and, in practical terms, it would be difficult to "put an end to" impunity. The Republic of Cuba therefore proposes that it be replaced with the phrase "join forces to combat", which the Republic of Cuba considers to be more objective since it reflects a realistic scope of action for the international community. The Republic of Cuba also considers it necessary to include the word "punishment" in this paragraph, in order to align the preamble with draft article 1 [1] (Scope).

France

[Original: French]

[See comment under general comments]

[36] Eighth preambular paragraph.

Panama

[Original: Spanish]

Panama regards the content of the preamble as satisfactory and concurs with, among other things, the recognition in the third preambular paragraph that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*). If adopted as a convention, the draft articles would be the first such text in which the prohibition of such crimes is recognized as *jus cogens*.

Panama also agrees with regard to the importance of preventing crimes against humanity and the duty to end impunity for their perpetrators, as set forth in the fifth preambular paragraph and throughout the draft articles. The wording of the paragraph, however, could be improved, given that the underlying premise appears to indicate a direct relationship between the duty to end impunity and the duty of prevention. Although a purely legal point, the causal link between punishment (as a means of ending impunity) and prevention is debatable. In order to avoid any potential for confusion, we would suggest wording in which prevention is recognized as the principal obligation and that reiterates the duty to punish crimes against humanity in cases of failure to meet that primary obligation.

Panama also considers the reference in the sixth preambular paragraph to article 7 of the Rome Statute of the International Criminal Court to be appropriate and necessary, given that the definition of crimes against humanity set forth therein has been endorsed by 123 States parties. That is evidence of the article's broad acceptance and its authority, to the point that it can be seen as codifying a customary rule of international law on the subject.

We would suggest, however, the inclusion of a paragraph reiterating that crimes against humanity should not be subject to any statute of limitations, as set forth in draft article 6, paragraph 6, and article 29 of the Rome Statute of the International Criminal Court. The importance of the non-applicability of statutes of limitations with regard to the investigation and punishment of crimes against humanity should also be stressed in such a paragraph.

In addition, we would recommend the inclusion of a paragraph setting forth the distinction between individual criminal responsibility and State responsibility with regard to crimes against humanity. As is well known, international crimes are not committed by abstract entities such as States, but by individuals.[37] With a view, therefore, to avoiding restrictive interpretations intended to shift responsibility from one to the other, such a paragraph would affirm that no provision contained in the draft articles shall be interpreted as substituting individual responsibility for crimes against humanity with that of the State.

Peru

[Original: Spanish]

The explicit recognition that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*), and that such crimes are among the most serious crimes of concern to the international community as a whole is essential here. In that regard, highlighting the need to prevent such crimes, in conformity with international law, and to put an end to impunity for the perpetrators of those crimes, is especially pertinent.

[37] See International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945–1 October 1946)*, vol. I (1947), Nuremberg, 1947, p. 223.

Defining crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court is important, inasmuch as it assures coherent treatment of the issue at the international legal level. However, that should not stand in the way of certain possible adjustments to the text, given the different purposes of the Statute, as the constituent instrument of the International Criminal Court, and the International Law Commission's draft articles, as the basis for a future international Convention which, in turn, can serve as a reference for the relevant national laws of States Members of the United Nations. Two examples in this connection, on which comments will be made below, specifically refer to the crimes of "persecution" and "enforced disappearance of persons".

Highlighting explicit consideration of the rights of victims, including the right to obtain redress and the right to the truth, witnesses and others in relation to crimes against humanity, as well as of the right of alleged offenders to fair treatment, is a positive element of the preamble.

In that vein, we believe that it would be desirable, from the Peruvian standpoint, for the draft articles to take into consideration vulnerable groups, including from a gender perspective.

Sierra Leone

[Original: English]

[See comment under general comments]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes that at paragraph 3 of the preamble to the draft articles the International Law Commission has taken the view that the prohibition on crimes against humanity is a peremptory norm of general international law. The International Law Commission has taken this view previously.[38]

The United Kingdom further notes that these draft articles are focused on establishing individual criminal liability for crimes against humanity. In this context, the United Kingdom is unclear on the benefits of including a statement on whether the prohibition on crimes against humanity is a peremptory norm of general international law. The United Kingdom is aware that the International Law Commission is looking at the subject of *jus cogens* in a separate piece of work and suggests that this question is left to be considered following the outcome of that work.

2. Draft article 1 – Scope

Chile

[Original: English]

Concerning article 1 of the project, it would be most important to include a second paragraph, stating that these draft articles only apply in respect to crimes allegedly occurred after their adoption (or entry into force, in case they become a convention). The Special Rapporteur has correctly noted that "a new convention would only operate with respect to acts or facts that arise after the convention enters into force for that State" (A/CN.4/680, para. 73), basing this assertion on Article 28 of the Vienna Convention on the Law of Treaties.

[38] See the report of the International Law Commission on the work of its sixty-ninth session (footnote 1 above), chap. IV, sect. C.2, para. (4) of the commentary to the preamble.

In this context, and also to avoid any kind of interpretation with regard to the intention of the parties – expressly called for by Article 28 of the Vienna Convention of the Law of Treaties –, it would be relevant to expressly clarify the temporal scope of application of these draft articles. This would remove any doubts which states could have on this point and which could cause them to refrain from adhering to a convention on the topic. In any event, such addition would have no bearing on a state's potential ability to prosecute crimes against humanity that were committed before the entry into force of such convention.

Cuba

[Original: Spanish]

[See comment on draft preamble]

Peru

[Original: Spanish]

Firstly, we regard as significant the fact that draft article 1 states that the draft articles apply to the prevention and punishment of crimes against humanity, thereby covering the two aspects to be addressed by a future Convention on the topic.

Sierra Leone

[Original: English]

Comments: Regarding scope, *ratione materiae*, the International Law Commission choose a narrow approach for this project. The focus is solely on crimes against humanity. At the same time, considering that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the four 1949 Geneva Conventions[39] 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 International Law Commission 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 Protocols[40] within national courts.

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 Commission's present draft articles. This would have allowed for the extension of the regime of inter-state cooperation, especially the

[39] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II), Geneva Convention relative to the Treatment of Prisoners of War (Convention III), and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV).

[40] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). (See, in this regard, article 49, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I); art. 51, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II); art. 130, Geneva Convention relative to the Treatment of Prisoners of War (Convention III); and art. 147, Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV).

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 Commission's project, to revisit the scope to include the other core international crimes.

Sierra Leone notes that the MLA (Mutual Legal Assistance) 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 report of the International Law Commission, 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, pp. 9–127).

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 International Law Commission 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 Commission 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.

For similar reasons, and consistent with Article 26 of the Commission's Statute, Sierra Leone considers that a technical meeting between the International Criminal Court and the International Law Commission could help strengthen the final version of the Commission's draft articles and their commentaries. Such engagement would potentially enable prosecutors from the International Criminal Court, defence lawyers, representatives of chambers and the registry, including victims' counsel and others, to share with the Commission 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.

[See also comment under general comments]

3. Draft article 2 – General obligation

Australia

[Original: English]

[See comment under general comments]

Chile

[Original: English]

In relation to draft article 2, it correctly asserts that crimes against humanity are crimes under international law, regardless of whether they are committed in time of armed conflict or not. However, the drafting should be modified in order to make even more clear that states are under the duty of preventing and punishing them in any hypothesis. Therefore, draft Article 2 could be phrased as follows: "Crimes against

humanity are crimes under international law, which States undertake to prevent and punish, regardless of whether or not they are committed in time of armed conflict".

Concerning the excellent draft commentary to this article 2, it contains complete and consistent sources justifying the characterization of crimes against humanity as offences under international law, showing that a context of armed conflict is not a necessary element of their definition. However, paragraph 5 should be slightly modified. When referring to the notion of crimes against humanity contained in the Charter of the International Military Tribunal established at Nürnberg, the commentary states that the definition of these crimes, as amended by the Berlin Protocol, was linked to the existence of an armed conflict. However, it should be recalled that Article 6 of the Charter referred to the crimes of its subparagraphs (a), (b) and (c) as "crimes coming within the jurisdiction of the Tribunal", and presumably did not purport to define all the elements that these offences should possess in order to be qualified as crimes under general international law. In this sense, the Charter established the requirements that the crimes had to comply with in order to be within the jurisdiction of the Nürnberg Tribunal. Accordingly, the Berlin Protocol did not establish a new requirement asserting that these offences had to be linked with an armed conflict in order to be considered international crimes. Instead, it only excluded from the jurisdiction of the tribunal those crimes which did not possess such a link.

In light of the above considerations, it would be advisable to rephrase paragraph 5 of this draft commentary, in the sense that the Charter of the International Military Tribunal established at Nürnberg, as amended by the Berlin Protocol, required that crimes against humanity were directly or indirectly linked with Second World War in order to fall under the jurisdiction of that judicial body. In this sense, it should be recalled that the Berlin Protocol did not exclude jurisdiction for crimes against humanity that had been committed before the war, as long as they retained a connection with the other offences which were under the jurisdiction of the International Military Tribunal. In relation with the following paragraphs of the draft commentary to article 2, they should also be adjusted to be consistent with this proposal.

Estonia

[Original: English]

In the view of Estonia, all States should undertake to investigate serious crimes and to prosecute those whose culpability is proven in accordance with law and the standards of the rule of law. Estonia believes that no State should ignore preventing nor investigating the crimes against humanity. Thus, we firmly support the general obligation to prevent and to punish crimes against humanity, as provided in draft article 2. Estonia would like to emphasise that crimes against humanity form part of international customary law and are non-derogable norms, but it is important to reach a universally recognised written provision in respect of these crimes as well as to achieve greater legal clarity.

New Zealand

[Original: English]

New Zealand supports the inclusion of Draft Article 2 setting forth the general obligation of States to prevent and punish crimes against humanity and recognises that the form of Draft Article 2 follows that of Article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. New Zealand is of the view however, that Draft Article 2, being in the nature of a "General obligation" as indicated by its heading, could make it clearer that the obligation being referred to is that of preventing and punishing crimes against humanity. This could be achieved, for example, by phrasing the Draft Article in terms such as: "States undertake to prevent

and punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict."

[See also comment on draft article 4]

Panama

[Original: Spanish]

This draft article recognizes that crimes against humanity are crimes under international law. Although the language used is fairly clear, we would recommend including a reference to individual criminal responsibility and that of the State and the distinction between the two. The wording of the draft article appears to be guided by that of article I of the Convention on the Prevention and Punishment of the Crime of Genocide, which was interpreted by the International Court of Justice in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) in terms of the responsibility of the State for criminal acts. In that case, the jurisdiction of the Court was limited to determining the responsibility of the State arising from violations of that Convention. It could nevertheless be inferred that the draft article refers both to individual responsibility and that of the State. We would recommend, therefore, including a paragraph to the following effect:

> "The present Convention shall be interpreted without prejudice to the individual criminal responsibility of the offender."

Peru

[Original: Spanish]

The Government of Peru believes that it is particularly important that draft article 2 made it perfectly clear that crimes against humanity can be committed both in time of armed conflict (wartime) and in the absence of an armed conflict (peacetime). That fact was also reflected in international practice in the Statute of the International Tribunal for Rwanda,[41] as well as in article 7 of the Rome Statute of the International Criminal Court.

Sierra Leone

[Original: English]

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, *Attorney-General of Israel* v. *Eichmann, Case No. 40/61, Judgment of 11 December 1961*, District Court of Jerusalem, *International Law Reports*, vol. 36, p. 5 at p. 49; *Prosecutor* v. *Barbie*, Cour de cassation, *ibid.*, vol. 78 , p. 124 at p. 136; *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), at p. 48; *Prosecutor* v. *Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Opinion and Judgment of 7 May 1997*, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 652, and *Judgment of 15 July 1999*, Appeals Chamber, paras. 282–305; and article 7 of the Rome Statute of the International Criminal Court).

Sierra Leone also appreciates that under the second part of Draft Article 2 [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

[41] Statute of the International Tribunal for Rwanda, Security Council resolution 955 (1994), annex, art. 3.

are punishable as such.[42] 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.

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 the view of Sierra Leone, 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.

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 (6) 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 Convention on the Prevention and Punishment of the Crime of Genocide has been interpreted by the International Court of Justice (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 111–113, , paras. 162–165). This point appears from the framing of current paragraph (1) of the commentary to draft article 2 which suggests that "[t]he 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).

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 caution of the International Court of Justice 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" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 220–221, para. 429). Thus, we consider that the duty to prevent 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.[43]

Suggestions: Regarding the commentary, especially to Draft Article 2, consideration could be given to explaining the meaning of the separate obligation to

[42] See *Yearbook of the International Law Commission*, *1996*, vol. II (Part Two), p. 17, para. 50 (art. 1).

[43] 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 W. A. Schabas, "Prevention of crimes against humanity", *Journal of International Criminal Justice*, vol. 16, No. 4 (September 2018), pp. 705–728.

prevent and the separate duty to punish. In this vein, the Commission 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 of Draft Article 4 and the commentary to it. This would include 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.

[See also comments under general comments and draft article 4]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft article 4]

4. Draft article 3 – Definition of crimes against humanity

Argentina

[Original: Spanish]

The definition of "enforced disappearance of persons" in draft article 3, paragraph 2 (*i*), is consistent with the definition in the Rome Statute of the International Criminal Court but differs from the definitions in the 1994 Inter-American Convention on Forced Disappearance of Persons and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

The main difference is that those Conventions do not include the expression "with the intention of removing them from the protection of the law for a prolonged period of time". It would be preferable to use a definition similar to the one in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which includes the phrase "place such a person outside the protection of the law" (art. 2) but does not contain the intentionality and duration requirements that appear in the draft articles. It is made clear in the draft articles that the definitions contained therein are without prejudice to other broader definitions provided for in other international instruments or national law. However, it would be appropriate to use a definition of "enforced disappearance of persons" that is in line with the most recent developments in international law, particularly since one of the objectives of the draft articles is the harmonization of national laws.

The definition of the term "gender" in draft article 3, paragraph 3, sets forth a binary gender system based on biological factors; it does not take into account the broad concept of gender identity. While the provision reproduces the language of the Rome Statute of the International Criminal Court, the Office of the Prosecutor of the International Criminal Court itself has expanded the interpretation of the definition of gender in the Statute, stating that it includes the social construction of gender (see the 2014 "Policy Paper on Sexual and Gender-Based Crimes" by the Office of the Prosecutor). The definition of gender used in the draft articles should therefore be updated in the light of the latest developments in international law.

Australia

[Original: English]

[See comments under general comments and draft article 5.]

Belarus

[Original: Russian]

[See comment under general comments.]

Belgium

[Original: French]

Draft article 3, paragraph 3, defines the concept of gender as follows: “the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”.

In its commentary, the Commission states that this definition is drawn from the Rome Statute of the International Criminal Court adopted in 1998. However, that definition does not take into consideration the developments of the last 20 years in the areas of international human rights law and international criminal law, particularly with regard to sexual and gender-based crimes. The Commission does not take into consideration the evolving definition of gender, which has recently been defined as a social construct rather than merely the biological and physiological characteristics that define men and women.

It is also worth noting that, in its “Policy Paper on Sexual and Gender-based Crimes” published in 2014,[44] the Office of the Prosecutor of the International Criminal Court elaborates on the meaning that it intends to give to the concept of gender:

> ‘Gender’, in accordance with article 7(3) of the Rome Statute of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.

The Commission should therefore amend draft article 3, paragraph 3, to align it more closely with international human rights law. Any text whose definition of gender fails to reflect the current state of international human rights law could marginalize women and lesbian, gay, bisexual, transgender and intersex persons, as well as other groups, and would risk exacerbating the impunity of sexual and gender-based crimes that amount to crimes against humanity.

Bosnia and Herzegovina

[Original: English]

The Ministry of Human Rights and Refugees of Bosnia and Herzegovina is, among other things, responsible for advancement of gender equality and monitoring and implementation of the international documents in this area. In that capacity, we would like to draw your attention to the definition of the term “gender” in the text of the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity and to ask you to consider amending the definition.

[44] Office of the Prosecutor of the International Criminal Court, “Policy Paper on Sexual and Gender-based Crimes” (2014), www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

Namely, we find the definition of “gender”, as stated in the Article 3 of the proposed Convention, to be opaque, outdated and not in line with the recent, more inclusive and more gender sensitive definitions of “gender” such as those in the Council of Europe Convention on preventing and combating violence against women and domestic violence or in the Committee on the Elimination of Discrimination against Women General recommendation No. 25, on article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures.

In particular, the Committee on the Elimination of Discrimination against Women General Recommendation No. 25 is referring to the definition of the term “gender” by using the following citation from the United Nations “1999 World Survey on the Role of Women in Development: Globalization, Gender and Work”:

> Gender is defined as the social meanings given to biological sex differences. It is an ideological and cultural construct but is also reproduced within the realm of material practices; in turn, it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.

In addition, in Article 3 (c) of the Council of Europe Convention on preventing and combating violence against women and domestic violence, the term “gender” is defined as follows: “‘gender’ shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.

As a country which ratified this Convention as early as 2013, we hope you will take this request into account and that you will consider harmonizing the definition “gender” in the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity with the above-cited newer, more comprehensive and more adequate definitions and, thereby, add to the quality of this important United Nations Convention.

Brazil

[Original: English]

Draft article 3 defines crime against humanity, mirroring article 7 of the Rome Statute of the International Criminal Court. As stated above, it is generally preferable to use this Statute as the basis for the draft articles. Nevertheless, the Commission’s text should not read the Statute in isolation from other sources of international law, including international human rights law. More specifically, Brazil considers that paragraph 3 of draft article 3 does not reflect the current human rights definition of gender. Since 1998, there has been significant development on the matter in international fora. Even the Office of the Prosecutor of the International Criminal Court adopted an updated understanding of gender in its “Policy Paper on Sexual and Gender-Based Crimes”. Therefore, Brazil recommends the deletion of paragraph 3 of draft article 3.

The definition of crime against humanity seems to take into consideration the original text of the Rome Statute of the International Criminal Court, thus disregarding the amendments adopted since 1998. More specifically, draft article 3, paragraph 1 (*h*) criminalizes persecution as a crime against humanity only when there is a connection with “the crime of genocide or war crimes”. This choice not only

raises the question on whether there is actually the need to require such a link, but also fails to include another crime that is also under the purview of the International Criminal Court: the crime of aggression, whose jurisdiction was recently activated. Considered by the International Law Commission as "the most indisputable example" of an international crime, or "the supreme international crime" (*Yearbook of the International Law Commission, 1976*, vol. II (Part Two), p. 121), the crime of aggression featured in the jurisdiction of some international tribunals, and forms part of the jurisdiction *ratione materiae* of the International Criminal Court. Hence, if the connection requirement is maintained for persecution as a crime against humanity, the draft article should include the link with the crime of aggression.

Canada

[Original: English and French]

The primary objective of Canada at this stage is to highlight to the Commission concerns with the Convention's definition of gender. While we acknowledge that this definition was taken directly from the Rome Statute of the International Criminal Court, the international community's understanding has since then evolved.

The proposed definition tethers the concept of gender to that of sex. This raises some serious legal and policy concerns. Generally speaking, the term "sex" has been used to refer to biological attributes, whereas the term "gender" refers to the socially constructed roles, behaviours, expressions, and identities of girls, women, boys, men, and gender diverse persons. Canada considers the Statute definition as under-inclusive and inaccurate. As there is currently no common definition agreed upon by States, Canada respectfully recommends against including any definition of gender.

Chile

[Original: English]

Draft article 3 contains the definition of crimes against humanity as they will be employed in the following articles of the project. Although its drafting closely follows Article 7 of the Rome Statute of the International Criminal Court, which should be positively highlighted, there are some precise aspects which could be revisited.

In relation to paragraph 1 (*h*) of draft article 3, it is not clear why the notion of persecution requires a necessary connection with other crimes against humanity, war crimes or the crime of genocide (in any event, the crime of aggression should be added). On this point, the respective commentary (paragraph (8)) simply explains that the connection with these crimes is required "to adapt" the analogous phrase employed in article 7 of the Rome Statute of the International Criminal Court "to the different context" of these draft articles. However, in the case of the former statute, it may be presumed that persecution was narrowly defined with the objective of restricting the scope of the offences under the jurisdiction of the Court. The formulation of its Article 7 does not imply that acts of persecution unconnected with other crimes should not be considered offences under general international law. Since the present draft articles do not confer jurisdiction to an international tribunal, the objective of restricting the scope of the concept of persecution is not necessarily applicable. In an instrument like the one under analysis, intending to establish a uniform definition of these crimes, such a restriction would imply that the intentional and severe deprivation of human rights by reason of the identity of a group is not sufficiently serious to be considered an international crime of itself. In light of this, the connection with other offences required by the last sentence of draft article 3, paragraph 1 (*h*), should be either removed, or the draft commentary should give reasons explaining why acts of persecution unconnected with other crimes are not to be considered offences under international law.

Notwithstanding the latter proposal, it should be noted that there is a subsequent definition of persecution provided for in the same article, in draft article 3, paragraph 2 (*g*). This one could also be further improved, in order to avoid that states may sustain substantially different interpretations regarding which fundamental rights are covered by the notion of persecution and which content they should be given. A more precise determination would be relevant to avoid or minimize discussions between states in relation to which breaches of fundamental rights would trigger the obligations imposed by a potential convention on the topic, particularly the duty of *aut dedere aut judicare*. It would also minimize potential conflicts regarding the content of the fundamental rights concerned, which may vary according to the national laws of every country. Thus, with this aim, draft article 3, paragraph 2 (*g*), under analysis could define persecution as "the intentional and severe deprivation of universal fundamental rights, as recognized under general international law, by reason of the identity of the group or collectivity". It is to be noted that the risk of fragmentation posed by several different interpretations is not present in the Rome Statute of the International Criminal Court, since it establishes a judicial body capable of granting a uniform interpretation of the concepts therein contained.

Draft article 3, paragraph 2 (*a*), defines the phrase "attack directed against any civilian population", referring to a course of conduct which is performed pursuant to or in accordance with an intentional policy. As the draft commentary correctly points out (paragraph (29)), such policy may be directed by a state, or any group or organization with the capacity to plan a widespread or systematic attack. To appropriately reflect the latter point, the last phrase of subparagraph 2 (*a*) could be modified as follows "…pursuant to or in furtherance of a State, group or organizational policy to commit such attack".

Afterwards, also in relation with draft article 3, paragraph 2 (*d*) could be slightly modified. It would be advisable to supress the word "lawfully", since its inclusion would seem to give the state concerned an unlimited discretion to establish any legal conditions in order to regulate the presence of people in a given territory. Thus, if this word is kept, the forcible transfer of population would only seem to arise if a given state displaced the people concerned in violation of its own internal rules. Seemingly, even in that situation, the forcible transfer of population would not be wrongful under subparagraph 2 (*d*) if international law provided a ground that allowed the transfer. Certainly, this cannot be the intention of the provision. In this context, this problem would be solved if the word "lawfully" was suppressed, and the phrase "without grounds permitted under international law" was replaced with "unless in conformity with international law". It would be clear that a state could not unilaterally displace a given population without any kind of justification, but could certainly proceed to move them if such action was allowed under international law. In the latter case, it is apparent that international law would not preclude the transfer or deportation of the people concerned if they were present in a given territory in violation of the municipal rules of the respective states, as long as these rules were in conformity with international law.

Draft article 3, paragraph 2 (*i*), defines the expression "enforced disappearance of persons" in an overall satisfactory manner. However, the sentence "with the intention of removing them from the protection of the law for a prolonged period of time" should be removed. Its inclusion would require the difficult proof of a subjective intention for which scarce elements will usually be available, and in any event, there are no apparent reasons explaining why such a precise intention is necessary to consider this conduct as a crime. Although the sentence concerned follows the concept of enforced disappearance which the Rome Statute of the International Criminal Court places under the jurisdiction of the Court, its phrasing differs from the one employed in the 2006 International Convention for the Protection

of All Persons from Enforced Disappearance. The latter definition should be preferred not only because it reflects the crime as it is currently understood, but also because it is an instrument which especially focuses on this offence, establishing a general definition which does not have to consider the jurisdictional issues that the Rome Statute of the International Criminal Court involves.

In relation with the definition of enforced disappearance contained in the 2006 Convention, article 2 only describes objective elements in order to individualize this concept. After they are mentioned, the last sentence requires that the conducts giving rise to enforced disappearance are ones "which place such a person outside the protection of the law". This refers to an objective effect that the conduct is required to cause, which may be easily obtained from the circumstances of the case, and certainly does not call for the determination of a precise subjective intention on the part of the perpetrator.

The definition of enforced disappearance employed by the 2006 Convention is substantially similar to the one contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, which provides the elements of the concept in the fourth paragraph of the preamble, without requiring a subjective element, as well.

With these considerations in mind, the inclusion of the sentence "with the intention of removing them from the protection of the law for a prolonged period of time" would have the effect of restricting once again the scope of application of this offence, discarding the objective formulation that was employed by the specific multilateral convention that was concluded on the subject, well after the adoption of the Rome Statute of the International Criminal Court. Also considering that the present instrument intends to establish a universal definition of crimes against humanity, and that there are no incentives in order to restrict any jurisdiction conferred upon an international tribunal, the sentence under analysis should be suppressed.

In relation with draft article 3, paragraph 3, it should be noted that the definition of gender therein contained, although drawn from the Rome Statute of the International Criminal Court, is not suitable for the context of persecution in which it is called to play a role. By establishing a restrictive interpretation in mandatory terms, the definition would seem to indirectly tolerate persecution by reason of gender identity, an outcome which could be hardly desirable, and one for which scarce reasons would be available. It should be noted that, in order to make it consistent with human rights law, even the Office of the Prosecutor of the International Criminal Court has sought to nuance the definition of "gender" as contained in the Statute. This may be easily explained, since persecution is not justifiable only because the people concerned assert to possess a gender other than those which are officially recognized. Accordingly, in its "Policy Paper on Sexual and Gender-Based Crimes", the Office of the Prosecutor stated, after repeating the definition of "gender" contained in the Statute, that "This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3)."

The approach of the Prosecutor's Office seems suitable for the context of persecution, actually precluding it by reason of gender identity. Therefore, in relation with the definition of "gender" contained in draft article 3, paragraph 3, it would be suggested to rephrase it as follows: "For the purpose of the present draft articles, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys."

However, in case the suggestion just referred to was not ultimately accepted, paragraph 3 should at least be deleted altogether. Otherwise, persecution by reason of gender identity, impermissible under international law, would possibly go unpunished.

In any event, it should be made clear that the proposed modification of paragraph 3 or its complete deletion would certainly not oblige states to institutionalize recognition of genders other than male and female, nor would oblige them to officially recognize the gender identity asserted by a given person. However, these modifications would have the desirable effect of recognizing as a criminal offence the intentional and severe deprivation of human rights of people which identify themselves as belonging to other categories, without prejudice to the official status of the latter in the municipal system of the states concerned.

Regarding draft article 3, paragraph 4, it should be noted that the effect of this "without prejudice" clause lacks full clarity. It does not expressly state which would be the possible consequences of maintaining broader definitions of crimes against humanity in other instruments, nor explains which would be the relationship between those other definitions and the provisions of the convention. Therefore, the current text could be rephrased as follows: "This draft article shall not prevent the application of broader definitions of crimes against humanity provided for in national laws or other international instruments, insofar as that they are consistent with the content of the present draft articles". In addition, the paragraph could also add another "without prejudice" clause, stating that the definitions contained in the present draft article shall not be understood as precluding other offences from being considered crimes against humanity under general international law or other international agreements.

Costa Rica

[Original: Spanish]

With regard to draft article 3, paragraph 2 (*i*), we are of the view that the definition used by the Commission should be expanded to include all elements of the following definition set forth in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance:

> For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Some of these elements have been left out of the draft article, which could lead to a restrictive reading with a much more limited scope than that provided under the Convention with regard to the perpetrators of such detentions, arrests or abductions and the acts constituting enforced disappearance, owing to the elimination of the reference to "any other form of deprivation of liberty" and the inclusion of a reference, not in the Convention, to "the intention of removing them from the protection of the law".

As indicated in the report of the International Law Commission on the work of its sixty-ninth session (A/72/10), the definition of "gender" included in draft article 3, paragraph 3, of the draft articles on crimes against humanity is based on the language used in article 7 of the 1998 Rome Statute of the International Criminal Court, which was considered by the Commission as relevant to draft article 3. Moreover, the preamble to the draft articles, recalling the definition of crimes against humanity as set forth in article 7 of the Statute, confirms this understanding.

However, the draft articles contain an obsolete definition of the term “gender” that ignores developments over the last two decades in the areas of human rights and international criminal law, including within the International Criminal Court, in relation to sexual and gender-based crimes.

The draft articles do not take into account the evolution of the definition of “gender,” which has been described more recently as a social construct and not only as representing the biological and physiological characteristics that have historically defined men and women in a binary manner. In our view, the concept of gender cannot be reduced to a person’s genitals but rather refers to “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences”.[45]

As such, there are many definitions that can be taken from the documents of various international bodies and that may be more relevant to a modern draft instrument.

In that regard, it is important to note that in June 2014 the Office of the Prosecutor of the International Criminal Court published a “Policy Paper on Sexual and Gender-Based Crimes”. That document is relevant to the present comments because in it the Office stresses, with respect to the characterization of gender under article 7 of the Rome Statute of the International Criminal Court, that “this definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys”, deciding therefore to apply and interpret “gender” in accordance with internationally recognized human rights pursuant to article 21, paragraph 3, of the Statute.

The reference to article 21, paragraph 3, of the Statute is particularly critical, as there is no similar provision in the draft articles. For that reason, it is all the more important that the definition of “gender” included in the draft articles be updated for consistency with international human rights law.

Given that, according to the Policy Paper, the Office of the Prosecutor of the International Criminal Court considers gender-based crimes to be “those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles”, it is important that draft article 3, paragraph 3, be revised as follows to incorporate the definition established by the Prosecutor of that Court:

> “3. For the purpose of the present draft articles, it is understood that the term “gender” [Delete: refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.] [Add: acknowledges the social construction of gender and the roles, behaviours, activities, and attributes that are assigned to individuals.]”

In conclusion, if the International Law Commission decides to include in the draft articles a definition of “gender” based on the Rome Statute of the International Criminal Court, it should be consistent with the entire legal framework established by that treaty, including the reference to international human rights law and, more importantly, to the recent development in its interpretation.

[45] United Nations, Committee on the Elimination of All Forms of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28), 16 December 2010, para. 5; and the Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, study entitled “Sexual Orientation, Gender Identity and Gender Expression: Key Terms and Standards” prepared by the Inter-American Commission on Human Rights (OEA/Ser.G. CP/CAAP-INF. 166/12), 23 April 2012, para. 14.

Cuba

[Original: Spanish]

The Republic of Cuba considers that it would be prudent to have the draft articles make a contribution to the conceptual understanding of the meaning of "crime against humanity", without undermining the conceptualization of the term in other international texts. It would therefore suggest that the word "hardship" [*penurias* in Spanish] be inserted after the word "suffering" [*sufrimientos* in Spanish] in paragraph 1 (*k*) of draft article 3 [3] (Definition of crimes against humanity). The subparagraph would then read as follows: "(*k*) other inhumane acts of a similar character intentionally causing great suffering or hardship, or serious injury to body or to mental or physical health." The Republic of Cuba considers that the inclusion of the word "hardship" makes the paragraph clearer and enables it to more fully reflect the legal interest that the draft article is intended to protect. The term "hardship" goes beyond the term "suffering". It covers certain circumstances to which a human being may be subjected that do not fall within the meaning of "suffering" but may very well constitute crimes against humanity, such as the scarcity or absence of material goods and services that are indispensable for his or her life and development.

Although the Republic of Cuba has read the text of draft article 3 [3], paragraph 2 (*a*), and the commentary thereto adopted by the Commission on first reading at its sixty-ninth session, it continues to have reservations about the usefulness and contribution of the word "multiple". The Republic of Cuba considers that the inclusion of the word could result in uncertainty and incorrect interpretations of the draft article and give rise to the belief that a crime against humanity is not committed during an attack against a civilian population unless several of the acts listed in draft article 3 [3] are carried out or one of those acts is carried out several times. The Republic of Cuba considers that a single commission of one of those acts in the context of an attack against a civilian population would be sufficient to constitute a crime against humanity.

Czech Republic

[Original: English]

We note with satisfaction that the draft definition of the crimes against humanity, as contained in draft article 3, mirrors *verbatim* the definition of crimes against humanity set forth in Article 7 of the Rome Statute of the International Criminal Court, except for the necessary contextual changes. The text of the draft article confirms that the definition of crimes against humanity under the Statute has already received wide acceptance and is increasingly seen as a codification of customary international law on crimes against humanity. Since the small changes to the definition brought about the inclusion of genocide and war crimes in the text of the draft articles on crimes against humanity (draft article 3, paragraph 1 (*h*)) we believe that it would be desirable to include definition of those crimes in the commentary or at least to refer to existing international instruments where these crimes are defined (see. e.g. paragraph (38) of the commentary to draft article 3).

Further, the crime of aggression is mentioned in the commentary to said draft article, but is not included in the text of the draft article itself with the explanation that this definition might be revisited once the requirements for the exercise of the jurisdiction of the International Criminal Court over this crime are met. We would prefer a text which would not be subject to future changes. We expect that the Commission will deal with this issue during the second reading, as envisaged in the commentary.

El Salvador

[Original: Spanish]

On draft article 3, paragraph 3, regarding the definition of crimes against humanity, in the light of the proposed language El Salvador believes that it might be appropriate to add the contemporary meaning of the term "gender" to the text of the draft article or to incorporate it in the commentary thereto, so as to harmonize the draft article with other instruments of international human rights law.

In this regard, the United Nations Committee that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women has established that the term "sex" refers to biological differences between men and women while the term "gender" refers to socially constructed identities, attributes and roles for women and men and the social and cultural meaning for these biological differences. The aforementioned addition would ensure that the article includes an expression whose meaning has changed in the progressive development of contemporary international law and guarantees protection for the full range of individual human rights that must be respected and guaranteed.

Estonia

[Original: English]

In principle, Estonia supports the approach taken in draft article 3 as concerns definition of crimes against humanity and its full correspondence with the wording of article 7 of the Rome Statute of the International Criminal Court. It is in order to avoid any discrepancy or conflict of the wording and possible different interpretation of crimes against humanity. At the same time, Estonia would like to point out that the current definition of crimes against humanity as reflected in draft article 3 and in the Statute applies only in respect of civilian population. This has been the case historically, but the purpose of this restriction is being questioned more and more and there are claims that the scope of the application of the composition of the offence should be without such a restriction. Taking from its historical experience, Estonia would have liked to raise the question whether this is an appropriate time to review this historical restriction of the composition of crimes against humanity.

For example, the description of the composition of the offence in section 89 of the Estonian Penal Code is broader and does not include the restriction to civilians as a general clause applicable to the protected persons.

Estonian Penal Code, section 89. Crimes against humanity

(1) Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by eight to twenty years' imprisonment or life imprisonment.

(2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.

On the other hand, it could be considered whether it would be justifiable to retain the policy element in article 7, paragraph 2 (a), of the Rome Statute of the International Criminal Court "pursuant to or in furtherance of a State or organizational policy to commit such attack" also in the draft article. Pursuant to this subparagraph, a crime against humanity should be the expression of the policy of a state or another organisation, not e.g. extensive spontaneous violence. This element is a disputable innovation in the composition of crimes against humanity in article 7 of the Statute,

which is not required for example in the Statutes of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda or in the definition of crimes against humanity in international customary law.

Estonia would like to express its concern in relation to the wording of the definition of "forced pregnancy" in draft article 3, paragraph 2 (*f*), which is complemented with the following sentence: "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy". Taking into account that the first sentence of the definition specifically emphasises the convention to cover cases of unlawful confinement of a woman forcibly been made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law, this supplementary sentence is confusing and should be considered irrelevant and therefore removed from the text.

Estonia also asks for reconsideration of the definition of "gender" in draft article 3, paragraph 3. The proposed wording of the definition is in accordance with article 7, paragraph 3 of the Rome Statute of the International Criminal Court. However, the Statute was composed 20 years ago and this definition does not reflect the current international human rights law. The proposed definition is too narrow and would exclude transgender and intersex persons. It would be necessary for the future convention on crimes against humanity to ensure protection of these persons, considering that transgender and intersex persons are more vulnerable to persecution.

As a minimum, we consider it important to revise the definition in line with the clarification of the definition in the Rome Statute of the International Criminal Court made by the Office of the Prosecutor of the International Criminal Court.

According to the 2014 "Policy Paper on Sexual and Gender-Based Crimes", the definition of gender (in the Statute) "acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys". This revision would also take into account more recent developments of international law, e.g. the Council of Europe Convention on preventing and combating violence against women and domestic violence that also includes a definition of gender.

France

[Original: French]

It is essential that the definition of the offence contained in the draft convention be identical to the one set out in article 7 of the Rome Statute of the International Criminal Court, as provided for in the draft article adopted by the Commission, except for some non-substantive changes that have, on the whole, been made.

A question may nonetheless be raised regarding paragraph 1 (*h*) of draft article 3, which uses the following wording of article 7 of the Statute: "in connection with any act referred to in this paragraph or with the crime of genocide or war crimes". However, unlike in the Rome Statute of the International Criminal Court, the concepts of "genocide" and "war crime" are not defined in the draft articles adopted by the Commission. One option could be to remove the element of "connection" in the definition. This is the approach taken in French law.[46]

[46] Article 212 -1 of the Penal Code: "Any of the following acts committed in execution of a concerted plan against a group of civilian population as part of a widespread or systematic attack also constitutes a crime against humanity and is punishable by life imprisonment: 1. Murder; 2. Extermination; 3. Enslavement; 4. Deportation or forcible transfer of population; 5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; 6. Torture; 7. Rape, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual

Greece

[Original: English]

- Draft Article 3, paragraph 1 (*h*): In light of the recent activation of the International Criminal Court's jurisdiction over the crime of aggression, we took note with interest the reference in paragraph (8) of the relevant Commentary to the need to revisit and amend accordingly paragraph 1 (*h*) of Draft Article 3.

[See also comment on draft article 13]

Israel

[Original: English]

Israel is mindful of the underlying considerations which have brought the Commission to incorporate the definition in article 7 of the Rome Statute of the International Criminal Court into Draft Article 3. However, as far as the obligation for criminalization under national law as enshrined in Draft Article 6 is concerned, customary international law does not necessarily or adequately overlap with the definition which appears in Draft Article 3. This is also reflected in the fact that the national laws of domestic jurisdictions which have criminalized crimes against humanity differ from one another, as noted in the commentary to the Draft Articles.[47] We suggest amending the draft articles accordingly.

Japan

[Original: English]

[See comment under general comments]

Liechtenstein

[Original: English]

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic the attack:

[(*a*)–(*g*)]

(*h*) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or ~~in connection with the crime~~

violence of comparable gravity; 8. Persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law; 9. Arrest, detention or abduction of persons, followed by their disappearance and the refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons with the intention of removing them from the protection of the law for a prolonged period of time; 10. Acts of segregation committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; 11. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

"The first two paragraphs of article 132-23 concerning the period of unconditional imprisonment are applicable to the crimes covered by this article." Text available from www.legifrance.gouv.fr.

[47] See the report of the International Law Commission on the work of its sixty-ninth session (see footnote 1 above), paragraphs (3) and (6) of the commentary to draft article 6, and the first report of the Special Rapporteur on crimes against humanity (A/CN.4/680), pp. 31–32.

~~of genocide or war crimes~~ **with the crime of genocide, war crimes or the crime of aggression**; [Art. 7 (1) (*h*) of the Rome Statute of the International Criminal Court]

Arguments: the Rome Statute of the International Criminal Court should be reflected accurately and fully which is best done by spelling out the relevant crimes in the Statute, which itself refers to "any crime within the jurisdiction of the Court", thus including the crime of aggression.

[2.]

3. For the purpose of the present draft articles, it is understood that the term "gender" ~~refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.~~ **refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.** [Understanding of "gender" adopted by the Office of the Prosecutor of the International Criminal Court[48]]

Arguments: In order to consistently reflect the Statute accurately and fully, the definition of "gender" should be the same as the definition of gender as interpreted by the Office of the Prosecutor of the International Criminal Court, which stresses that the "definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys", deciding therefore to apply and interpret "gender" in accordance with internationally recognized human rights.[49] Failure to reflect the current human rights definition of gender could sideline women; lesbian, gay, bisexual, transgender and intersex persons; and other marginalized groups. It could also result in greater impunity for gender-based crimes. As only little jurisprudence related to gender under international criminal law exists, the convention will serve as a mean to contribute to the legal understanding of gender. In short, if the International Law Commission decides to have a definition of "gender" in the draft articles based on the Rome Statute of the International Criminal Court this has to be consistent with the whole legal framework created by the said treaty, including the reference to international human rights and the most recent development on its interpretation.

Malta

[Original: English]

With reference to the proposed convention on the prevention and punishment of crimes against humanity, Malta wishes to request that the definition of gender be changed to be in line with the one found in the Council of Europe Convention on preventing and combating violence against women and domestic violence. This would ensure that the treaty also covers trans and genderqueer persons.

New Zealand

[Original: English]

New Zealand observes that Draft Article 3, paragraph 3, defines the term "gender", by replicating article 7, paragraph 3, of the Rome Statute of the International Criminal Court. The negotiations which led to that definition in the context of the Statute were contentious, and naturally, occurred prior to the subsequent development of jurisprudence, policy and practice relevant to the

[48] See the "Policy Paper on Sexual and Gender-Based Crimes", p. 3.

[49] For the latest example, see the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152).

interpretation and application of the term to criminal accountability and in other contexts, by the International Criminal Court, the Office of the Prosecutor, other international organisations, international instruments and States themselves. New Zealand domestic law recognises biological sex and gender identity as distinct concepts. For the purposes of a convention based on these Draft Articles, New Zealand would prefer a definition which better reflected that distinction and the ways in which gender is experienced and expressed in contemporary society, if a definition is considered necessary at all.

Panama

[Original: Spanish]

The wording of draft article 3 is similar to that of article 7 of the Rome Statute of the International Criminal Court, which defines crimes against humanity and is widely accepted as the benchmark on the matter. Given that, at the time of writing, 123 States are parties to the Statute, Panama believes that the definition contained in article 7 has become binding as a customary rule of international law under article 38 of the Vienna Convention on the Law of Treaties. That being the case, Panama is of the view that draft article 3 reaffirms customary rules concerning the definition of and conduct constituting crimes against humanity.

Peru

[Original: Spanish]

Regarding draft article 3, which contains the definition of crimes against humanity, we take the view that:

(i) Persecution against any identifiable group or collectivity, referred to in paragraph 1(h), should in and of itself be understood as a crime against humanity rather than when occurring "in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes";

(ii) The enforced disappearance of persons, under paragraph 1(i) and, specifically, the description of what is understood by the crime, which appears in paragraph 2(i), should dispense with the reference to "a prolonged period of time".

Portugal

[Original: English]

Allow us now some brief comments on a few specific articles. In light of our comments, we welcome the use of the definition of crimes against humanity contained in Article 7 of the Rome Statute of the International Criminal Court with the necessary changes in the proposed draft article 3. As the Commission stated, such definition has been accepted by more than 120 States and it reflects how these crimes are understood today.

Sierra Leone

[Original: English]

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.

Comments: The International Law Commission expressed a preference for the International Criminal Court '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 International Law Commission's crimes against humanity topic and the system of the Rome Statute of the International Criminal Court.

Still, although it is true that the Statute definition of crimes against humanity is considered to largely reflect customary international law, in the view of Sierra Leone, the Commission should not lose sight of the fact that the International Criminal Court's 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 Statute definition of the crime, minor adjustments could not be made to improve it – as at least two other States have also suggested.[50] This would reflect the fact that, twenty years after the 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 definition based on the International Criminal Court, has revealed some drafting mistakes that were not evident when the Rome Statute of the International Criminal Court was negotiated in 1998.

There is also the separate, but related, concern whether the International Law Commission's definition of crimes against humanity should take into account other developments in international law *since* the Rome Statute of the International Criminal Court 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 of the International Criminal Court.[51]

Below, we focus on three issues that appear to arise from the relatively narrower International Criminal Court 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 International Criminal Court-based draft definition. To do so could undermine the desired legal certainty. It might also upset the balance that the International Law Commission and many states parties to the International Criminal Court 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

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

[51] 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 , 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.

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 jurisprudence of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, the Special Court for Sierra Leone and some of the International Criminal Court jurisprudence, the presence of 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.

"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.[52]

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

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, paragraph 2 (a), of the Rome Statute of the International Criminal Court 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 International Criminal Court's *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 reintroduces the State/organizational policy requirement, which according

[52] In *Prosecutor* v. *Milan Martić*, the Appeals Chamber of the International Tribunal for the Former Yugoslavia found that the term "civilian" has the same meaning as that under article 50 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (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 *Prosecutor* v. *Milan Martić, Case No. IT-95-11-A, Judgment of 8 October 2008*, Appeals Chamber, International Tribunal for the Former Yugoslavia, paras. 296–302. Later jurisprudence of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the Special Court for Sierra Leone 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.

to the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Kunarac* et al. Case (2002, para. 98), is no longer required under customary international law. Like the International Tribunal for the Former Yugoslavia Appeals Chamber, Sierra Leone does not consider the policy element a requirement for proof of crimes against humanity under customary international law.

The ambiguity of the policy requirement which predated the adoption of the Rome Statute of the International Criminal Court has already caused challenges for interpreters of Article 7, paragraph 2 (a), including International Criminal Court 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.[53] The same pattern can be found among some International Criminal Court 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 situation in Kenya.[54]

For this reason, Sierra Leone welcomes the International Law Commission'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.

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 Commission'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

[53] See, for instance, C. 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", *Leiden Journal of International Law*, vol. 23 (2010), pp. 855–873; W. Schabas, "Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: closing the loopholes," *ibid.*, pp. 847–853; C. C. Jalloh, "Situation in the Republic of Kenya", *American Journal of International Law*, vol. 105, No. 3 (July 2011), pp. 540–; G. Werle and B. Burghardt, "Do crimes against humanity require the participation of a State or a 'State-like' organization?", *Journal of International Criminal Justice* , vol. 10 (2012), pp. 1151–1170; C. C. Jalloh, "What makes a crime against humanity a crime against humanity", *American University International Law Review* , vol. 28, No. 2 (2013), pp. 381–441 ; and L. N. Sadat, "Crimes against humanity in the modern age", *American Journal of International Law*, vol. 107, No. 2 (April 2013), pp. 334–377.

[54] *Situation in the Republic of Kenya, Case No. ICC-01/09, Decision of 31 March 2010 pursuant to article 15 of the Rome Statute of the International Criminal Court on the authorization of an investigation into the situation in the Republic of Kenya*, Pre-Trial Chamber, International Criminal Court.

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".

Suggestions: Sierra Leone has not proposed a deletion of the State or organizational policy requirement from the International Criminal Court definition, which has been adopted by the International Law Commission, 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 of the International Criminal court. 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 Commission 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

Finally, regarding the third example where Draft Article 3 (which is based on Article 7 of the Rome Statute of the International Criminal Court) 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, paragraph 1 (*c*), Control Council Law No. 10 on the punishment of persons guilty of war crimes, crimes against peace and against humanity (1945); article 5 (h), Statute of the International Tribunal for the Former Yugoslavia; article 3 (h), Statute of the International Tribunal for Rwanda; article 2 (h), Statute of the Special Court for Sierra Leone; article 5, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; and article 28C, paragraph 1 (h), of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights).

Even the Commission's early work on crimes against humanity has long recognized 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 mankind[55] and draft code of crimes against the peace and security of mankind,[56] many national laws domesticating the Rome Statute of the International Criminal Court, international instruments such as the Statutes of the International

[55] See, in this regard article 2, paragraph 11 of the draft code of offences against the peace and security of mankind and the accompanying commentaries (*Yearbook of the International Law Commission, 1954*, vol. II, p. 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).

[56] See article 18 (*e*) of the draft code of crimes against the peace and security of mankind (*Yearbook of the International Law Commission, 1996*, vol. II (Part Two), pp. 47–50).

Tribunal for the Former Yugoslavia and International Tribunal for Rwanda and their case law,[57] 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 the Trial Chamber of the International Tribunal for the Former Yugoslavia , "although the Statute of the [International Criminal Court] may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law".[58] This led the Trial Chamber , and another in the case *Prosecutor* v. *Kordić and Čerkez*,[59] to explicitly reject the notion that persecution must be linked to other core crimes to meet the contextual threshold of crimes against humanity.

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 International Criminal Court 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 stand-alone 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 crimes against humanity. For some states may well be contracting parties to the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions, but not necessarily parties to a future crime against humanity convention.[60]

Suggestions: As Sierra Leone considers that persecution is a stand-alone 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~~"**.

Another concern with the Commission-endorsed definition of persecution as a crime against humanity is that it excludes another International Criminal Court 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 International Criminal Court. 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

[57] *Prosecutor* v. *Kupreškić* et al., *Case No. IT-95-16-T, Judgment of 14 January 2000*, Trial Chamber, International Tribunal for the Former Yugoslavia, 14 January 2000, para. 581.

[58] *Ibid.*, para. 580.

[59] *Prosecutor* v. *Kordic and Cerkez, Case No. IT-95-14/2-T, Judgment of 26 February 2001*, Trial Chamber, International Tribunal for the Former Yugoslavia, 26 February 2001, para. 197.

[60] As of writing, only 149 of the 193 Member States of the United Nations were parties to the Convention on the Prevention and Punishment of the Crime of Genocide. This may not be an issue for the four Geneva Conventions, which each currently has 196 States parties. It is possible that some concerns might arise in relation to lack of congruence with Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (174 states parties), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (168 parties), and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III) (75 states parties).

the extent that the future convention seeks to complement the regime of the Rome Statute of the International Criminal Court 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 International Law Commission instrument on a collision course with the national legislation of states, especially states parties to the International Criminal Court that might have adopted implementing legislation incorporating the Statute's exact requirements.

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 Commission'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 of the International Criminal Court. The latter explicitly speaks to "any crime within the jurisdiction of the Court". Any crime within International Criminal Court jurisdiction would also, given the stated intention of the International Law Commission Drafting Committee to remain "faithful" to Article 5 of the 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 para. 6).

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 of the International Criminal Court, 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 Statute.

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

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 and other cruel, inhuman or degrading treatment or punishment,[61] 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 of the International Criminal Court 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").

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*" (emphasis added). The amended version would, for the same reason it rightly preserves any wider definitions available under other

[61] Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted on 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.

international instruments or national law, would do the same also in relation to the definition of the crime *under customary international law*.

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*".

[See also comments under draft article 8 and draft article 13]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic Countries welcome the fact that the International Law Commission has retained the definition of the term "crime against humanity" in Article 7 of the Rome Statute of the International Criminal Court as the material basis for the draft articles. This point has been raised by the Nordic countries, as well as by many other delegations in the Sixth Committee. However, the Statute was adopted twenty years ago. By retaining the definition *verbatim*, the draft articles fail to take into account the evolving jurisprudence by the International Criminal Court and other tribunals and international practice.

This is particularly evident in regard to the definition of "gender" retained from Article 7, paragraph 3, of the Statute. While the Commission has elaborated on some elements of the crime "crimes against humanity", such as "widespread or systematic", "directed against any civilian population" and "with knowledge of the attack", there is no similar study of the definition of "gender". The Nordic countries are of the view that the definition of "gender" contained in draft article 3, paragraph 3, does not reflect current realities and content of international law. Current definitions of the term acknowledge the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys. The Nordic countries consider that the definition of gender in the draft articles must take this development into account and be updated accordingly.

Office of the Prosecutor of the International Criminal Court, "Policy Paper on Sexual and Gender-Based Crime":

"'Gender', in accordance with article 7(3) of the [Rome Statute of the International Criminal Court], refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys."

International Committee of the Red Cross:

"The term 'gender' refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term 'sex' refers to biological and physical characteristics."

World Health Organization:

"Gender refers to the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men."

UN-Women (United Nations Entity for Gender Equality and the Empowerment of Women):

"Gender refers to the roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women."

Furthermore, many parts of the definitions in the draft articles contain elements that are open to interpretations and value judgments. It is worth noting that according to Article 9 of the Rome Statute of the International Criminal Court, the *Elements of Crimes* adopted by the Assembly of States Parties, shall assist the Court in the interpretation of the Statute.

According to draft article 3, paragraph 1 (*k*), a constituent of a "crime against humanity" could also consist of "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

The provision in draft article 3, paragraph 1 (*k*) resembles a provision permitting analogy. The principle of legality in criminal law, based on international human rights treaties, does not permit analogy to the detriment of a prosecuted person. Although Article 7, paragraph 1 (k) of the Rome Statute of the International Criminal Court contains a corresponding provision, Article 22 of the Statute also specifically provides on the principle of legality in criminal law. Article 22, paragraph 2, in the Statute prohibits analogy and requires that in case of ambiguity, the definition shall be interpreted in favor of the person being prosecuted. The International Law Commission's draft article do not contain such a provision. Moreover, it appears from Articles 1 and 5 of the Statute that the jurisdiction of the International Criminal Court is limited to "the most serious crimes of international concern". Such a provision is conducive to influencing the interpretation of penal provisions by keeping it reasonably narrow. The possible convention must not contain any provisions permitting analogy to the detriment of a prosecuted person.

In light of the above, an essential question from the perspective of the extent of criminal liability and the obligation to enforce it is how to interpret, first, the attack element included in the definition of the offence and, second, the question of when the constituent act is considered committed "as part of" such an attack.

Having committed the constituent act "as part of" an attack is a precondition for liability that is both essential and largely open to interpretations. Therefore, this precondition should, as a minimum, be discussed more extensively in the commentaries to the draft articles. At the time being the discussion on the "as part of" element is rather limited. In any case, the element must be given a narrow content.

Part III of the Rome Statute of the International Criminal Court lays down provisions on general principles of criminal law. The Commission's set of draft articles lacks provisions on certain issues regulated by Part III of the Statute. For instance, the draft articles lack a provision on the mental element of a crime corresponding to Article 30 of the Statute. The precondition that the perpetrator had knowledge of the attack, required in the introductory sentence of the Commission's draft article 3, paragraph 1, on the definition of crimes, means that the mental element is taken into account only in relation to the "attack" criterion of the elements of crime. Therefore, the potential convention should regulate the mental element in more detail, where it should be limited to intent and knowledge.

Switzerland

[Original: French]

Switzerland welcomes the fact that the draft articles are based on the existing international legal framework. It particularly appreciates the fact that the definition of crimes against humanity in draft article 3 reproduces *verbatim* the definition in article 7 of the Rome Statute of the International Criminal Court, apart from a few non-substantive modifications. It is important to avoid a definition that diverges from that of the Statute because the International Criminal Court is called upon to play a

central role in the prosecution and adjudication of crimes against humanity. In general, every effort must be made to prevent any conflict between the draft articles and existing treaty texts. However, Switzerland also appreciates that draft article 3, paragraph 4, provides that the draft article is without prejudice to any broader definition provided for in any international instrument or national law. The commentary to the paragraph could also contain a sentence suggesting that account be taken of relevant developments in case law, particularly that of the International Criminal Court.

Ukraine

[Original: English]

Article 3 "Definition of crimes against humanity" of the draft articles contains the list of acts constituting "crime against humanity". This article based on the article 7 of the Rome Statute of the International Criminal Court, the jurisdiction of which was accepted by Ukraine.

Article 7, paragraph 1 (h), of the Statute stipulates that a "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or *any crime within the jurisdiction of the Court*" (emphasis added).

While Article 3, paragraph 1 (*h*), of the draft articles stipulates that a "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or *in connection with the crime of genocide or war crimes*" (emphasis added).

Taking into consideration that according to the article 5 of the Statute, the International Criminal Court has jurisdiction with respect to: (*a*) the crime of genocide, (*b*) crimes against humanity, (*c*) war crimes, and (*d*) the crime of aggression, Ukraine proposes to bring Article 3, paragraph 1 (*h*), of the draft articles in conformity with Article 7, paragraph 1 (h), of the Rome Statute of the International Criminal Court.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom supports the International Law Commission's decision to use the definition of crimes against humanity from the Rome Statute of the International Criminal Court for the purposes of the draft Articles. In general, the United Kingdom would urge against any deviation from that definition in order to ensure consistency between the two instruments and to avoid any confusion over which crimes do or do not fall within the scope of "crimes against humanity". Further, many of the States Parties to the Rome Statute of the International Criminal Court will have given effect to the Statute definition in their domestic law and may be disinclined from making substantive amendments to that definition.[62]

However, the United Kingdom is aware that consistency with the Statute may not be possible in three cases. These are in relation to draft Article 3, paragraphs 1 (*h*), 2 (*i*), and 3, as discussed below.

[62] The definition used by the United Kingdom can be found in Schedule 8 to the International Criminal Court Act 2001.

The final part of draft Article 3, paragraph 1 (*h*) says: "or in connection with the crime of genocide or war crimes". This contrasts with article 7, paragraph 1 (h), of the Rome Statute of the International Criminal Court which says: "in connection with … any crime within the jurisdiction of the Court".

It is not possible to transfer the Statute language across to the draft Articles. However, the cross reference to genocide and war crimes is unsatisfactory in the absence of a definition of those crimes.

In the view of the United Kingdom, the preferable solution would be to simply delete "or in connection with the crime of genocide or war crimes". The United Kingdom considers that this amendment would make little practical difference, as in the vast majority of situations any persecution that would occur in connection to the crime of genocide or war crimes would also occur in connection to one of the other crimes referred to in draft Article 3, paragraph 1. In addition, removing those words would hopefully avoid the complications that leaving them in would likely create. Finally, where States like the United Kingdom have implemented the definition of crimes against humanity in the Statute into their national law, they should be able to continue with that slightly wider definition without conflicting with the definition in the draft Articles (as draft Article 3, paragraph 4, permits broader definitions).

As regards draft article 3, paragraph 2 (*i*), the definition of "enforced disappearance of persons" in the draft articles follows the one in the Rome Statute of the International Criminal Court.

However, the United Kingdom recognises that since the Statute, a number of States have ratified the International Convention for the Protection of All Persons from Enforced Disappearance, which has a slightly different definition. The United Kingdom is not a signatory to that Convention.

In the view of the United Kingdom, the draft Articles should continue to use the definition of "enforced disappearance of persons" in the Statute. The definition in the International Convention for the Protection of All Persons from Enforced Disappearance appears to be wider than the definition in the Statute. As such, if the draft Articles use the definition in the International Convention for the Protection of All Persons from Enforced Disappearance, the signatories to the Rome Statute of the International Criminal Court would potentially be required to amend their national legislation implementing the Statute to give effect to a future convention based on the draft Articles.

Draft Article 3, paragraph 3, defines "gender" as referring to two sexes—male and female. Consequently, persecution of persons who do not consider themselves as male or female in connection with another crime referred to in draft Article 3, paragraph 1, would potentially fall outside the scope of crimes against humanity. There is therefore the question of whether or not this definition of gender is appropriate despite the fact that it follows the wording of the Statute. In the view of the United Kingdom, it is no longer appropriate and therefore should be dropped from the draft Articles. States may then, if necessary, negotiate a new definition should they decide to pursue a convention based on the draft Articles.

As a final point on draft Article 3, paragraph (41) of the Commentary on draft Article 3 notes that "[a]ny elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance". While this is perhaps an obvious point, there may be some benefit in including wording along these lines in the draft Articles themselves to avoid any disputes between States in the context of mutual legal assistance or extradition.

Uruguay

[Original: Spanish]

With respect to enforced disappearance, Uruguay suggests that the words "with the intention of removing them from the protection of the law" and "for a prolonged period of time" be eliminated in order to bring the definition into line with those set forth in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, the 1994 Inter-American Convention on Forced Disappearance of Persons and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

With regard to the crime of persecution, the language adopted in the draft articles is not consistent with customary international law. According to the wording of draft article 3, persecution may only be committed in connection with other crimes under international law. Although this formulation reflects article 7 of the Rome Statute of the International Criminal Court (and is the same as that set forth in article 28 of Act No. 18.026, in our domestic legislation), Uruguay agrees with the conclusions of Amnesty International stating that persecution should in itself be considered a crime against humanity, "independent of the other crimes, and, therefore, may be committed even in the absence of other crimes, as long as the acts of the accused [are] part of a pattern of widespread and systematic crimes directed against a civilian population"; and, in line with the Statute of the International Tribunal for the Former Yugoslavia, rejecting the concept of a connection with other crimes under international law.

Customary international law does not require any "connection" with other prohibited acts, which supports the explanation of various jurists that this is a jurisdictional threshold for the purposes of the Statute. Indeed, it was a compromise clause among governmental delegations participating in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998, intended to avoid a sweeping interpretation criminalizing all discriminatory practices.

Likewise, there is no requirement for such a "connection" in the main precedents for the Rome Statute of the International Criminal Court (1945 Control Council Law No. 10 on the punishment of persons guilty of war crimes, crimes against peace and against humanity and the 1994 Statute of the International Criminal Tribunal for Rwanda), including those of the International Law Commission itself, or in subsequent instruments (the Statute of the Special Court for Sierra Leone, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, the Kosovo Law on Specialist Chambers and Specialist Prosecutor's Office and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights). Lastly, the 1996 draft code of crimes against the peace and security of mankind includes "persecution on political, racial, religious or ethnic grounds" as one of the crimes against humanity, without the "connection" requirement.

The phrase "in connection with" seems unclear and is subject to various interpretations.

The definition of "gender" is based on the language used in article 7 of the Rome Statute of the International Criminal Court; however, the draft articles ignore developments over the last two decades in the areas of human rights and international criminal law in relation to sexual and gender-based crimes, since gender as a construct and the psychological and biological characteristics that define men and women are not reflected in the above-mentioned paragraph.

It is important to highlight the June 2014 "Policy Paper on Sexual and Gender-Based Crimes" of the Office of the Prosecutor of the International Criminal Court, in which the Office states in relation to the definition of "gender" in article 7 of the Statute that "[t]his definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys", deciding therefore to apply and interpret "gender" in accordance with internationally recognized human rights pursuant to article 21, paragraph 3.

This reference to article 21, paragraph 3, of the Statute is particularly important as there is no other similar provision in the draft articles; moreover, this definition of the Office of the Prosecutor of the International Criminal Court is an updated definition that is in accordance with international human rights law.

In that regard, we would suggest a definition that reflects the progress made in the definition of "gender" and is based on the above-mentioned definition developed by the Office of the Prosecutor of the International Criminal Court.

That would ensure that a reference to the most recent development in the interpretation of "gender" under international human rights law is included in the draft articles.

5. Draft article 4 – Obligation of prevention

Australia

[Original: English]

[See comment under general comments]

Chile

[Original: English]

Draft article 4 refers to the obligation of prevention. Its text is quite clear but at the same time gives enough flexibility to States in order that they can choose different means to perform this obligation. In relation to paragraph 1 (*a*), it would only be suggested to replace the last part for the following "or other appropriate preventive measures in any territory under its jurisdiction or control". Concerning paragraph 2, its drafting should be further clarified. Its current form would seemingly intend to prevent that exceptional circumstances are invoked as a defence so as to exclude or justify individual criminal responsibility, or as a defence brought before an allegation of state responsibility for an internationally wrongful act. However, this paragraph does not refer to the obligation to punish these crimes, and therefore its respective draft commentary (paragraph (23)) correctly clarifies that this provision only addresses the issues related to prevention. Accordingly, draft paragraph 2 should be rephrased as follows: "2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification for failing to prevent or for tolerating crimes against humanity."

Cuba

[Original: Spanish]

With regard to paragraph 1 of draft article 4 [4] (Obligation of prevention), the Republic of Cuba suggests removing the phrase "including through", which is imprecise and therefore not consistent with the spirit of a draft legal norm, and replacing it with the phrase "through the following actions". The paragraph would then read: "Each State undertakes to prevent crimes against humanity, in conformity with international law, through the following actions:".

Czech Republic

[Original: English]

Draft article 4, paragraph 1 (*a*), contains the obligation of prevention and covers all preventive measures, including effective "administrative" measures through which each State undertakes to prevent crimes against humanity. While we acknowledge that similar wording is used in Article 2, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment to prevent acts of torture, given the systematic and widespread nature of crimes against humanity, we would appreciate that the Commission further elaborates in the commentary on the meaning of "administrative measures" with regard to prevention. The commentary in this regard might serve as a guideline for future implementation of the draft articles and therefore any detailed explanation would be of a great use.

Further, draft article 4 seems to be an all-encompassing provision. While the general terminology might be desirable in order to include any conceivable preventive measure, we believe that the draft articles would benefit from including a provision mentioning concrete examples of preventive measures directly in the text of the draft article, such as, for instance, training of officials which is explicitly provided for in the United Nations Convention against Corruption or Convention against torture and other cruel, inhuman or degrading treatment or punishment (article 10) or in the International Convention for the Protection of All Persons from Enforced Disappearance (article 23).

With respect to draft article 4, paragraph 1 (*b*), according to which the States shall also cooperate, as appropriate, with other organizations, in our view the obligation to cooperate with non-governmental organizations is not well established in treaties on criminal matters. According to standard treaty provisions related to criminal law, States are obliged to cooperate among themselves, sometimes including with intergovernmental organizations. Hence, we believe that more elaboration and explanation on the obligation to cooperate with non-governmental organizations is needed, although we recognize that the obligation is not drafted as absolute.

Estonia

[Original: English]

Estonia welcomes that draft article 4 specifies the obligation of prevention and stipulates that no exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Estonia is convinced that impunity for crimes against humanity cannot be stopped without the cooperation of States and relevant intergovernmental and other organisations. We need to strengthen our common efforts to bring an end to crimes against humanity and make perpetrators accountable. Therefore, Estonia welcomes draft article 4, paragraph 1 (*b*), which provides that each State undertakes to prevent crimes against humanity in cooperation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations.

Estonia underlines that every State has a responsibility to ensure that its national law prohibits crimes against humanity and to create the capability to investigate serious international crimes and to prosecute them. In order to make the whole system work, every country has to play its role.

New Zealand

[Original: English]

New Zealand notes that the Commentary to Draft Article 4 explains (with reference to the interpretation of the International Court of Justice of article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide) that the obligation on a State to prevent an act which is a crime under international law also has the effect of prohibiting that State from itself committing that act. New Zealand accepts that this is the case, and recognises that Draft Articles 2 and 4 would have the effect of prohibiting States from committing crimes against humanity. Nevertheless, New Zealand considers that any doubt on this question could be avoided if Draft Article 4 also explicitly stated that States themselves are prohibited from committing crimes against humanity.

Panama

[Original: Spanish]

The Commission, in its commentaries on the draft articles, recognizes that the obligation to prevent crimes against humanity contains four elements: first, not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law";[63] second, "to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing" such acts;[64] third, by taking "effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction"; and fourth, by pursuing certain forms of cooperation.[65] Such elements, however, are not explicitly set forth in the draft articles. Although article 4, paragraph 1, places no limit on measures to be taken to prevent and punish crimes against humanity, we would recommend including the first two of the above-mentioned elements, which would obviate the need for further discussion and prevent restrictive interpretations regarding such measures.

Sierra Leone

[Original: English]

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.

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

[63] *Ibid.*

[64] *Ibid*., paragraph (12) of the commentary to draft article 4.

[65] *Ibid*., paragraph (19) of the commentary to draft article 4.

of the commentaries to this provision before returning to the wider issue about prevention being much broader than just criminal prosecutions.

As to paragraph (1) of the commentary, which essentially seeks to make the case for the duty to prevent, the Commission "viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts". The Commission goes on to note that, "[i]n 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 Commission, 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".

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.

In relation to paragraphs (2) to (4) of the commentary to draft article 4, an additional reference could be given to war crimes law. This is because, under Article 1 common to the four 1949 Geneva Conventions, the requirement on the parties "to respect and to 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 International Court of Justice.[66]

On paragraph 10, the International Court of Justice had also decided, in the context of the Convention on the Prevention and Punishment of the Crime of Genocide, 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 International Court of Justice 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.

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) of the commentary (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

[66] See J. S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. I, Geneva, International Convention for the Red Cross (ICRC), 1952, p. 26; and *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 199–200, para. 158.

also, in the substance, a seeming close linkage between the content of paragraph (10) and paragraph (18) of the commentary to draft article 4. We would therefore suggest moving the latter further above and perhaps even merging it with the former.

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 Charter of the United Nations mentioned, referring to cooperation between the United Nations and regional bodies. Indeed, Article 52 of the Charter of the United Nations 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 intervention of the Economic Community of West African States (ECOWAS) in Liberia. Increasingly, regional bodies are sites of action for 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 Charter of the United Nations might all be relevant in this regard.

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.

Sierra Leone notes that paragraphs 138 and 139 of the 2005 World Summit Outcome (General Assembly resolution 60/1 of 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 United Nations member states *unanimously affirmed* at the Summit that "[e]ach 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.

The General Assembly has continued to endorse the doctrine. In fact, as recently as 24 September 2018, heads of State and government of the United Nations 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 "recognis[ing] 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" (Political Declaration adopted at the Nelson Mandela Peace Summit, para. 12. See also General Assembly resolution 63/308 of 14 September 2009; Security Council resolution 1674 (2006) of 28 April 2006, para. 4, reaffirming the provisions of paragraphs 138 and 139; and Security Council resolution 1706 (2006) of 31 August 2006, second preambular paragraph).

At the regional level, about five years before the adoption of the World Summit Outcome, 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.

Suggestions: Sierra Leone proposes that the International Law Commission 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 International Court of Justice jurisprudence on prevention but perhaps going beyond it, in the commentary.

[See also comments under general comments and draft article 2]

Singapore

[Original: English]

Singapore agrees with the principle in draft article 4, paragraph 1 (*b*), that States should undertake to prevent crimes against humanity through "cooperation with other States, relevant intergovernmental organizations, and, as appropriate other organizations". However, the scope of a State's obligation in this regard is not clear. The relationship between the duty of prevention through cooperation contained in draft article 4, paragraph 1 and the obligations in other provisions, such as the obligation to take preliminary measures when an alleged offender is present in territory under a State's jurisdiction to ensure his or her presence (draft article 9), and the obligation to render mutual legal assistance in investigations, prosecutions and judicial proceedings (draft article 14), is not clear. We understand that the type of cooperation to be expected is likely to be contextual in nature, but some explanation of the scope of the obligation in the commentary on this draft article would assist States to understand the nature of the commitment contained in draft article 4, paragraph 1.

Switzerland

[Original: French]

The emphasis placed on prevention, which is the subject of draft article 4, is also to be welcomed. Switzerland considers that the prevention of crimes against humanity is as important as the punishment of those crimes. The fact that paragraph 2 of the draft article highlights that no exceptional circumstances whatsoever may be invoked as a justification of such crimes is also welcome.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom considers that the undertaking to prevent crimes against humanity as set out in draft Articles 2 and 4 constitutes a proposal for the progressive development of the law (*lex ferenda*). As such, in the United Kingdom's view, the Commentary to draft Article 4 should make this position clear.

The United Kingdom also notes that the undertaking to prevent is not intended to be limited to the specific obligations set out in paragraphs 1 (*a*) and (*b*) of draft Article 4. This is evident from the drafting of draft Article 4, paragraph 1, as well as paragraph (7) of the Commentary to draft Article 4, which cited the International

Court of Justice to the effect that the undertaking to prevent "is not merely hortatory or purposive, and is not merely an introduction to later draft articles". Further, it seems the obligations created by the undertaking are intended to be broad. Paragraph (7) of the Commentary on draft Article 4 notes that at the provisional measures phase of the case on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Herzegovina)*, the Court determined that the undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide imposed "a clear obligation" on the parties "to do all in their power to prevent the commission of any such acts in the future".

Helpfully, the Commentary to draft Article 4 seeks to provide more detail on what the undertaking requires (e.g. for States to use best efforts).[67] However, this analysis is limited as it draws heavily on the findings of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Herzegovina)*, which is specific to the case of genocide. The courts may take a different approach in the context of crimes against humanity. Further, even if the approach were the same, the burden placed on States by such an approach is likely to be greater when applied to crimes against humanity as compared to genocide, given the wider ranging nature of the former.

Consequently, the United Kingdom has concerns about creating such a broad, and potentially ever expanding, set of obligations for States in relation to crimes against humanity. The lack of certainty increases the risk of disputes about the exact requirements placed on States, especially in terms of any obligations they might have to act extraterritorially.

In light of this, the United Kingdom would ask the International Law Commission whether there are any specific obligations, which would be required to satisfy the undertaking to prevent, that it has not included in paragraphs 1 (*a*) and (*b*) of draft Article 4. If there are, it may assist to include them explicitly and thus to give as much certainty as possible to what is required by States when accepting the undertaking at draft Articles 2 and 4, paragraph 1. In the view of the United Kingdom, a longer but exhaustive list of obligations is preferable to a shorter but unlimited one.

In a number of places in the draft Articles (draft article 4, paragraph 1 (*a*); draft article 7, paragraphs 1 (*a*) and 2; and draft article 8), the draft Articles make reference to "any territory under its jurisdiction". In the view of the United Kingdom, this should be limited to "in its territory". First, this provides greater certainty as to where the obligations set out within the draft Articles apply, as it will not always be clear whether territory is under the *de facto* jurisdiction of the State. Second, even if the position is clear, it may not always be practical to apply the relevant draft Articles where a State exercises *de facto* control over territory.

6. Draft article 5 – *Non-refoulement*

Australia

[Original: English]

Draft article 5 provides an express prohibition of *refoulement* of a person "to territory under the jurisdiction of another State" where there are substantial grounds for believing the person would be in danger of being subjected to a crime against humanity. In determining whether such "substantial grounds" exist, a State's competent authorities are to take into account "all relevant considerations". These include, where applicable, the existence in the territory under the jurisdiction of the

[67] See paragraph (12) of the Commentary to draft Article 4.

State to which the person is to be returned of a "consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law."[68]

Australia appreciates the intention behind this provision, and observes that many of the acts which may amount to crimes against humanity would be captured by existing *non-refoulement* obligations pursuant to the 1951 Convention relating to the Status of Refugees, the 1966 International Covenant on Civil and Political Rights and the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment. Australia recalls that these instruments give rise to obligations not to expel, extradite or return a person, either directly or indirectly, to a place where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion (under the Convention relating to the Status of Refugees); or where there are substantial grounds for believing he or she would be subjected to torture (under the Convention against torture and other cruel, inhuman or degrading treatment or punishment and the International Covenant on Civil and Political Rights) or to cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the death penalty (under the International Covenant on Civil and Political Rights and its Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty).

Having regard to the definition of crimes against humanity contained in draft article 3, Australia considers there is significant overlap between the aforementioned obligations of *non-refoulement* and the proposed obligation with respect to crimes against humanity, and that compliance with these existing obligations would, in the majority of instances, constitute compliance with the proposed obligation.

Australia takes this opportunity to note its view, in accordance with that of the United Nations human rights committees, that, for there to be "substantial grounds" that a person would be in danger of being subjected to conduct covered by the aforementioned existing *non-refoulement* obligations, there must be a personal, present, foreseeable and real risk to that person. This standard would in Australia's view also apply in respect of *non-refoulement* arising in relation to a crime against humanity.

Brazil

[Original: English]

On draft article 5, it is commendable the inclusion of a "*non-refoulement*" clause in the draft articles. Initially envisaged in the 1951 Convention relating to the Status of Refugees, the principle of "*non-refoulement*" today has a broader scope. Many human rights monitoring bodies have interpreted their respective instruments as establishing an absolute prohibition of expulsion or return, normally based on the risk of "irreparable harm". Draft article 5 should follow a similar approach and include, as grounds for applying the "*non-refoulement*" principle, not only the risk that the person will be subjected to a crime against humanity, but also the risk of genocide, war crimes and torture. Furthermore, it could benefit from a provision prohibiting extradition when there are substantial grounds for believing that the person may face the application of the death penalty.

[68] Draft article 5, paragraph 2.

Chile

[Original: English]

Draft article 5 establishes an obligation of *non-refoulement*. Its text is generally clear and satisfactory. However, regarding the considerations that should be born in mind to determine the existence of danger, the standard included as an example in paragraph 2 could be revisited. Although it is drawn from the 1951 Convention relating to the Status of Refugees and the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, the present draft articles already contain a certain definition of persecution, which specifically refers to the risk posed by violations of human rights. Therefore, it could be advisable to use an analogous formulation, so that the assessment of the risk of *non-refoulement* duly considers all the relevant hypotheses of persecution. With this aim, the phrase "consistent pattern of gross, flagrant or mass violation of human rights" could be replaced by "consistent pattern of severe and intentional deprivation of universal fundamental rights" (a formulation aligned with the proposal already put forward in relation with the definition of persecution).

Germany

[Original: English]

In paragraph 2, the language of the second half-sentence ("including…"), which is in line with Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, serves to clarify that the general human rights situation in the State must be taken into account when assessing whether a real threat of enforced disappearance is at stake. In the case of crimes against humanity, however, the general situation is already covered in the facts of the crime that presuppose a widespread or systematic attack on the civilian population (see Article 3, paragraph 1). The second half-sentence therefore appears systematically superfluous.

Greece

[Original: English]

The utility of this Draft Article should, in our view, be reconsidered by the Commission, given the already well-established and comprehensive obligations of States regarding the principle of non-refoulement deriving from major international conventions on refugee or human rights law and the case-law of regional and international judicial or quasi-judicial bodies. The possible overlap with other treaty regimes was also pointed out by several members of the Commission during the relevant discussions. Moreover, we are not sure whether the specific nature of crimes against humanity which, according to their definition, are committed as part of a widespread or systematic attack directed against a civilian population was duly taken into account. Finally, we wonder whether the reference to "territory under the jurisdiction of another State" in both paragraphs of this Draft Article is adequate in this context given the problems that may create and we invite the Commission to reconsider its use.

Peru

[Original: Spanish]

The explicit references to the principles of "*non-refoulement*" and "*aut dedere aut judicare*" in draft articles 5 and 10, respectively, are welcome.

Sierra Leone

[Original: English]

Comments: Sierra Leone agrees with the absolute nature of this rule. We welcome the decision of the International Law Commission 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.

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.

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).

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.

[See also comments under general comments and draft article 2]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries have previously stressed the importance of the principle of *non-refoulement*. The current draft article 5 is an important provision for the purpose of preventing persons from being exposed to crimes against humanity. Although the said provision is focused on avoiding the exposure of a person to crimes against humanity, this provision is without prejudice to other obligations of *non-refoulement* arising from other treaties and customary international law. In fact, the Nordic countries do not believe that the draft provision seeks to extend obligations of states regarding *non-refoulement* beyond existing obligations, but we look forward to engaging in further discussions on the precise scope of the provision.

Uruguay

[Original: Spanish]

In draft article 5, the references to "territory under" (paragraph 1) and "the territory under" (paragraph 2) should be removed, as they limit the scope of the obligation.

Similarly, the principle of *non-refoulement* should not be limited to the prohibition of extradition or other forms of expulsion when there are substantial grounds for believing that a person is in danger of being subjected to a crime against humanity, but should also cover any other crime under international law, such as genocide, war crimes, torture, enforced disappearance or extrajudicial execution, or cases where the person may reasonably be at risk of being subjected to serious human rights violations, the death penalty, trials before military courts or commissions, etc.

7. Draft article 6 – Criminalization under national law

Argentina

[Original: Spanish]

Article 6, entitled "Criminalization under national law", should include a provision establishing an obligation for States to take the necessary measures to ensure that their national laws provide for crimes against humanity to be investigated and prosecuted by civilian courts, in order to prevent military tribunals from assuming jurisdiction over such crimes. The international trend is to prohibit military jurisdiction over ordinary crimes, crimes under international law and human rights violations. Only civilian courts are in a position to guarantee the right to a fair trial and due process.

Article 6 should also contain a provision prohibiting amnesties for those responsible for the commission of crimes against humanity, as such amnesties are inconsistent with the obligation of States to investigate and prosecute and with the right of victims to an effective legal remedy.

Australia

[Original: English]

[See comment under general comments]

Belarus

[Original: Russian]

[See comment under general comments]

Brazil

[Original: English]

Brazil reads paragraph 5 of draft article 6 ("criminalization under national law") together with the International Law Commission's commentaries on this matter. In this regard, it considers that this provision has no effect on the procedural immunities that a foreign State official shall enjoy before a national criminal jurisdiction, in accordance with international customary law and in line with the case law of the International Court of Justice.

Chile

[Original: English]

Draft article 6, or its respective commentary, should also explore the possibility of including grounds for excluding responsibility, including mental incapacity and duress. These grounds could follow well the formulation contained in Article 31 of the Rome Statute of the International Criminal Court, which specifically addresses the matter. This would be plainly consistent with an observation made by the Special Rapporteur in his Second Report, when he stated that "[a]ll jurisdictions that address crimes against humanity permit grounds for excluding criminal responsibility to one degree or another" (A/CN.4/690, para. 55). Including these grounds in the present draft articles would prevent states from establishing substantially different rules on the matter, which would certainly be a desirable outcome.

Also in relation with this draft article, it is to be noted that its paragraph 7 should expressly exclude the application of the death penalty as a punishment for the commission of these crimes.

Cuba

[Original: Spanish]

With regard to paragraph 2 of draft article 6 [5] (Criminalization under national law), the Republic of Cuba proposes removing subparagraph (*a*), which seems redundant since paragraph 1 of the draft article already clearly sets forth the duty of each State to ensure that crimes against humanity constitute offences under its criminal law.

Czech Republic

[Original: English]

We note the commentary to draft Article 6, paragraph 5, concerning the non-applicability of mitigating circumstances to person holding official position. Although it seems quite logical and therefore not necessary to explicitly address the question of precluding the invocation of official position as a ground for mitigation or reduction of sentence, in criminal law a legal certainty is of paramount importance and, therefore, we suggest to include it in the text of the draft article, not only in commentary thereto (e.g. by adding the text "…nor a ground for reduction or mitigation of sentence" at the end of the text of draft article 6, paragraph 5).

Regarding draft article 6, paragraph 7, we note the analysis with respect to the terminology "appropriate" versus "effective" penalties. We acknowledge that treaties on criminal matters contain mostly terminology of "appropriate" penalties, on the other hand, we believe that we would send a strong dissuasive message to possible perpetrators by including also the adjective "effective", so the text would read "appropriate and effective" penalties. For instance, according to Article 12 of the United Nations Convention against Corruption States shall provide for "effective, proportionate and dissuasive" penalties. Apparently, it is possible to add more characteristics without doing any harm to the object of the provision, which is to provide for penalties for the serious crimes committed.

We welcome the inclusion of the provision on the liability of legal persons in draft article 6, paragraph 8. At the same time we take note of the fact that there is a divergence of views among States on the liability of legal persons in connection with crimes under international law. Some treaties on criminal matters contain provision on liability of legal persons, but neither the Rome Statute of the International Criminal Court, nor the conventions that address crimes that are part of the definition of crimes

against humanity, include such provision. We believe that the commentary to this provision would benefit from further clarification on the relation between the liability of legal persons and the organizational policy element which forms part of the definition of crimes against humanity.

El Salvador

[Original: Spanish]

With regard to draft article 6 on criminalization under national law, El Salvador notes with satisfaction the need to regulate the obligation of States to criminalize such offences at the domestic level, given that the appropriate drafting of national regulations is a way to ensure the effective application of the future guidance for the draft articles on crimes against humanity.

Specifically, the formulation contemplated in paragraph 2 of the aforementioned draft article provides that a State shall take the necessary measures to ensure that committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime are offences under its criminal law. Among such forms of participation, it is noted with concern that the concept of "indirect perpetration" is not included within the forms of execution and participation of such crimes.

In this regard, doctrine has generally recognized that indirect perpetration is when an individual responsible for an act uses another person as an instrument who carries out the criminal conduct. This widespread interpretation has led to the contention that members of a criminal organization who independently order crimes can then be responsible as indirect perpetrators, even when those who carried out the acts in question are also punished as fully responsible perpetrators.

In this regard, "indirect perpetrators" can only be those members of a rigidly led organization who have the authority to give orders and use it to cause the commission of criminal acts. Hence there may be a chain of several indirect perpetrators at the various levels of command whose orders, given to an organization, must be unlawful.

Therefore, it is felt that indirect perpetration is relevant to the draft articles because it would define and punish participation in criminal acts by those individuals who do not physically execute a crime but who direct it through a power structure, in which they give orders and assume a planning role. Indeed, considerations regarding the control of individuals by organized power structures make it possible to address the criminal conduct of various structures ranging from criminal organizations and gangs to State structures.

Estonia

[Original: English]

Estonia is a State abiding by the rule of law. Relevant agencies investigate all the crimes against humanity they know about and punish those whose guilt is possible to prove in accordance with the standards of the rule of law. Referring to article 89 of the Estonian Penal Code (provided above), Estonia supports draft article 6, paragraph 1, which stipulates that each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law. We are also supportive of draft article 7, which provides inter alia that each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles.

Estonia would like to highlight that the wording of the consideration of immunities stipulated in draft article 6, paragraph 5 could be stronger. There is no reason to become detached from the provisions of article 27, paragraph 1 of the Rome Statute of the International Criminal Court.

France

[Original: French]

With regard to draft article 6, paragraph 7, on the choice of penalties, it is indeed desirable to preserve a degree of discretion for States with regard to sovereign power. Nonetheless, France, recalling its efforts, together with its partners in the European Union, among others, to oppose the death penalty and all physical punishment tantamount to inhuman and degrading treatment, however serious the punishable acts, recommends that such penalties – starting with the death penalty – be explicitly excluded.

France welcomes the inclusion of the provision, in paragraph 8 of draft article 6, on liability of legal persons. Although not envisaged in the Rome Statute of the International Criminal Court, the question of the liability of legal persons for crimes against humanity is an important one. French criminal law contains specific provisions on the liability of legal persons for crimes against humanity.[69]

A question may nevertheless be raised as to whether to include this issue in a provision on criminalization under national law. Indeed, as envisaged in the draft article submitted, some procedural flexibility should be available to States to determine the scope of this stipulation and avoid frivolous legal proceedings. Accordingly, it might be desirable to include a specific provision on the liability of legal persons for crimes against humanity. Further details could also be provided, as in article 5 of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, which could be transposed to this draft:

> 1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.
>
> 2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
>
> 3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Greece

[Original: English]

Regarding paragraph 1 of this Draft Article, it is suggested to add after the words “crimes against humanity” the phrase “as defined in the present draft articles”.

[69] Article 213-3 of the Penal Code: “Legal persons declared criminally liable, in accordance with article 121-2, of crimes against humanity are liable, in addition to the fines prescribed in article 131-38, to: 1. The penalties referred to in article 131-39; 2. Confiscation of all or part of the property which they own or, subject to the rights of an owner in good faith, property which they may freely dispose of” (available from www.legifrance.gouv.fr).

Israel

[Original: English]

- **Responsibility of Commanders and other Superiors (Draft Art. 6, para. 3)** – Draft article 6, paragraph 3, deviates from the recognized customary international legal standard for the required *mens rea* for establishing command responsibility, which is the one set forth in the statutes of the *ad hoc* international criminal tribunals set up following the atrocities committed in the former Yugoslavia and in Rwanda (International Tribunal for the Former Yugoslavia and International Tribunal for Rwanda).[70]

- **Criminal Responsibility of Legal Persons (Draft Art. 6, para. 8)** – Draft Article 6, paragraph 8, which provides that each State shall take measures to establish criminal, civil or administrative liability of legal persons for the offences referred to in the current draft article, does not reflect existing customary international law. As acknowledged by the commentary to this draft article, most tribunals to date did not include a provision on criminal liability of legal persons.

- **Immunity (Draft Art. 6, para. 5)** – Draft Article 6, paragraph 5, regulates the issue of immunities, and is of a general nature. In our view, it is important to add to the existing clarification in the commentary to this Draft Article that "paragraph 5 has no effect on any procedural immunity that a *current or former* foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law".[71] This would help ensure that this draft article will be interpreted in accordance with established principles of international law.

  [See also comments on draft article 3]

Liechtenstein

[Original: English]

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

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[70] Draft Article 6, paragraph 3, in its current form, replicates Article 28 of the Rome Statute of the International Criminal Court. However, there is wide recognition that the Article 28 definition does not reflect customary international law. This was stated clearly by the International Criminal Court's Office of the Prosecutor in its October 2017 *amicus curiae* submission to the Constitutional Court of Colombia, and in its March 2018 oral presentations in the appeals proceedings in *Prosecutor* v. *Bemba Gombo, Case No. ICC-01/05-01/08-T-373-ENG, Hearing of 10 January 2018*, Appeals Chamber, International Criminal Court, pp. 17 and 39). The disparity between the customary rule on command responsibility and Article 28 of the Rome Statute has also been discussed by the following authorities: A. Cassese *et al., Cassese's International Criminal Law*, 3rd ed., Oxford University Press, 2013, p. 190; O. Triftterer and R. Arnold, *Article 28*, in O. Triffterer and K. Ambos (eds.), *The Rome Statue of the International Criminal Court: a Commentary*, 3rd ed., C. H. Beck, Hart and Nomos, 2016, pp. 1056, and 1090–1091; G. Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, pp. 31 and 195; Cryer, *et al., An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, 2010, pp. 393–394. Moreover, States, including those party to the Rome Statute of the International Criminal Court, which have adopted command and superior responsibility provisions to their domestic laws, have adopted various models, and the Article 28 language can hardly be said to have gained any widespread adoption.

[71] See paragraph (31) of the commentary to draft article 6.

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

2.bis This ~~Statute~~ *Convention* shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this ~~Statute~~ *Convention*, nor shall it, in and of itself, constitute a ground for reduction of sentence. **[Art. 27, para. 1, of the Rome Statute of the International Criminal Court]**

2.ter Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar *national courts of a State party* from exercising *their* jurisdiction over such a person. **[Art. 27, para. 2, of the Rome Statute of the International Criminal Court]**

Argument: To ensure that States waive, limit or exclude the inviolability or immunity from jurisdiction accorded to their own head of state, heads of government or ministers of foreign affairs before foreign jurisdictions.

[3. – 4.]

5. ~~Each State shall take the necessary measures to ensure that, under its criminal law, t~~ *The offences referred to in this draft article* shall not be subject to any statute of limitations. **[Art. 29 of the Rome Statute of the International Criminal Court]** Each State shall also take the necessary measures to restrict the applicability of statutory limitations in civil proceedings.[72]

Argument: Provision should be more "self-executing"; reflect current developments in case law showing that in certain circumstances it is unreasonable for a State to invoke statutory limitations in civil litigation; useful guidance in anticipation of an increase in civil litigation concerning acts that may amount to international crimes[73].

Morocco

[Original: Arabic]

The preamble to the Constitution of the Kingdom of Morocco, which is an integral part of the Constitution, states that Morocco shall be committed to protecting, promoting and fostering the development of international human rights law and international humanitarian law, bearing in mind the universal and indivisible character of human rights.

Article 23 of the Constitution criminalizes genocide and other crimes against humanity, war crimes and all gross and systematic human rights violations.

With a view to ensuring that national legislation is consistent with the Constitution, the Ministry of Justice has formulated law 10.16 of the draft criminal code. Chapter 7 *bis,* entitled "Crime of genocide, crimes against humanity and war crimes", defines the crime of genocide as follows:

[72] Alternative proposal by Hugo Relva, Amnesty International: "Statutory limitations shall not apply to criminal or civil proceedings in which victims of crimes against humanity seek full reparation".

[73] https://cms.webbeat.net/ContentSuite/upload/cav/doc/The_ILC_Draft_Articles_on_Crimes_Against_Humanity_ENG(1).pdf.

Anyone who wilfully kills the members of a national, ethnic, religious or racial group, as such, with the intent to destroy them in whole or in part, shall be guilty of the crime of genocide and shall be punished with execution".

The following acts also constitute genocide and shall be punished with life imprisonment if they are committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group, as such:

- Causing serious bodily or mental harm to members of the group;
- Wilfully inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

Article 448.6 sets forth the following definition of crimes against humanity:

Anyone who, as part of a widespread or systematic attack, wilfully carries out killings directed at a civilian population, with knowledge of the attack, shall be guilty of the crime of genocide and shall be punished with execution. The following acts also constitute crimes against humanity and shall be punished with life in prison, if they are committed as part of a widespread or systematic attack directed at a civilian population with knowledge of the attack:

1. Extermination, with the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

2. Enslavement, meaning the exercise of any or all of the powers attaching to the right of ownership over a person and including the exercise of such power in the course of trafficking in persons, in particular women and children;

3. Deportation or forcible transfer or expulsion of population, without grounds permitted under the law, from the area in which they are lawfully present;

4. Persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender grounds, meaning the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

5. Enforced disappearance of persons, meaning the arrest, detention or abduction of persons, with the intention of refusing to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the purpose of removing them from the protection of the law for a prolonged period of time.

The following acts also constitute crimes against humanity and shall be punished with life in prison, if they are committed as part of a widespread and systematic attack directed at a civilian population with knowledge of the attack:

- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- Torture, meaning the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the perpetrator;
- Rape, indecent assault, sexual slavery, enforced prostitution, forced pregnancy or childbirth, enforced sterilization, or any other form of sexual violence of comparable gravity;

- Discrimination committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

Part VI of the draft law sets out a definition of war crimes. Anyone who wilfully kills persons protected under international humanitarian law during armed conflict, shall be guilty of a war crime and shall be punished with execution.

The following acts constitute war crimes and shall be punished with life imprisonment:

- Torture or inhuman treatment, including biological experiments;
- Wilfully causing great suffering, or serious injury to body or health;
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- Unlawful deportation or transfer or unlawful confinement;
- Taking of hostages;
- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- The passing of sentences and the carrying out of executions without previous judgement pronounced by a court constituted in accordance with the law, affording all recognized judicial guarantees;
- Unjustifiable delay in the repatriation of prisoners of war or civilians.

Peru

[Original: Spanish]

Peru welcomes the fact that paragraph 4 of draft article 6, on criminalization under national law, specifies that it is inappropriate or irrelevant to take the exercise of official duties as a ground for excluding criminal responsibility for crimes against humanity. This accords with the provisions of article IV of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and article 27 of the Rome Statute of the International Criminal Court.

Portugal

[Original: English]

Regarding the liability of legal persons, we must recall that there aren't many States that recognize such liability. Portugal informs that it already foresees in its criminal legislation the liability of legal persons in certain cases. In our view, the wording proposed for paragraph 8 of draft article 6 offers flexibility and gives

discretion on the matter to States. However, we feel there might be merit in a further study of this question.

In this regard, having adopted a provision on States taking measures to establish the liability of legal persons, the Commission should also consider this issue regarding the establishment of national jurisdiction. From the reading of the wording of draft article 7, as well as of its commentary, it seems this provision only takes into consideration cases where the offender is an individual.

Sierra Leone

[Original: English]

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 International Law Commission 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

Incitement as a form of accessorial 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 practice[74] and in the practice of international criminal courts that have prosecuted crimes against humanity. It is even present in the work of the International Law Commission itself, which in the 1954 Draft Code, recognised "direct incitement".[75] Interestingly, the International Law Commission 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 of the International Criminal Court. 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.

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 International Law Commission draft into harmony with the Rome Statute of the International Criminal Court and state practice, the International Law Commission might consider adding a

[74] See, in this regard, the similar concern expressed in the statement of Iceland, *Official Records of the General Assembly, Sixth Committee, Seventy-first Session, 24th meeting* (A/C.6/71/SR.24).

[75] Article 2, paragraph 3 (*f*), 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" (*Yearbook of the International Law Commission, 1996*, vol. II (Part Two), pp. 18–22).

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.

Official position

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 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: "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 International Law Commission'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".

Sierra Leone also notes the decision of the Special Court for Sierra Leone Appeals Chamber in the case involving former Liberian President Charles Taylor. It may be relevant in regard to the question of immunities (see *Prosecutor* v. *Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on immunity from jurisidiction of 31 May 2004*, Appeals Chamber, Special Court for Sierra Leone, paras. 44–57, holding that, on the basis of among other things, Principle 7 of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal which is part of customary international law that the official position of Taylor as an incumbent Head of State at the time when the Special Court for Sierra Leone's criminal proceedings were initiated against him was not a bar to his prosecution).

Second, it seems that at the time of the preparation of the third report of the Special Rapporteur, the International Law Commission was separately studying the question of immunity *ratione materiae* of State officials from foreign criminal jurisdiction. From this perspective, as a procedural matter, the Commission 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 International Law Commission 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.[76]

[76] Sierra Leone acknowledges that Draft Article 7 was controversial within the International Law Commission 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 Commission – in accordance with its statute and practice – may on the basis of the

Sierra Leone understands that, instead of the formulation in paragraph 5 of Draft Article 6, some members of the Commission proposed the inclusion of the equivalent of Article 27 of the Rome Statute of the International Criminal Court in the draft articles on crimes against humanity to enhance the complementarity between the draft articles and the 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 International Law Commission 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.

Sierra Leone considers that the proposal to reproduce Article 27 of the Rome Statute of the International Criminal Court in full could make a future convention more consistent with the obligations of the 123 states parties to the International Criminal Court. 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 Convention on the Prevention and Punishment of the Crime of Genocide, 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 of the International Criminal Court, we consider it should not provide less than the minimum required by the Convention on the Prevention and Punishment of the Crime of Genocide.

Suggestions: Sierra Leone suggests that Article 27 of the Rome Statute of the International Criminal Court could be incorporated into the proposal for a crimes against humanity convention. Alternatively, given their rough parity and grave nature, the International Law Commission might consider adopting with the appropriate modifications the text contained in Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide 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 Convention on the Prevention and Punishment of the Crime of Genocide position on the matter.

Appropriate penalties

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

"progressive development" prong of Article 15 of its statute advance recommendations to states. It has even done so in the present project.

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.

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.

One omission that the International Law Commission 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 regime of the Rome Statute of the International Criminal Court, 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 United Nations are said to have either abolished the death penalty or no longer practice it. (See, in this regard, A/69/288 at paragraphs 7–16 discussing the trends and relevant General Assembly resolutions).

Liability of legal persons significant to deter crimes against humanity

With regard to paragraph 8 of Draft Article 6, Sierra Leone welcomes this important provision. We laud the International Law Commission 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 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 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.

[See also comments under general comments and draft article 13]

Singapore

[Original: English]

Draft article 6, paragraph 5 provides that States should ensure that the fact that the offence is "committed by a person holding an official position is not a ground for excluding criminal responsibility".

Paragraph (31) of the commentary on this draft article states that draft article 6, paragraph 5 is without prejudice to the "procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law". For clarity, Singapore

proposes that this statement should be incorporated into the text of the draft article itself. This would make clear that the obligation under draft article 6, paragraph 5 only addresses substantive criminal responsibility under national law, and does not preclude raising immunity of State officials as a procedural bar to the exercise of foreign criminal jurisdiction over State officials.

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft article 11]

Switzerland

[Original: French]

Switzerland welcomes the fact that, in draft article 6, States are called upon to ensure that the different forms of participation in crimes against humanity, including an attempt to commit such a crime and various forms of incitement or assistance, are established as offences under their national law. With regard to paragraph 3 of the draft article, Switzerland appreciates the fact that it reproduces the provision of the Rome Statute of the International Criminal Court concerning the responsibility of commanders and other superiors. It encourages the Commission to indicate that States may go beyond that provision. For example, under national law, the conditions for the responsibility of the commander may be extended to other superiors, as provided under the Swiss Military Criminal Code (art. 114a) and the Swiss Criminal Code (art. 264k).

Switzerland considers it important to emphasize in the draft article that superior orders (para. 4) and official position (para. 5) do not constitute substantive defences for the purpose of excluding all criminal responsibility. Switzerland welcomes the commentary produced by the Commission in that regard.

Switzerland supports the express reference in draft article 6 to the fact that crimes against humanity should not be subject to any statute of limitations (para. 6).

With regard to draft article 6, paragraph 7, in which States are asked to provide for “appropriate penalties”, Switzerland regrets that the death penalty and penalties that amount to inhuman or degrading treatment are not expressly excluded. It suggests that the Commission consider including the prohibition of this type of penalty in the draft articles.

The fact that draft article 6, paragraph 8, provides a basis for establishing the criminal liability of legal persons can also be welcomed as a positive development, and it is prudent to make the provision subject to the provisions of national law in that area.

Swiss law, for example, provides for the criminal liability of corporations only if the crime is committed within the corporation and in the performance of commercial activities in accordance with its purposes (art. 102, para. 1, of the Swiss Criminal Code [CP; RS 311.0]); thus it is difficult to imagine that that provision could apply to crimes against humanity.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

While the United Kingdom has no concerns with draft Article 6, paragraph 6, regarding the prohibition on statutes of limitation for crimes against humanity, it may

be helpful for the draft Articles to state that this does not mean that States are obliged to prosecute crimes against humanity that took place before such crimes were criminalised in their law.

The United Kingdom is aware that the Special Rapporteur would appreciate comments on draft Article 6, paragraph 8, in particular. In the view of the United Kingdom, it is unclear what draft Article 6, paragraph 8, adds to the legal position. Those States that have liability for legal persons as a matter of course will likely allow such liability for crimes against humanity. Those States that do not have such liability are unlikely to change their position because of draft Article 6, paragraph 8. Thus, draft Article 6, paragraph 8, risks creating controversy without having any substantive legal effects.

Uruguay

[Original: Spanish]

In order to make certain that national justice systems are as effective as possible, Uruguay recommends that draft article 6, paragraph 3, be amended to ensure that the principles of civilian superior responsibility are stringent, as required by international customary law and international treaty law (e.g., Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), under which the same rules apply to civilian superiors as to military commanders.)

Furthermore, a superior, whether military or civilian, whatever his or her official or government position, must be criminally responsible for crimes established under the future convention that have been committed by persons under his or her effective authority, command or control, when, by reason of his or her office, position or function, he or she knew that those persons were participating in whatever way in the commission of such crimes and, provided that it was possible for him or her to do so, did not take all reasonable and necessary measures in his or her power to prevent, report or repress the commission of those crimes.

Lastly, it should be established that neither an order from a superior nor the existence of exceptional circumstances may be invoked to justify such crimes.

Notwithstanding draft article 6, paragraph 5, Uruguay recommends that the future convention include a provision similar to article 27, paragraph 2, of the Rome Statute of the International Criminal Court, specifically indicating that States may suspend, limit or revoke, by agreement and to the extent that they deem appropriate, the inviolability or immunity from foreign jurisdiction granted to their Heads of State, Heads of Government or ministers for foreign affairs.

8. Draft article 7 – Establishment of national jurisdiction

Argentina

[Original: Spanish]

Article 7 could restrict the broad concept of universal jurisdiction, which “establishes the right or the obligation of a national court to examine and, if appropriate, judge the crimes ... by implementing national and/or international criminal law, regardless of where those crimes were committed, the nationality of the alleged perpetrator and the victims, or any other connection to the State exercising the jurisdiction” (Principle 1, Madrid-Buenos Aires Principles of Universal Jurisdiction).

Australia

[Original: English]

Australia notes that, in addition to the obligation to establish jurisdiction based on territory or active nationality, draft article 7 appropriately preserves for States' discretion the ability to establish jurisdiction on the basis of passive personality.

Belgium

[Original: French]

[See comment on draft article 10]

Brazil

[Original: English]

Draft article 7, which deals with issues of jurisdiction, is similar to the provisions of other international instruments, such as the Convention against torture and other cruel, inhuman or degrading treatment or punishment. In its judgment on the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the International Court of Justice affirmed the understanding that the provisions of the Convention against torture and other cruel, inhuman or degrading treatment or punishment on the matter established universal jurisdiction as one of the basis for prosecuting suspects of torture. Paragraph 2 of draft article 7, by using almost the same language as the Convention, also seeks to establish universal jurisdiction over crimes against humanity.

While there is no doubt on the need to ensure that crimes against humanity do not go unpunished, the means to attain this goal might deserve further debate, taking into account the developments of international law and institutions. The International Law Commission work on crimes against humanity seeks to fulfill a gap on the international system, which already relies on global conventions to prevent and punish genocide and war crimes. Differently from the Convention on the Prevention and Punishment of the Crime of Genocide or the Geneva Conventions and related protocols, which entered into force before the existence of the International Criminal Court, the draft articles on crimes against humanity are subsequent to the establishment of the system of the Rome Statute of the International Criminal Court. As a consequence, its provisions must strengthen that system, including by prioritizing the International Criminal Court when the custody state has no nexus with the crime, the suspects or the victims.

Article 17 of the Statute does not establish which forms of jurisdiction are acceptable grounds to trigger the complementarity principle and thus render a case inadmissible before the International Criminal Court. In this regard, there have been doubts on whether states exercising universal jurisdiction would have primacy over the International Criminal Court. Given that the draft articles aim at complementing and strengthening the Statute system, the text should provide that, where there might be a conflict between the exercise of universal jurisdiction and the International Criminal Court jurisdiction, the latter should prevail. Furthermore, the draft articles would benefit from the addition of safeguards to prevent the abuse of the universality principle, such as a provision giving jurisdictional priority to states with the closest links to the crimes.

Czech Republic

[Original: English]

Draft article 7 sets forth wide bases for establishing national jurisdiction with respect to the crimes against humanity. Therefore, it is possible that more States might have jurisdiction at the same time regarding the same offence. We suggest to include a provision according to which States shall strive to coordinate their action appropriately, should such situation occur. Similar provision can be found for instance in Article 7, paragraph 5, of the International Convention for the Suppression of the Financing of Terrorism.

On the other hand, we note with satisfaction that the provision on multiple requests for extradition was discussed and that it was left to the discretion of States. There are huge differences among States regarding the criteria for taking decision when more requests for extradition are pending at the same time; however, unlike the above suggested provision of Article 7, in case of conflicting requests for extradition the person would not be subject twice to criminal proceedings for the same offence.

El Salvador

[Original: Spanish]

In connection with draft article 7 concerning the establishment of national jurisdiction, reference must be made to paragraph 2 which provides that: "Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles."

In that regard, it is noted that the above wording does not specify the precise scope of the article, which, according to the commentary to the draft, is cases in which the State has an obligation to establish jurisdiction, even if the crime itself was not committed on its territory, or the alleged offender or victims are not nationals of that State; that is, the obligation to establish jurisdiction without territorial or personal connections.

That regulation however, although it may seem well founded because it addresses the nature of the crime and reaffirms the principle of universal jurisdiction, is ambiguous given the wording towards the end of the paragraph referring to the principle *aut dedere aut judicare*, which is already expressly included in draft article 11. Therefore, given the confusion arising from the wording of the paragraph above, a revision is recommended to clarify the principle specifically referred to, namely, the principle of universal jurisdiction.

Estonia

[Original: English]

[See comment on draft article 6]

Greece

[Original: English]

With regard to paragraph 2 of this Article, we would like to support comments made by States during the relevant discussions within the Sixth Committee that a degree of flexibility and procedural and/or prosecutorial discretion should be provided given the complexity of the crimes against humanity, the difficulties that national jurisdictions may encounter in properly adjudicating cases of such crimes

committed in other parts of the world, the conflicts of jurisdiction which may arise and the risks of forum shopping.

Morocco

[Original: Arabic]

The courts of Morocco have jurisdiction over any crime committed in Moroccan territory, regardless of the nationality of the perpetrator. If any of the constituent elements of a crime was committed in Morocco, the crime shall be considered as though it had been committed in Moroccan territory. The jurisdiction of Moroccan courts includes the principal act and all acts of participation or concealment, even if such acts were committed outside Morocco and by foreigners.

The courts of Morocco have jurisdiction over any crime or misdemeanour committed on the high seas on board a Moroccan-flagged vessel, regardless of the nationality of the perpetrators, and any crime committed in a Moroccan sea port on board a foreign trading vessel. Competence rests with the court that has jurisdiction over the vessel's first port of docking, or with the court that has jurisdiction over the place in which the perpetrator was arrested, if the arrest took place subsequently in Morocco.

Moroccan courts have jurisdiction to consider crimes committed on board Moroccan aircraft, regardless of the nationality of the perpetrator. They have jurisdiction over crimes committed on board foreign aircraft if the perpetrator or the victim is a Moroccan citizen, or if the aircraft landed in Morocco after the crime was committed.

Any crime can be prosecuted and a judgment rendered if it was committed by a Moroccan, even if it took place outside Morocco.

Any foreigner who commits a crime punishable under Moroccan law, whether as the principal perpetrator, accomplice or accessory, can be prosecuted and judged under Moroccan law if the victim of the crime was a Moroccan citizen.

The Code of Criminal Procedure enshrines the principle of universal jurisdiction with a view to preventing impunity. Anyone who, outside Morocco, has committed the crime of genocide, crimes against humanity, war crimes or any of the acts criminalized under the international instruments which Morocco has ratified or to which it has acceded, and that have been published in the *Official Gazette*, can be prosecuted and judged by Moroccan courts, if the person is present in Moroccan territory.

Any foreigner subject to an extradition warrant can be prosecuted and judged by Moroccan courts if he committed outside Morocco crimes or misdemeanours that are punishable under Moroccan law. His extradition to the requesting State may be declined for any of the reasons set forth in the same law.

Prosecution may take place on the basis of an official complaint from the requesting State, supported by the available evidence, or after that State has agreed that the extradition file can be deemed to constitute a formal complaint.

It should be noted that the recommended amendments set out above have met with widespread approval among legal scholars, politicians, parliamentarians, academics and all representatives of civil society.

Portugal

[Original: English]

[See comment on draft article 6]

Sierra Leone

[Original: English]

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.

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.

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.

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 International Law Commission's 1996 draft code of crimes against the peace and security of mankind. 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" (art. 8). In paragraph (5) of its commentary to Article 8, the Commission 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, "[t]he 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*" (para. (7) of the commentary to article 8; emphasis added). This approach has support in other international instruments, and in the national legislation of many states..

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 International Law Commission'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.

Regarding draft article 7, paragraphs 1 (*a*) and 2, 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 International Law Commission to clarify the matter.

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 International Law Commission could consider either defining the term, which was provided in Article 1 of the Convention relating to the Status of Stateless Persons.[77] The latter is now considered part of customary international law. The Commission 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), para. 3).

Suggestions: Sierra Leone suggests that the draft articles for a future crimes against humanity convention could, in line with the International Law Commission'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.

[See also comments under general comments and draft article 6]

Singapore

[Original: English]

Draft article 7, paragraph 2, requires States to establish jurisdiction whenever an alleged offender is present on the State's territory, regardless of whether any of the other jurisdictional links in paragraph 1 are satisfied by the State, when that State does not extradite or surrender the person in accordance with the articles. Our understanding is that draft article 7, paragraph 2, is intended to provide an additional treaty based jurisdiction in respect of an alleged offender on the basis of presence alone when none of the other connecting factors are present. Therefore, jurisdiction under that paragraph can only be exercised in respect of nationals of States parties. In other words, our understanding is that draft article 7, paragraph 2, only permits States to establish jurisdiction over crimes committed by a national of a State party and does not extend to establishing jurisdiction over nationals of States non-parties.

This should be expressly reflected in the text of this draft article.

As draft article 7 accommodates multiple bases for the establishment of jurisdiction, it is possible that multiple States may have national jurisdiction over the criminal offence in question and wish to exercise such jurisdiction. The draft articles do not explain how any such potential conflicts of jurisdiction can be solved. The Special Rapporteur has explained that such matters are often resolved through comity and cooperation among the States and that practically, the State in whose territory the

[77] 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 International Law Commission, "can no doubt be considered to have acquired a customary nature" (*Yearbook of the International Law Commission*, 2006, vol. II (Part Two), p. 36, paragraph (3) of the commentary to article 8 of the draft articles on diplomatic protection). This definition is also said to be the Convention's "most significant contribution to international law" (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, available from www.unhcr.org/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html).

alleged offender is present, is well positioned to proceed with the prosecution if it is willing and able to do so.[78]

Where such conflicts of jurisdiction exist, the draft articles should accord primacy to the State which can exercise jurisdiction on the basis of at least one of the limbs in Article 7, paragraph 1, rather than a custodial State that can only exercise jurisdiction on the basis of Article 7, paragraph 2, alone. This is because the former would be the State with a greater interest in prosecuting the offence in question.

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The commentary notes that in general, international instruments have sought to encourage States to establish a relatively wide range of **jurisdictional bases under national law** to address the most serious crimes of international concern. This is instrumental for eliminating the risk of impunity. In addition to territorial jurisdiction, the draft article obliges states to establish active personality jurisdiction. Furthermore, if the State considers it appropriate, it may also establish jurisdiction over stateless persons habitually residing in that State's territory, or in cases where the victim is a national of that State. We would like to note that the Nordic countries, under their respective criminal codes generally have active personality jurisdiction not only over stateless persons residing in our countries, but also over resident foreign nationals. We may also, under certain circumstances, exercise criminal jurisdiction over crimes committed abroad, directed at our nationals or at permanent residents.

International Law Commission's draft article 7, paragraph 1, together with draft article 10, sets out the obligation to extradite or prosecute (*aut dedere aut judicare*). We wish to note that, in order to effectively support the *aut dedere aut judicare* obligation, national courts need to be granted jurisdiction to try the alleged offender if he or she is not extradited or surrendered. Depending on the circumstances, this may require resorting to a jurisdictional base other than just territorial or active personality jurisdiction. We note that draft article 7 does not exclude the exercise of a broader jurisdictional base, if such a basis is provided for under relevant national law. Indeed, under international law, crimes against humanity are widely seen as crimes subject to universal jurisdiction. Therefore, the Nordic countries would encourage adding a specific reference to **universal jurisdiction** at the end of draft article 7, paragraph 3.

In United Nations instruments (i.e. United Nations Convention against Corruption, art. 44, para. 11), the obligation to extradite or prosecute is often limited to instances where a State refuses extradition because extradition of nationals is prohibited. However, the wording of draft article 10 is general and not limited to the non-extradition of nationals. Consequently, it involves a widening of the principle. The Nordic countries are not opposed to consider such an expansion of the principle per se. However, we think it would be useful to assess whether it is always necessary for such cases to be submitted to the competent authorities for the purpose of prosecution, even without the requesting state calling for such submission. In Norway for instance, a refused extradition request is to be forwarded to the competent authorities for prosecution if the state seeking extradition requests Norway to take on the proceedings. An equivalent to this practice follows from article 44, paragraph 11, of the United Nations Convention against Corruption.

[78] See A/CN.4/690, para. 115.

Switzerland

[Original: French]

The definition of national jurisdiction under draft article 7, paragraph 1, is to be welcomed. A broad definition of such jurisdiction, including not only territorial jurisdiction but also the possibility of establishing active and passive personality jurisdiction, means that, as far as possible, gaps in the prosecution of crimes against humanity can be avoided. The same approach is taken in paragraphs 2 and 3 of the draft article, as they also provide for jurisdiction based on the presence of the alleged offender in the territory, without prejudice to potentially broader jurisdiction provided for under national law.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes that draft Article 7, paragraph 1 (*a*), requires a State to establish its jurisdiction over ships registered in that State. The Commentary to draft Article 7 explains this approach as follows: "Further, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State".[79]

In the view of the United Kingdom, the Commentary is not quite accurate in this respect. The jurisdictional link between a State and a ship is that of nationality, not territory. Further, that nationality link is not conferred only by registration. As confirmed by article 91, paragraph 1, of the United Nations Convention on the Law of the Sea, "[s]hips have the nationality of the State whose flag they are entitled to fly". It is entitlement to fly the flag of a State, rather than where a ship is registered, that is critical for the grant of nationality to a ship, although the United Kingdom recognises that registration is a major means by which nationality is granted. The United Kingdom respectfully requests that the draft Articles reflect this position.

The United Kingdom broadly supports the approach taken in draft Article 7, paragraph 2, (and in draft Article 10) to require States to exercise jurisdiction over crimes against humanity when the alleged offender is present in the absence of extradition. However, signing up to such an obligation would require the United Kingdom to amend its domestic law on crimes against humanity, as presence in the United Kingdom alone is not currently sufficient for the exercise of jurisdiction.[80] Consequently, before becoming a party to a convention containing this extension of jurisdiction, the United Kingdom would need to assess in full the impact on its justice system.

[See also comment under draft article 4]

9. Draft article 8 – Investigation

Australia

[Original: English]

[See comment under general comments]

[79] Paragraph (6).

[80] See section 51 of the International Criminal Court Act 2001.

Chile

[Original: English]

Now, regarding draft article 8, the obligation to proceed to a prompt and impartial investigation should also be triggered whenever an allegation that crimes against humanity have been or are being committed is brought before the competent authorities of that state.

Sierra Leone

[Original: English]

Comments: Sierra Leone agrees with the International Law Commission 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.

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.

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 International Law Commission commentary to clarify whether quasi-judicial investigations might be sufficient to meet the obligations envisaged by Draft Article 8.[81] 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.

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 it 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.

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

[81] See, for an expression of similar concerns, S. M. H. 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", *Journal of International Criminal Justice*, vol. 16, No. 4 (1 September 2018), pp. 877–908.

jurisdiction". As to the threshold of a "reasonable ground to believe", this language was sourced from Article 12 of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment. It is said to 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 International Criminal Court 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.

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").

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", [82] in addition to being prompt and impartial", has been endorsed by states as well as by international bodies.

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 of the International Criminal Court could be useful in this regard. Moreover, as the Human Rights Committee has observed in relation to the International Covenant on Civil and Political Rights, "[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 Human Rights

[82] See, for instance, General Assembly resolutions 2583 (XXIV) of 15 December 1969, preamble and para. 1; 2712 (XXV) of 15 December 1970, preamble and para. 5; and 2840 (XXVI) of 18 December 1971, preamble, as well as decisions of human rights treaty bodies such as the Human Rights Committee, *Al Khazmi* v. *Libya*, Communication No. 1832/2008, Views adopted on 18 July 2013, para. 7.6.

Committee, General comment No. 31 [80], the nature of the general legal obligation of States parties to the Covenant, paras. 15 and 18).

[See also comments under general comments and draft article 10]

Singapore

[Original: English]

Singapore agrees with the requirement in draft article 8 that States should "ensure that its competent authorities proceed to a prompt and impartial investigation" of possible crimes against humanity that have been conducted or are being conducted in any territory under its jurisdiction. However, we consider that the commentary on this draft article should clearly state that the reference to "impartiality" does not require any special impartiality measures above and beyond the general standards of investigations for criminal proceedings that are applicable under domestic law.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment under draft article 4]

10. Draft article 9 – Preliminary measures when an alleged offender is present

Australia

[Original: English]

[See comment under general comments]

Belgium

[Original: French]

Draft article 9 requires the State to take into custody any person in its territory who is alleged to have committed crimes against humanity, or to "take other legal measures to ensure his or her presence". That draft article should clearly be interpreted like all similar provisions contained in conventions of international criminal law, such as 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment.

It should also be clear that this provision cannot impede the application of the rules of international law with regard to immunity. As the Commission rightly states in paragraph (31) of its commentary to article 6, paragraph 5, it would be useful for the Commission to specify, in its commentary to draft article 9, that the draft article is without prejudice to the Commission's ongoing work regarding the topic of immunity of State officials from foreign criminal jurisdiction.

Cuba

[Original: Spanish]

Regarding paragraph 2 of draft article 9 [8] (Preliminary measures when an alleged offender is present), the Republic of Cuba suggests adding the phrase "in accordance with the law of that State" at the end of the sentence, to take into consideration the fact that such measures may be applied in accordance with the specific features of the law of each country.

France

[Original: French]

In order to ensure consistency and accuracy, the term “State” could be replaced, in the three paragraphs of draft article 9, by the words “competent authorities”, as used in draft article 8.

In addition, France would like to draw the attention of the Special Rapporteur and the Commission to the fact that that the term “preliminary inquiry” contained in draft article 9, paragraph 2, refers in French law to a specific phase of the proceedings, the scope of which is more limited than that covered by the draft articles (preliminary inquiry, but also expedited investigation procedures or investigation phase). This could also be the case in other national legal systems. Accordingly, it would be appropriate to adopt a more neutral term, such as “investigations” or “inquiry”.

Lastly, paragraph 3 of draft article 9 might give rise to some difficulties regarding the confidentiality of the proceedings under the domestic law of States, in terms of both respect for the presumption of innocence and procedural efficiency.[83] The transmission of information would be likely to influence the outcome of the investigation or inquiry in progress. In France, only the Prosecutor of the Republic is empowered to release details about investigations and to determine which elements may be communicated.

On that basis, an alternative wording of draft article 9 could read as follows:

“1. Upon being satisfied, after an examination of the information available to them, that the circumstances so warrant, ~~any State~~ **the competent authorities** of any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

“2. ~~Such State~~ **The competent authorities** of that State shall immediately undertake **investigations/an inquiry** ~~a preliminary inquiry~~ into the facts.

“3. ~~When a State~~ When the competent authorities of a State, pursuant to this draft article, have taken a person into custody, they shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. **If it considers that such information is not of such a nature as to endanger the ongoing investigations,** the State ~~which makes the preliminary inquiry~~ whose competent authorities institute the **investigations/inquiry** referred to in paragraph 2 of this draft article shall promptly report the findings to the said States and shall indicate whether it intends to exercise its jurisdiction”.

[83] Article 11 of the French Code of Criminal Procedure provides that:
“Except where otherwise provided by law and without prejudice to the rights of the defence, the procedure during the inquiry and the investigation shall be secret.
“An individual who cooperates in this procedure is required to maintain professional secrecy in the conditions and under the terms of articles 226-3 and 226-14 of the Penal Code.
“However, to avoid the dissemination of inaccurate or incomplete information or to end a disturbance of public order, the Prosecutor of the Republic may, automatically and at the request of the investigating court or the parties, release objective details of the procedure that do not reflect any evaluation of the merits of the charges against the defendants involved” (available from www.legifrance.gouv.fr).

Germany

[Original: English]

In para. 1 last sentence Germany proposes to substitute "to enable any ... proceedings to be instituted" by "…to be conducted" as the measures in question must be kept up for as long as necessary in order to secure the full duration of the proceedings.

The obligation under para. 3 to "immediately notify" the States referred to in Art. 7 para. 1 appears new under international public law. It poses important questions with regard to the strategy of inquiry and foreign policy considerations. Germany therefore proposes to redraft the provision on the following lines: "When a State, pursuant to this draft article, has taken a person into custody, it shall endeavor to consult, as appropriate, with the States referred to in draft article 7, paragraph 1, in order to indicate whether it intends to exercise jurisdiction and whether to exchange its findings."

Sierra Leone

[Original: English]

Comments: Sierra Leone noted that this provision is based on Article 6 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. 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.

Suggestions: Sierra Leone considers that the International Court of Justice's authoritative interpretation of the equivalent provision of the Convention against torture and other cruel, inhuman or degrading treatment or punishment applies *mutatis mutandis* to Draft Article 9. (See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*). 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".

On the latter, the International Law Commission 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.

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".

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.

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.

On paragraph 5 of the commentary, the reference made to the Convention against torture and other cruel, inhuman or degrading treatment or punishment and the International Court of Justice 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.

[See also comments under general comments, draft article 10 and draft article 11]

Singapore

[Original: English]

Draft article 9 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present to ensure his or her presence. Draft article 9, paragraph 2, provides that States shall "immediately make a preliminary inquiry into the facts". States may face practical difficulties in investigating crimes where jurisdiction is exercised on the basis of the alleged offender's presence in any territory under the State's jurisdiction only and where other jurisdictional links provided in draft article 7, paragraph 1, are absent. The commentary on the draft article should make clear that the extent of the inquiry required would be dependent, among other things, on the jurisdictional basis for the State's exercise of criminal jurisdiction.

11. Draft article 10 – *Aut dedere aut judicare*

Argentina

[Original: Spanish]

[See comment on draft article 13]

Australia

[Original: English]

Draft article 10 contains an express *aut dedere aut judicare* obligation which requires the State in the territory or under the jurisdiction of which the alleged

offender is present to submit the case to its competent authorities for prosecution, unless it extradites the person or surrenders him or her to a competent international criminal tribunal. The State's competent authorities are obliged to take their decision on whether to proceed with the prosecution in the same manner as in any other case concerning a grave offence under national law.

Australia respectfully submits it would be useful to clarify that where the State in question is a common law jurisdiction, "submission to competent authorities for prosecution" would entail provision of relevant information to police for their evaluation and then, if sufficient information is available, investigation, in accordance with relevant procedures and policies. If a police investigation reveals sufficient evidence of criminal conduct, a brief of evidence would be prepared for a prosecutorial authority. A decision on whether to commence a prosecution would be made independently in accordance with relevant policies.

Belgium

[Original: French]

The Commission's commentary to draft article 10 specifies that, as is the case for numerous multilateral treaties of international criminal law, the obligation to prosecute crimes against humanity is governed by the "Hague Formula", after the 1970 (Hague) Convention for the suppression of unlawful seizure of aircraft. That rule means that, unless the crime to which that type of treaty refers was committed on the territory of a State party or by a citizen of that State, the alleged offender should be prosecuted by the authorities of the State party in which he or she is present only if a third State has requested extradition and the State in question has declined to extradite.

In other words, the obligation to prosecute an individual who allegedly committed the crime outside the State in which he or she is present, and who is foreign to that State, would be subject to a prior extradition request for that individual. However, draft article 7, paragraph 2, correctly provides that the State must prosecute the alleged perpetrator of a crime against humanity "in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles". In that case, prosecution therefore does not depend on a prior extradition request: it is automatically incumbent on the State in which the arrest took place, as is incidentally also the case under article 9 of the draft code of crimes against the peace and security of mankind.[84] The rule is therefore (1) *judicare*; (2) failing that, *dedere*. The maxim *aut dedere aut judicare* should therefore be replaced with *judicare aut dedere* or *judicare vel dedere*. Those phrases would more precisely reflect the obligation to prosecute crimes against humanity (as is the case for war crimes,[85] the crime of torture[86] and enforced disappearances[87]).

[84] *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), p. 32, para. (7) of the commentary to article 9.

[85] 1949 Geneva Conventions, common articles 49, 50, 129 and 146.

[86] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, *Judgment, I.C.J. Reports* 2012, p. 422, at p. 451, para. 75, also quoted in the report of the International Law Commission on the work of its sixty-ninth session (A/72/10), 2017, pp. 84–85, para. (4).

[87] 2006 International Convention for the Protection of All Persons from Enforced Disappearance, article 9, paragraph 2.

Chile

[Original: English]

Draft article 10 establishes the duty of *aut dedere aut judicare*. When explaining the content of the obligation, the drafting follows the formulation employed by the Convention for the suppression of unlawful seizure of aircraft. The latter is more precise than other international instruments establishing a similar duty, and therefore, this draft article is quite satisfactory.

However, it would be highly convenient to add a second paragraph regarding the principle of *ne bis in idem*. In this sense, the new paragraph should assert that the obligation established by this draft article shall not arise if the alleged offender has already been convicted or acquitted for the same offences. Notwithstanding this suggestion, the latter rule could also have an exception, which could follow the formulation employed by subparagraphs (a) and (b) of Article 20, paragraph 3, of the Rome Statute of the International Criminal Court.

The well-founded commentary to draft article 10 should also be modified in a certain aspect. Its paragraph (8) states that "[t]he obligation upon a State to submit the case to the competent authorities may conflict with the ability of the State to implement an amnesty", which could be understood as allowing these general exclusions of responsibility in relation to these offences.

However, a general amnesty conferred in respect of crimes against humanity is impermissible. This would allow that these offences were left completely unpunished, and only because the State in which the perpetrators were present unilaterally decided to exclude criminal responsibility for their commission. Accordingly, the first sentence of paragraph (8) under analysis should be rephrased as follows: "The obligation upon a State to submit the case to the competent authorities precludes the possibility of implementing an amnesty in relation to crimes against humanity." In order to be consistent with this proposal, paragraph (11) of the same commentary should also be modified. Its first part should be rephrased, and its second part should be deleted altogether. Regarding the changes to be made to the first part of paragraph (11), the word "unlawfully" should be inserted between the words "amnesty" and "adopted".

Czech Republic

[Original: English]

As regards draft article 10 on the obligation *aut dedere aut iudicare*, we note that the text of the provision is based on the so-called "Hague formula" pursuant to the 1970 (Hague) Convention for the suppression of unlawful seizure of aircraft. As stated by the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, cited in the commentary, the provisions of the "Hague formula" create elements of a single conventional mechanism aimed at preventing perpetrators from going unpunished, by ensuring that they cannot find refuge in any State Party, since States parties to any such convention have a "common interest" to ensure that relevant crimes are prevented and prosecuted. In addition, we welcome the inclusion of the word "surrender" in draft article 10 as reflecting the different terminology used in various international instruments. We concur with the statement that it is obvious that the surrender to the international criminal tribunal by a State Party is possible only where such State has recognized its jurisdiction. For the purpose of coherence we would suggest to include it in the text of the draft article as it is provided for in the International Convention for the Protection of All Persons from Enforced Disappearance.

Greece

[Original: English]

With regard to this Draft Article, we would like to reiterate our call to the Commission to align further its wording with the wording of the so-called "Hague formula", as the latter was incorporated in numerous conventions aiming at the repression of specific offences, including terrorism, and, in particular, in the Convention against torture and other cruel, inhuman or degrading treatment or punishment (Art. 7) and, more recently, in the International Convention for the Protection of All Persons from Enforced Disappearances (Art. 11). More specifically, we invite the Commission to rephrase this Draft Article so as to read: "The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender him or her to another State or competent international criminal tribunal, submit the case to its competent authorities for the purpose of prosecution." Given the fact that Draft Articles 8 [7] and 9 [8] are based on the relevant provisions of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, we see no reason why Draft Article 10 [9] which is closely connected with the abovementioned Draft Articles should be an exception in this regard. Moreover, we are of the view that with the above proposed wording the first sentence of Draft Article 10 [9] is better articulated with its second sentence, which, in this case, should begin with the phrase "These authorities".

Morocco

[Original: Arabic]

[See comment under general comments]

Panama

[Original: Spanish]

Panama views favourably the inclusion in draft article 10 of the principle of *aut dedere aut judicare* for crimes against humanity. Nevertheless, we would recommend including a time element in order to prevent abuses and ensure that the accused do not escape punishment for this type of crime. In that regard, it should be stipulated under this draft article that the decision to prosecute the accused before the competent authorities must be taken within a reasonable period of time. It is worth mentioning that the International Court of Justice referred to that issue in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, in which it stated that that obligation was implicit in article 1, paragraph 7, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.[88] Given the similarity of the obligation to prosecute or extradite set forth in that Convention, the element of time should be included in the draft articles for crimes against humanity.

Peru

[Original: Spanish]

[See comment on draft article 5]

[88] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 74, para. 166.

Sierra Leone

[Original: English]

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.

On a related note, Sierra Leone notes that the International Law Commission 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 Commission's 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.

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.

It seems also relevant that the practice of the United Nations, which began in the context of the Lomé Peace Agreement of 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 United Nations Secretary-General at ECOWAS and United Nations-sanctioned peace talks proved to be important concerning the Special Court for Sierra Leone 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 Statute of the Special Court for Sierra Leone 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 Special Court for Sierra Leone.[89]

Based on the experience of Sierra Leone, we appreciate and underscore that these are complex issues. There are no easy answers or one size fits all solutions.

[89] 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.

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 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, *Prosecutor* v. *Kallon and Kamara, Case No. SCSL-2004-14-AR72(E), Decision of 13 March 2004 on challenge to jurisdiction: Lomé Accord Amnesty*, Appeals Chamber, Special Court for Sierra Leone, at paras. 71 and 67, 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, *Prosecutor* v. *Kondewa*, *Case No. SCSL-2004-14-AR72(E), Decision of 25 May 2004 on lack of jurisdiction/abuse of process: amnesty provided by the Lomé Accord*, Appeals Chamber, Special Court for Sierra Leone, 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".)

Suggestions: Sierra Leone would have appreciated an International Law Commission 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 Commission's commentary. We note also that there is a wealth of academic literature on the issue.

[See also comments under general comments and draft article 9]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft article 7]

Switzerland

[Original: French]

The addition of an *aut dedere aut judicare* clause in draft article 10 is also welcome, and the fact that the clause also provides for surrender to a competent international criminal tribunal duly reflects the developments of recent years with regard to international criminal justice. However, Switzerland wonders whether the enforcement of the sentence should also be included in such a clause. For example, if a person who is sentenced in one State for a crime against humanity but who has not served his or her sentence is currently present in another State, the latter State should also extradite the person or enforce the sentence itself. This is made clear in the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, for example, but is not made clear in draft article 10. Where necessary, such a provision on the enforcement of the sentence should be subject to examination of the conditions in which the relevant judgment

was delivered (right to a fair trial), for example by making it subject to national law, as in the draft articles relating to extradition and mutual legal assistance.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment under draft article 7]

12. Draft article 11 – Fair treatment of the alleged offender

Austria

[Original: English]

Austria has doubts relating to the present drafting of paragraph 3 addressing the relationship between the rights of persons in prison, custody or detention and the laws and regulations of the state exercising its jurisdiction. Paragraph 2 defines the rights of these persons, such as the right to communicate without delay with the nearest representative of their state of nationality. Paragraph 3, on the other hand, states that such rights "shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended". We are aware that this wording is based on Article 36, paragraph 2, of the Vienna Convention on Consular Relations as well as on other important international instruments; nevertheless, practice has shown that this wording does not exclude an interpretation according to which national laws and regulations might prevail over the rights of the detainees. Therefore, paragraph 3 should either be deleted or replaced by a clear rule protecting the rights of the detainees against restrictions based on national law, such as, for instance, that the national laws and regulations "must enable the full exercise of the rights accorded under paragraph 2".

Brazil

[Original: English]

Draft article 11 could be strengthened in order to bring it closer to the fair trial guarantees provided in the Rome Statute of the International Criminal Court. Some of the guarantees provided in articles 55 and 63 of the International Criminal Court treaty are currently not present in the draft articles. Even though paragraph 1 of draft article 11 established the right to a fair treatment, the text would benefit from more precision, which could be attained by resorting to the language of the Statute on the matter.

Cuba

[Original: Spanish]

Concerning paragraph 2 of draft article 11 [10] (Fair treatment of the alleged offender), the Republic of Cuba suggests adding a subparagraph reflecting the right to a defence. The subparagraph could be worded as follows: "to receive legal assistance for his or her defence in any of the situations mentioned".

Estonia

[Original: English]

Estonia also highlights the importance of fair treatment of the alleged offender, including a fair trial, and full protection of his or her rights under applicable national

and international law, including human rights law. Therefore, Estonia welcomes draft article 11.

Israel

[Original: English]

Draft Article 11 veers from existing law by granting alleged offenders rights that are not stipulated in Article 36 of the 1963 Vienna Convention on Consular Relations. In particular, it entitles stateless persons who are in prison, custody or detention in a State, to communicate upon request with a representative of a State who is willing to protect that person's rights. Israel suggests replacing Draft Article 11 with language that accurately reflects customary international law, as stipulated in the abovementioned Article 36 of the Convention.

Liechtenstein

[Original: English]

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law**, including but not limited to the following:**

(a) In respect of an investigation under this ~~Statute~~ *Convention*, a person:

(i) Shall not be compelled to incriminate himself or herself or to confess guilty;

(ii) Shall not be subject to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(iii) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(iv) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such ground and in accordance with such procedures as are established in this ~~Statute~~ *Convention*.

(b) Where there are ground to believe that a person has committed an offence covered by the present draft articles and that person is to be questioned, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(i) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed an offense covered by the present draft articles;

(ii) To remain silent, without such silence being a consideration in the determination of guilt or innocence

(iii) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(iv) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel. [Art. 55 Rome Statute of the International Criminal Court]

(c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this ~~Statute~~ *Convention*, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(i) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(ii) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(iii) To be tried without undue delay;

(iv) To be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(v) To examine, or have examined, the witness against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this ~~Statute~~ *Convention*;

(vi) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the national courts of a state party are not in a language which the accused fully understands and speaks;

(vii) Not to be compelled to testify or confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(viii) To make an unsworn oral or written statement in his or her defence; and

(ix) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal. [Art. 67 (1) Rome Statute of the International Criminal Court]

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Peru

[Original: Spanish]

Draft article 11, concerning the fair treatment of the alleged offender, is also significant because it guarantees a fair trial and full protection of that individual's rights under applicable national and international law, including human rights law.

Sierra Leone

[Original: English]

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.

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

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 International Covenant on Civil and Political Rights. 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 of the International Criminal Court, which addresses the "[r]ights of persons during an investigation" and separately sets out the "[p]resumption of innocence" and the "[r]ights 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.

[90] 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, paragraphs 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.

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.

Suggestions: Sierra Leone believes that it would be useful for the International Law Commission 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 International Covenant on Civil and Political Rights, are fundamental and can be appropriately emphasized even if a measure of latitude seems sometimes permitted in relation to the former.

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".

Singapore

[Original: English]

Singapore agrees with the principle in draft article 11, paragraph 1, that any person against whom measures are taken in connection with an alleged offence shall be accorded "fair treatment" at all stages of the proceedings. Paragraphs (3) and (4) of the commentary on draft article 11, paragraph 1 appear to suggest that "fair treatment" should be understood as incorporating the standards set forth in article 14 of the 1966 International Covenant on Civil and Political Rights. The obligation to accord an accused person a "fair and public hearing" (as provided in Article 10 of the Universal Declaration of Human Rights) is part of customary international law. However, it does not appear settled that all the provisions of Article 14 of the International Covenant on Civil and Political Rights reflect the precise content of the relevant rule of customary international law. Paragraphs (3) and (4) of the commentary of draft article 11, paragraph 1, should be amended to reflect this.

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries attach great importance to **due process** considerations, which are particularly pertinent in the context of criminal law. We agree with the International Law Commission that the alleged offender shall at all stages of the proceedings be guaranteed fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law, as reflected in draft article 11. In relation to the obligation in draft article 6, paragraph 7, to ensure that crimes against humanity shall be punishable by

appropriate penalties that take into account their grave nature, the Nordic countries believe that the draft article should draw inspiration from Article 77 of the Rome Statute of the International Criminal Court, which does not include the death penalty as an applicable penalty for genocide, crimes against humanity and war crimes.

Switzerland

[Original: French]

Switzerland welcomes the fact that guarantees of fair treatment of the alleged offender, including the right to a fair trial, are mentioned in draft article 11, and that the rights of victims, complainants and witnesses are also taken into consideration in draft article 12.

Uruguay

[Original: Spanish]

With regard to draft article 11, Uruguay suggests that the wording of article 55 (Rights of persons during an investigation) and article 67 (Rights of the accused) of the Rome Statute of the International Criminal Court be taken as a reference in order to ensure that the future convention guarantees suspects and accused persons the right to a fair trial, with due process at all stages of the proceedings, in accordance with the most stringent rules of international and human rights law.

For example, paragraph 2 of draft article 11 should include the right to consular assistance – and legal counsel – for all foreigners or stateless persons deprived of liberty, regardless of their immigration status, in accordance with General Assembly resolution 65/212 of 21 December 2010.

13. Draft article 12 – Victims, witnesses and others

Argentina

[Original: Spanish]

Associations of victims and/or members of their families should be mentioned in article 12, and the title should be “Victims, witnesses, associations of victims and/or members of their families, and others”.

The article should also contain a definition of the term “victims” and mention their right to know the truth about the circumstances in which the crimes occurred. It is important to establish the truth, since widespread or systematic attacks directed against civilian populations often involve the spreading of misinformation promoting the perpetration of the crimes or justifying attacks on the victims. Furthermore, the magnitude of the crimes means that they are usually concealed from public opinion and contested. Safeguarding the right to truth is linked to the protection of other rights of victims, such as the right to judicial guarantees and the right of access to information, and also entails an obligation for States to clarify, investigate, prosecute and punish the persons responsible for the crimes.

Australia

[Original: English]

In addition to appropriate guarantees for the fair treatment and trial of an accused, draft article 12 makes specific provision for the rights of victims, witnesses and “others” such as relatives and representatives. States are to ensure their legal systems support victims’ rights to present their views and concerns at appropriate

stages of proceedings, and to obtain reparations for crimes against humanity, whether individually or collectively.

Australia respectfully submits it would be useful to clarify that where the State in question is a common law jurisdiction, longstanding criminal trial procedures such as the opportunity to deliver victim impact statements at the point of sentencing would fulfil the intention of the provision, and that there is no intention that draft article 12 would require a common law jurisdiction to import into its criminal trial procedures opportunities for non-witness "participation" in a manner more readily understood in the civil law tradition.

With respect to draft article 12, paragraph 3, Australia respectfully submits that it would be helpful for the commentary to clarify that a State would not be under an obligation to provide compensation for victims of crimes against humanity perpetrated by a foreign government outside of the said State's territory or jurisdiction.

Chile

[Original: English]

Draft article 12 concerns measures to be adopted in relation to victims, witnesses and other people. In order to duly safeguard the presumption of innocence, there should be minor changes in 2 provisions, applicable to those stages of the criminal proceedings in which the existence of the crime and the participation of the suspects have not yet been determined. In paragraph 1 (*b*), the word "victim" should be replaced by the expression "alleged victim", and in paragraph 2, the word "victims" should be replaced by "alleged victims".

Also in respect to draft article 12, in its paragraph 1 (*b*), after the word "witnesses" it would be desirable to include the words "judges, prosecutors", so that the examples therein listed also include state officials.

Estonia

[Original: English]

Estonia also welcomes the particular attention of the International Law Commission to the victims of crime against humanity and inclusion of a specific article dedicated to this issue. Draft article 12 addresses the rights of victims, witnesses and other persons affected by the commission of a crime against humanity. However, the draft article does not provide a definition of a victim of crime against humanity and this is left to national jurisdictions. In order to ensure that victim's rights are fully recognized and ultimately realized, a clear and universal understanding could be helpful in determining the scope of victims. We propose to specify who can qualify as victims of a crime against humanity or alternatively to give at least a minimum set of rights of protection that the victims be entitled to.

In draft article 12, paragraph 3, the International Law Commission has paid specific attention to the questions of reparation and restitution, which we certainly welcome. At the same time, not much attention has been paid to the procedural safeguards and other substantive rights of the victims. We would also like to point out that specific needs of particularly vulnerable victims or groups of victims of crimes against humanity (for instance children whose best interest should prevail) deserve separate attention that could be addressed in draft article 12. Strengthening international legal framework and standards provide a basis for eliminating impunity and improving accountability for crimes committed against children in times of conflict and political violence.

France

[Original: French]

In general, it may be preferable to include a specific article to address the question of victims whose situation must be distinguished from that of witnesses, while taking into account the fact that victims may also be called upon to testify. The draft articles should also include an obligation for States to examine the complaint impartially and promptly and give them the opportunity to submit their views and comments during the criminal trial.

Such an article might be worded as follows:

"Right to redress, assistance and protection of victims:

"l. Each State shall, within its available means, take appropriate measures to provide assistance and protection to victims of crimes against humanity against ill-treatment or intimidation as a result of the proceedings. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11 (Fair treatment of the alleged offender).

"2. Each State shall take the necessary measures to ensure in its legal system 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, consisting, as appropriate, of one or more of the following or other forms: restitution; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

"3. Each State shall, in accordance with its national law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11."

Liechtenstein

[Original: English]

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims **as defined in paragraph X**, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

X. Each victim has the right to know the truth regarding the circumstances of ~~the enforced disappearance~~ *an offence covered by the present draft articles*, the progress ~~and results~~ of the investigation*, and its results*. Each State ~~Party~~ shall take appropriate measures in this regard. [Art. 24, para. 2, of the International Convention for the Protection of All Persons from Enforced Disappearance]

Y. For the purposes of the ~~Statute and the Rules of Procedure and Evidence~~ *Convention*:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any ~~crime within the jurisdiction of the Court~~ *offence covered by the present draft articles*;

(b) Victims may also include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes. [Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court]

Argument: Fundamentally necessary to classify who is considered a victim and subject to reparation rights; victims and their relatives require to know the full and complete truth of what happened to them.

Portugal

[Original: English]

Concerning draft article 12 "Victims, witnesses and others", we note that the current drafting deals both with the different participants in the criminal proceedings – victims, witnesses and others – and with different stages of the proceedings – namely the participation in the proceeding itself and the award of compensations to the victims. Even though the heading of this draft article seems to allow for an extensive coverage of the subject, it seems to us that this provision would benefit if the question of compensations were to be addressed in a separate article. In our view, it would make the text clearer as these two stages of the proceedings would be treated separately.

Furthermore, we consider that a single article dealing solely with the issue of compensations would give more emphasis to the rights of victims.

Sierra Leone

[Original: English]

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.

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 International Law Commission 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.

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 International Law Commission 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 Commission 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.

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.

The biggest concern of Sierra Leone is with paragraph 3 of Draft Article 12. 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), the experience of Sierra Leone with the mass commission of crimes against humanity suggests this could still be problematic.

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 International Law Commission 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.

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 12, paragraph 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 International Law Commission's draft articles.

Suggestions: In light of the above concerns, Sierra Leone encourages the Commission to reconsider this provision especially paragraph 3. Should the International Law Commission 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."

[See also comments on draft article 10 and draft article 11]

Singapore

[Original: English]

Article 12, paragraph 3 requires States to ensure that, in their legal systems, "victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis". Singapore considers that an explicit reference to moral damages is not necessary. It should be left to each State to decide the scope of damage for which reparation may be available for victims. This would be consistent with the approach in Article 75, paragraph 1, of the Rome Statute of the International Criminal Court, which also does not contain an explicit reference to moral damages, but rather permits the court to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims".

Switzerland

[Original: French]

[See comment on draft article 11]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom supports the decision to avoid defining the term "*victim*" (as discussed at paragraphs (3) and (4) of the Commentary to draft Article 12) given the need to reflect the differing approaches at national level. It also supports the decision not to define "protective measures" in draft Article 12, paragraph 1, (as discussed in paragraph (10) of the Commentary to draft Article 12) given the need to ensure the necessary flexibility.

Further, the United Kingdom considers paragraph (20) of the Commentary to draft Article 12 to be helpful, as it indicates that draft Article 12, paragraph 3, could be satisfied by civil claims processes. However, it may be helpful to make this position more explicit to ensure that there is no presumption that States must establish compensation schemes, although they can do so if they wish.

Finally, with regard to Article 12, paragraph 3, the United Kingdom has considered whether "cessation and guarantees of non-repetition" strictly fall within the scope of "reparation". While cessation or guarantees of non-repetition may not

actually “repair” material or moral damages, it is quite possible that victims may seek such forms of action and thus the United Kingdom sees no issue with including them within the list.

Uruguay

[Original: Spanish]

Victims

Uruguay recommends several amendments to draft article 12 to ensure that the rights of victims are fully recognized and realized:

- include a definition of “victim” as set forth in article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance;
- impose on States parties an obligation to examine the complaints presented by victims or their representatives to determine whether there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed;
- require States parties to inform victims of the progress and results of the examination of the complaint and any subsequent investigations;
- specify that victims shall receive legal counsel where appropriate;
- establish the right to prompt, full and effective reparation that addresses the harm suffered by victims, as well as the obligation of States to develop reparation programmes to fulfil their responsibilities.

Right to truth

Establishing the truth about crimes against humanity is particularly important. Widespread or systematic attacks against civilian populations often involve spreading misinformation that promotes or seeks to justify discrimination against and the targeting of victims, and the extent of these crimes is often concealed and contested. Consequently, Uruguay recommends including a new provision based on article 24, paragraph 2, of the International Convention for the Protection of All Persons from Enforced Disappearance (“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”) and principle 4 of the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (“Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”).

14. Draft article 13 – Extradition

Argentina

[Original: Spanish]

Article 13 should not provide for the possibility of refusing extradition on the basis of the nationality of the person sought. That benefit should not apply in the case of persons who may have committed crimes against humanity. Cooperation among States in pursuing perpetrators is crucial to ensuring that justice is done and working to provide guarantees of non-repetition. Therefore, States should not use the concept of nationality to enable possible perpetrators to remain outside the reach of the jurisdiction of the State in which the crimes were committed simply on the grounds that the person is a national of the State receiving the extradition request. That

concept, which is deeply rooted in international law, should be analysed critically, given that it seriously infringes upon the right of victims, their families, and society as a whole to truth and justice, especially since the domestic legal systems of many States in the international community do not recognize the legal concept of conviction in absentia. It should also be noted that in many situations it is not possible to apply the principle of *aut dedere aut judicare*, for example in States where there are legal impediments (such as amnesties or statutes of limitations) to the investigation of crimes against humanity committed in their own territories.

Australia

[Original: English]

Australia appreciates the detailed elaboration of provisions within the draft articles to assist with extradition proceedings and mutual legal assistance requests relating to alleged crimes against humanity.

With respect to extradition, currently Australia may only consider extradition requests from States that are designated "extradition countries" by Regulations under domestic law, specifically the Extradition Act 1988 (Cth), a piece of Australian domestic law. Designated "extradition countries" are generally States with which Australia has a bilateral extradition treaty, or, in the case of Commonwealth countries, an agreement of less-than-treaty status which Australia has agreed to treat as akin to obligations with respect to extradition. In the context of multilateral treaties ratified by Australia, the designation of other States as "extradition countries" is limited to the extradition regimes established under those multilateral treaties. An international convention containing provisions such as those contained in the draft articles could facilitate cooperation between Australia and States not currently designated as "extradition countries" with respect to cases involving crimes against humanity, if ratified by Australia.

With respect to mutual legal assistance, Australia notes that it is currently able to consider requests for mutual legal assistance from any country under its domestic law (the Mutual Assistance in Criminal Matters Act 1987 (Cth)), including with respect to crimes against humanity.

Austria

[Original: English]

Austria interprets paragraph 6 stating that "[e]xtradition shall be subject to the conditions provided for by the national law of the requested State" as allowing states to refuse the extradition of their own nationals if such refusal is required by their national law. In Austria, constitutional law excludes the extradition of Austrian nationals, apart from extradition in certain cases governed by European Union law. However, non-extradition in a case of a crime against humanity would not lead to impunity, as such crimes are now punishable in Austria under the specific provision of Section 321a of the Criminal Code, introduced in 2016.

As explained in the International Law Commission's commentary to draft article 13, paragraph 6, other conditions an extradition could be made dependent upon are the exclusion of the death penalty or the respect for the rule of speciality, according to which a trial can be conducted in the requesting state only for the specific crime for which extradition was granted. However, according to the Commission's Commentary, certain grounds for the refusal of an extradition based on national law are impermissible, such as the invocation of a statute of limitation in contravention of draft article 6, paragraph 6, or other rules of international law. It would be interesting to know which other grounds for an impermissibility of a refusal of an

extradition based on national law the Commission had in mind, since it mentioned the statute of limitation contravening international law as the only example.

Concerning the Commission's Commentary to draft article 13, paragraph 9, which excludes the obligation to extradite if extradition would lead to a prosecution or punishment based on discrimination, we have doubts relating to paragraph (26) of that Commentary. The penultimate sentence of this paragraph states that "States that do not have such a provision explicitly in their bilateral [extradition] agreements will have a textual basis for refusal if such a case arises". This sentence seems to imply that the multilateral agreement to be concluded could affect the scope of application even of future bilateral extradition treaties. Did the Commission assume that the multilateral agreement would always prevail over future bilateral treaties?

Chile

[Original: English]

As a last observation, related to draft article 13, the possibility of deleting the word "alone" used at the end of paragraph 2 should be considered. Its inclusion serves no apparent purpose, and in fact, may be misleading.

Czech Republic

[Original: English]

Regarding the draft article 13, paragraph 4 (*a*), we note that similar provision is contained only in the United Nations Convention against Corruption and United Nations Convention against Transnational Organized Crime. In the commentary to this draft provision, we do not see compelling reasons for the inclusion of such text. In addition, the provision as it stands differs from those in the above mentioned treaties as it does not provide for time period when such information to the Secretary-General is supposed to be conveyed. Should the text remain in the draft articles, we suggest to include the time limits which usually are time of signature or deposit of instrument of ratification, acceptance, approval or accession.

We propose to include the rule of speciality also in draft article 13, as the rule might apply with respect to the extradited person in a similar way as with respect to the witnesses and experts mentioned in paragraph 15 of the draft annex or to the detained person temporarily transferred to the requested State as mentioned in paragraph 19 of the draft annex. It might be based on the provision of Article 14 of the European Convention on Extradition, but we are open to any suggestions.

Regarding draft article 13, paragraph 9, we wonder whether it is possible to further explain the reason for refusal of extradition that reads the "other grounds that are universally recognized as impermissible under international law" as it is a new concept which is not contained in previous conventions and is not explained in the commentary. We consider this wording to be rather vague. Although we understand that it is drafted in such a way as to provide States with wide discretion, this provision certainly does not contribute to the legal certainty.

We also would like to clarify some information contained in the commentary to the draft article 13. Even though a person may be convicted and sentenced, it does not necessarily mean that it has to escape only from lawful custody. Such person may even flee from the State before starting to serve the sentence of imprisonment in order to trigger the application of the draft article on extradition for the purpose of enforcement of sentence.

Further, we would like to point out that despite the existence of some multilateral and bilateral treaties on extradition, this judicial assistance is often

provided also on the basis of the guarantee of reciprocity, whereas according to the national law of some States adherence to the general principles of law is also considered as a legal ground for providing judicial assistance.

[See also comments on draft article 14]

France

[Original: French]

France wishes to recall that, according to its constitutional and treaty obligations (especially articles 2 and 3 of the European Convention on Human Rights and of Protocol No. 6 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, of 28 April 1983), it may neither surrender nor extradite to, or even cooperate with, a State without a guarantee that the death penalty or inhuman or degrading treatment will not be carried out in the case in question.[91] Paragraph 6 of the draft article allows for such a refusal. France here reiterates the comments on draft article 6 by advocating the explicit exclusion of the possibility of pronouncing a death sentence and all physical punishment tantamount to inhuman and degrading treatment.

Germany

[Original: English]

Para. 1 gives rise to questions with regard to the extradition for co-extradited offences (e.g. genocide and war crimes) which are not covered by Art. 1 and 3. It would be unfortunate if the draft articles led to the result that perpetrators were only extradited specifically for crimes against humanity, but that other acts committed within the same situation were not covered. It should be examined whether Art. 13 could not allow for accessory extraditions and be supplemented by a paragraph which is aligned with Art. 2 para. 4 of the United Nations Model Treaty on Extradition (www.unodc.org/pdf/model_treaty_extradition.pdf): "If a request for extradition includes several separate offences each of which is punishable under the laws of both States, but some of which do not fulfil the conditions as an extraditable offence covered by the present draft articles, the requested State may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence."

Greece

[Original: English]

Draft Articles 13 and 14: With regard to these Draft Articles for which the Commission has, after extensive discussions, opted for the "long-form" model proposed by the Special Rapporteur, and while we understand that the Commission was motivated in its choice by the wish to include in the Draft Articles the most advanced and detailed clauses on the mater, we would like to reiterate our concerns – shared also by some Commission members regarding the extensiveness of those provisions which risks overshadowing the main topic of the Draft Articles and undermining their balance.

Moreover, we think it would be appropriate to also mention in this context the international initiative [see comments under final form below], aiming at the adoption of an international treaty dealing exclusively with issues of extradition and mutual

[91] Under article 66-1 of the Constitution of 4 October 1958, "No one shall be condemned to the death penalty".

legal assistance in relation not only to crimes against humanity but also to other core crimes under international law.

An additional point that we wish to make with regard to these Draft Articles is that, while the Commentaries indicate the precise articles of the international instruments, after which each particular paragraph of these Draft Articles is modelled, departures from the wording of those international instruments is not always sufficiently explained and justified.

The most illustrative example, in our view, is Draft Article 13, paragraph 9, on the non-obligation of a State to extradite a person accused of having committed crimes against humanity when there are substantial grounds to believe that the extradition request has been made for the purpose of prosecuting or punishing that person on account of a number of grounds. We note that the Commission has decided to alter the list of the grounds initially proposed by the Rapporteur, by, inter alia, adding the term "culture" to that list. In the relevant Commentary (paragraph (25)) we simply read that the term "culture" was added "in line with the language used in draft article 3, paragraph 1 (*h*)". In the absence of any further explanation, we still fail to see the link between Draft Article 3 paragraph 1 (*h*), referring to "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … or other grounds" in the context of the definition of crimes against humanity and Draft Article 13, paragraph 9, dealing with the extradition or not of a person accused of having committed crimes against humanity.

Sierra Leone

[Original: English]

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.

We appreciate the International Law Commission'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 Convention on the Prevention and Punishment of the Crime of Genocide. 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.[92] Thus, in our submission, its inclusion would likely help crystallize State practice and consolidate customary international law.

Sierra Leone notes that Draft Article 13, paragraph 1, provides for "[e]ach 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.

[92] 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 International Convention for the Protection of All Persons from Enforced Disappearance and Article XI of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

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 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" (emphasis added).

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, paragraph 6, of the United Nations Convention against 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.

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.

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 Convention against Transnational Organized Crime and the United Nations Convention against Corruption, 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]".

Lastly, on the dual criminality requirement, we agree with and support the International Law Commission'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.

[See also comments under general comments and draft article 1]

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Draft article 13, paragraph 2, provides that an offence covered by the draft articles shall not be regarded as a **political offence** and, accordingly, a request for extradition based on such an offence may not be refused on these grounds alone. However, the definition of the crime in draft article 3 is open to interpretations and value judgments in many respects, which may prove problematic in respect to the application of draft article 13, paragraph 2.

Switzerland

[Original: French]

It also considers justified the fact that the draft articles relating to **extradition** (art. 13, para. 6) **and mutual legal assistance** are subject to national law where indicated. Nonetheless, Switzerland welcomes the fact that, in the extradition clause, it is specified that a crime against humanity shall not be regarded as a political offence. It also welcomes the fact that the Commission has based these draft articles on existing multilateral rules. This should facilitate their application.

Switzerland notes that the **obligation of promptness** that applies to extradition proceedings (see, for example, art. 44, para. 9, of the United Nations Convention against Corruption) is not directly enshrined in the draft article relating to extradition, whereas it is provided for in the draft annex that applies in accordance with paragraph 8 of draft article 14 relating to mutual legal assistance. Extradition proceedings often result in the detention of the person who is to be extradited. The principle of promptness is important in this type of proceeding. In general, there is no reference in the draft article on extradition to the possibility of detention with a view to extradition, which in practice is the rule set out in the United Nations Convention against Transnational Organized Crime, for example. However, this point seems to be covered in the draft article on preliminary measures, but without an explicit reference to extradition. It would be desirable to have an explicit reference in the draft articles to detention and to the principle of promptness for the purposes of extradition.

In the draft articles and commentaries, the Commission does not seem to **distinguish between extradition and the transfer of sentenced persons**. It is important and necessary for such a distinction to be made in the text. Multilateral conventions such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption rightly contain a separate provision on transfer.

The **extradition of minors** does not seem to be addressed in the draft articles.

Bearing in mind that an alleged perpetrator of a crime against humanity may be a minor (cf. the problem of child soldiers), Switzerland considers that codification of differential treatment could provide added value.

In Switzerland, the Federal Act on International Mutual Assistance in Criminal Matters provides that “[c]hildren and juveniles, as defined in the Swiss Criminal Code, shall, if possible, be repatriated by the child protection service rather than extradited. The same applies to persons between the ages of 18 and 20 if extradition could endanger their development or social rehabilitation” (art. 33, para. 1).

Having taken note of draft article 13, paragraph 6, and the commentary thereto, Switzerland considers that the draft article could nonetheless also provide explicitly

that a request for extradition to a country that applies the **death penalty** shall not be granted unless that country gives assurances that the death penalty will not be required, imposed or enforced. In general, Switzerland wonders whether the phrase "conditions provided for by the national law" is restricted to rules codified in an abstract and general manner or whether it also refers to **diplomatic assurances** given by the requested State to the requesting State in respect of a specific case of mutual legal assistance or extradition. It is in this latter sense that in Switzerland "[t]he executing and the appellate authority as well as the Federal Office may make the granting of mutual assistance wholly or partly subject to certain conditions" (Federal Act on International Mutual Assistance in Criminal Matters, art. 80p, para. 1). In the interests of cooperation among various jurisdictions, Switzerland considers that the Commission should clarify the meaning of "conditions provided for by the national law" and consider the possibility that those conditions could include such diplomatic assurances.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom does not have any specific comments on the draft Articles dealing with extradition and mutual legal assistance. However, should the International Law Commission take the view that those draft Articles need to be simplified to ensure greater support from other States, the United Kingdom would not oppose such a decision.

15. Draft article 14 – Mutual legal assistance

Australia

[Original: English]

[See comment on draft article 13]

Austria

[Original: English]

Austria wishes to underline that mutual legal assistance has to be rendered with due respect for the national laws and regulations concerning the protection of personal data. The "without prejudice to national law-clause" of draft article 14, paragraph 6, offers the basis for such an interpretation.

Cuba

[Original: Spanish]

The Republic of Cuba considers that the phrase "the widest measure of" should be removed from paragraph 1 of draft article 14 (Mutual legal assistance), since it does not provide a specific or quantitative description of legal assistance. Similarly, the Republic of Cuba suggests removing the phrase "to the fullest extent possible" from paragraph 2 of the draft article, since it is extremely vague and could give rise to broad interpretations.

The Republic of Cuba proposes adding the phrase "in conformity with the provisions of their domestic law" at the end of paragraph 4 of draft article 14 (Mutual legal assistance).

Czech Republic

[Original: English]

With respect to the commentary to draft article 14 we question the statement that the mutual legal assistance (MLA) in criminal matters is typically undertaken on the basis of reciprocity and suggestion that MLA treaties, multilateral and bilateral, are scarce. In Europe, the European Convention on Mutual Assistance in Criminal Matters applies and is widely accepted. Within the Organization of American States the Inter-American Convention on Mutual Assistance in Criminal Matters was adopted. Further, there is a number of bilateral treaties on MLA that might be used as a legal basis for various types of MLA concerning also crimes against humanity.

France

[Original: French]

In order to facilitate communication and thus cooperation, it would be advisable to stipulate that the request for mutual legal assistance must be translated into one of the six official languages of the United Nations.

In addition, it would be appropriate to specify that mutual legal assistance could further allow for the provision of financial documents and could also be used in pursuit of the following objectives:

- To ensure the protection of witnesses in line with national provisions
- To enforce security measures on behalf of the requesting State, consistent with the rules of the requested State
- To provide assistance with interceptions of communications and special investigation techniques.

It would also be useful to add a provision to this article giving preference to the annex concerning the conditions for the application of mutual legal assistance to bilateral and multilateral treaties, if the annex proves to be more effective in the matter, since article 14 already stipulates that it applies to the extent that it provides for “greater mutual legal assistance” and that “States are encouraged to implement the draft annex if it facilitates cooperation”.

Germany

[Original: English]

The language of paragraph 7 is based on other United Nations conventions, e.g. Article 18, paragraph 6, of the United Nations Convention against Transnational Organized Crime and Article 46, paragraph 6, of the United Nations Convention against Corruption. The latter two, however, do not provide for the additional half-sentence “except that the provisions of this draft article shall apply to the extent they provide for greater mutual legal assistance”. This addition should be rejected because it causes legal uncertainty. It is practically significant that specific bilateral or (regional) multilateral agreements, where they exist, take priority in co-operation on crimes against humanity.

Greece

[Original: English]

[See comment on draft article 13]

Morocco

[Original: Arabic]

[See comment under general comments]

New Zealand

[Original: English]

In New Zealand, mutual legal assistance is largely governed by the Mutual Assistance in Criminal Matters Act 1992 for both requests made by New Zealand to other States and requests made by other States to New Zealand. The legal system of New Zealand does not require the existence of a mutual legal assistance treaty or convention in order to request or provide mutual legal assistance. As such, New Zealand requests the Commission to consider the formulation of Draft Article 14, paragraph 8, in light of the position of New Zealand and other States which may not require treaties of mutual legal assistance. New Zealand would prefer a formulation in which the draft annex applies to requests pursuant to Draft Article 14 if the States in question are not bound by such a treaty, or which do not otherwise have a legal basis to provide such assistance.

Sierra Leone

[Original: English]

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 International Law Commission draft.

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.

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".

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 International Tribunal for the Former Yugoslavia, International Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court (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.

[See also comments under general comments, draft article 1 and draft article 13]

Switzerland

[Original: French]

With regard to draft article 14 on mutual legal assistance, Switzerland welcomes the possibility of spontaneous transmission of information between States. It regrets, however, that it is not specified in the draft article that information transmitted spontaneously may be used in the State that receives it only in investigations and not directly in criminal proceedings. In Switzerland, a formal request for assistance is necessary for such information to be used in criminal proceedings.

[See also comment on draft article 13]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft article 13]

16. Draft article 15 – Settlement of disputes

Austria

[Original: English]

Although draft article 15 on "Settlement of disputes" follows traditional patterns of dealing with this subject, we wonder, however, why paragraph 2 does not set a time limit for the negotiations before a case can be submitted to the International Court of Justice? This omission could be used to unduly protract the settlement of a dispute. While the present text leaves the decision as to whether the condition of negotiations has been met or not to the International Court of Justice or to arbitration, a fixed time limit, such as a limit of six months, would undoubtedly facilitate the implementation of this provision.

As regards draft article 15, paragraph 3, the time for making a declaration to opt out of compulsory dispute settlement should be specified. As in other conventions, it should be stipulated that such declaration may be made no later than at the time of the expression of the consent to be bound by the future convention.

Czech Republic

[Original: English]

We appreciate the inclusion of the provisions on the settlement of disputes. In conformity with other conventions on criminal matters we propose to include in draft article 15, paragraph 3, reference to the moment for making the declaration of non-acceptance of the procedure for the settlement of disputes, which is usually the time of signature or deposit of instrument of ratification, acceptance, approval or accession (see, for instance, Article 30, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment).

France

[Original: French]

It would be useful for the Special Rapporteur and the Commission to include a provision on the possibility of formulating reservations, since the draft articles may be used for the conclusion of an international convention. Such a provision would be especially helpful in promoting the widest possible acceptance of the draft, given that paragraph 2 of draft article 15 envisages an arbitration clause conferring jurisdiction

on the International Court of Justice for any dispute concerning the interpretation or application of the draft articles.

Greece

[Original: English]

With regard to this Article on inter-State dispute settlement, we would like to echo the views expressed by some Commission members – and also reflected at the relevant Commentary – that the drafting of dispute settlement clauses should be left, together with other final clauses, to States if and when the elaboration of a convention on the basis of the final Draft Articles is decided. Notwithstanding the above and as far as the content of this Draft Article is concerned, we would like to express our preference for the initial proposal made by the Special Rapporteur in his third report (Draft Article 17) reflecting the tried and tested three-tier process of negotiation, arbitration and judicial settlement.

Sierra Leone

[Original: English]

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?

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.

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 Convention on the Prevention and Punishment of the Crime of Genocide 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 Convention on the Prevention and Punishment of the Crime of Genocide, Sierra Leone considers that draft article 15 on settlement of disputes should at least establish the compulsory jurisdiction of the International Court of Justice along the same lines contemplated by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. This would put a potential crimes against humanity convention on the same plane as the Convention on the Prevention and Punishment of the Crime of Genocide.

Suggestions: Sierra Leone suggests the following dispute settlement clause contained in Article IX of the Convention on the Prevention and Punishment of the

Crime of Genocide 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."

17. Draft annex

Austria

[Original: English]

As to the Annex relating to requests for mutual legal assistance where no bilateral agreement applies, we would like to state the following relating to point 8 of this Annex: in our view, mutual legal assistance may be refused not only if the request is not in conformity with the provisions of the draft annex, but also if it is not in conformity with the draft articles themselves.

Czech Republic

[Original: English]

We consider the draft annex as a useful guidance for MLA requests. Although it is important for the designated central authority to have the responsibility to receive requests, in general we believe that it is similarly important that it is endowed with "competence" to receive it (not the "power"). Given that the requests are usually executed by the judiciary which is independent, we suggest that "central authorities encourage speedy and proper execution by the competent authorities and ensure speedy transmission to them" (paragraph 2 of the Annex).

Last but not least, we would like to propose to include in the draft annex the provision regarding transit of persons in custody or extradited persons. It is an important part of the mutual legal assistance in criminal matters as often there are no direct flights and the transferred person has to transit through other States than the requested or requesting State.

El Salvador

[Original: Spanish]

Finally, with regard to the draft annex to draft article 14, specifically paragraph 8 thereof, we note with concern that mutual legal assistance may still be refused if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests. In that regard, El Salvador believes it is necessary to expand the draft commentaries with a legal construct of what should be understood as *ordre public*, since this concept and others, such as "fundamental interests", are indeterminate legal concepts. Although there is basic certainty about the purpose they serve, this does not mean that there is a common understanding among different States as to their precise meaning.

Thus, we believe that the commentaries to the draft article could be broadened to identify situations that, reasonably, may provide legal protection; and thus become grounds for refusal of mutual legal assistance, based on the legal parameters of the laws or forum of the State in question.

France

[Original: French]

[See comment on draft article 14]

Germany

[Original: English]

Germany supports the designation of a "central authority" under paragraph 2 of the Annex, as also provided for by the United Nations Convention against Transnational Organized Crime as well as the United Nations Convention against Corruption.

Switzerland

[Original: French]

[See comment on draft article 13]

C. Comments on the final form of the draft articles

Argentina

[Original: Spanish]

With regard to the issues concerning mutual legal assistance addressed in the draft articles, it should be borne in mind that the purpose of the draft articles, as clearly stated in draft article 1, is to ensure the prevention and punishment of crimes against humanity.

In 2011, a core group of States (currently Argentina, Belgium, Mongolia, the Netherlands, Slovenia and Senegal) launched an international initiative known as the Mutual Legal Assistance (MLA) Initiative, which is now backed by 60 States from the five United Nations regional groups. As stated in the permanent declaration in support of the MLA Initiative, "the existing legal framework for international judicial assistance in the domestic investigation and prosecution of [war crimes, crimes against humanity and genocide] is outdated and insufficient". It was accordingly suggested in the declaration "that the international community of States open negotiations on a procedural multilateral treaty on mutual legal assistance and extradition to cover this gap".

The treaty will establish a uniform, detailed and modern set of restrictive rules on international judicial assistance and extradition in relation to those three crimes, on the basis of the existing definitions – which will not be reconsidered – and modern provisions on mutual legal assistance and extradition contained in the most recent widely or universally ratified international treaties on criminal matters.

The Commission's draft articles are focused on the universal criminalization of crimes against humanity in a convention and on the prevention and prosecution of such crimes, while the aim of the MLA Initiative is to provide tools for international cooperation among States that wish to strengthen as soon as possible the prosecution at the national level of the three core international crimes as currently defined in treaties and under customary international law.

In sum, the MLA Initiative and the draft articles of the International Law Commission have different scopes, purposes and negotiation processes, and both deserve to be considered separately by the international community, taking into account their specificities and the different forums in which they were developed.

Austria

[Original: English]

Austria expresses support for the elaboration of an instrument, preferably a convention, regarding extradition and mutual legal assistance in cases of crimes against humanity. However, we all are also aware of other relevant international initiatives concerning legal cooperation with regard to the prosecution of atrocity crimes. In order to avoid duplication, the Commission should be fully informed about these initiatives to be able to take them into account.

Belarus

[Original: Russian]

[See comment under general comments]

Belgium

[Original: French]

As is clearly indicated in draft article 1, the purpose of the draft articles is to prevent and prosecute crimes against humanity.

In 2011, a core group of States (currently six States, namely Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia) launched an international initiative known as the Mutual Legal Assistance (MLA) Initiative, which is currently supported by 60 States from the five regional groups of the United Nations. As stated in the permanent declaration of support for the MLA Initiative, "the existing legal framework for international judicial assistance in the domestic investigation and prosecution of [war crimes, crimes against humanity and crimes of genocide] is outdated and insufficient". It is therefore suggested that "the international community of States open negotiations on a procedural multilateral treaty on mutual legal assistance and extradition to cover this gap".

The treaty would provide for a harmonized, detailed and modern set of binding rules on mutual legal assistance and extradition for such crimes. Those rules based on the existing definitions of the crimes, which should not be reopened, and on the existing, modern provisions for mutual legal assistance and extradition set out in the most recent international treaties that have been widely, if not universally, ratified.

The Commission's draft focuses on crimes against humanity, their universal criminalization by means of conventions, and prevention and prosecution. The MLA Initiative, on the other hand, is intended to provide tools for international cooperation among States that wish, as soon as possible, to strengthen their domestic prosecution of the main international crimes, as defined by treaties and by customary international law.

In conclusion, the MLA Initiative and the Commission's draft have different scopes, objectives and dynamics of negotiation. The international community should examine each of them in a differentiated manner, taking into account their specificities and the different forums in which they have developed.

Canada

[Original: English and French]

Canada is currently reviewing the proposed Convention and consulting with stakeholders, including on the question of whether it addresses aspects of crimes

against humanity that are not sufficiently covered in existing legislation, including the Crimes Against Humanity and War Crimes Act.

Chile

[Original: English]

[See comment under general comments]

Czech Republic

[Original: English]

[See comment under general comments]

Estonia

[Original: English]

Currently crimes against humanity lack an international treaty that national laws, measures and international cooperation could build upon in fighting against impunity. Draft articles on crimes against humanity drafted by the International Law Commission are intended to serve as a basis for the elaboration of a future international convention.

In the opinion of Estonia, draft articles take into account the developments of international law, set a realistic outlook for the future and constitute an appropriate basis for the preparation of a convention against crimes against humanity. Estonia is of the position that it is high time and of utmost importance to act with full responsibility in preventing and ending crimes against humanity and bringing to justice those who are responsible for crimes against humanity.

Estonia is convinced that crimes against humanity, which are among the most serious crimes and are of concern to the international community as a whole, must be prevented in conformity with international law, as provided in the preamble of the draft articles, and impunity for the perpetrators must be put to an end. In our view, draft articles on crimes against humanity have a crucial role in creating strong legal measures to prevent crimes against humanity and to punish the perpetrators. Estonia welcomes the formulation of draft articles on crimes against humanity and a clear vision to go on with the work towards a future international convention.

…

Estonia hopes that these comments on draft articles contribute to the formation of convention on the prevention and punishment of crimes against humanity. The draft articles on crimes against humanity are an important step towards the future convention and we once again thank the International Law Commission for the most valuable contribution in this regard.

France

[Original: French]

[See comment under general comments]

Germany

[Original: English]

[See comment under general comments]

Greece

[Original: English]

Greece attaches great importance to the fight against impunity for the most heinous crimes of international concern, including the crimes against humanity. In this it welcomes the adoption on first reading of the Draft Articles which, independently of the outcome of future discussions within the Sixth Committee on their final legal form, could, with some further adjustments, contribute significantly to the prevention of such crimes and the strengthening of accountability by providing useful guidance to those States which have not yet adopted legislation regarding the criminalization and prosecution of such crimes at the domestic level.

It is true that currently and unlike other serious crimes under international law there is no international convention dealing specifically with crimes against humanity. We are also fully aware that it was the intention of both the Special Rapporteur and the Commission to produce a set of Draft Articles which would serve as a basis for the elaboration of a future convention. However, we would like to reiterate that we are not entirely convinced about the desirability and the necessity of a convention addressing exclusively that category of crimes.

We share, thus, the views expressed by a number of States in previous sessions of the Sixth Committee that the Rome Statute of the International Criminal Court, to which already 123 States are Parties, provides a sufficient legal basis for the domestic criminalization and prosecution of crimes against humanity, through the definition of these crimes as contained in its Article 7 which has received broad support among States, and, more importantly, the principle of complementarity underpinning the system of the Rome Statute of the International Criminal Court.

Indeed, Greece as a State Party to the Statute and a staunch supporter thereof from the very beginning, has enacted implementing legislation penalizing, inter alia, crimes against humanity as defined in Article 7 of the Statute.

We are, therefore, of the view that the entry into force of the Statute and the establishment of the International Criminal Court has rendered to a large extent unnecessary the elaboration of a convention on the crimes against humanity.

We also believe that, despite the cautious approach followed by both the Special Rapporteur and the Commission not to affect existing conventional regimes and the Rome Statute of the International Criminal Court, as demonstrated by the fact that paragraphs 1-3 of Draft Article 3 reproduce almost verbatim Article 7 of Rome Statute of the International Criminal Court, the risk of reopening during a future negotiation of a convention the consensus reached on the definition of the crimes against humanity cannot be excluded. Moreover, we share the concerns expressed by some States and members of the Commission that such a convention may hamper efforts to achieve the widest possible acceptance of the Statute, since some States may deem it sufficient to ratify the former without adhering to the latter.

Greece concurs with the Special Rapporteur and the Commission that the Statute does not regulate inter-State cooperation on crimes falling within its jurisdiction. However, it is also a fact that the absence of a robust inter-State cooperation system does not affect only crimes against humanity but also crimes of genocide and war crimes despite the fact that they make the object of specific conventions.

Greece believes, therefore, that instead of a lengthy process of negotiation of a future convention where all relevant critical issues could be reopened with an uncertain outcome, the efforts of the international community should focus, at this stage, on the one hand, on the promotion of universality and effective implementation of the Statute and, on the other, on the establishment of necessary mechanisms of

inter-State cooperation for the domestic investigation and prosecution of the most serious crimes of concern to the international community.

In this respect, we would like to join other States in recalling the international initiative for the adoption of a multilateral instrument on mutual legal assistance and extradition for the domestic prosecution of the most serious international crimes already supported by 60 States, including Greece.

Panama

[Original: Spanish]

Panama welcomes the drafting of articles regarding the prevention and punishment of crimes against humanity. Their adoption as a convention would represent a major step forward in the codification and progressive development of obligations with regard to the prevention and punishment of crimes against humanity.

The obligation to prevent and punish such crimes is enshrined as a general norm in many quasi-universal international instruments. Under the Convention on the Prevention and Punishment of the Crime of Genocide, for example, States have the duty to prevent and punish acts of genocide committed in their territory, while the 1949 Geneva Conventions and its Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)enshrine the obligation to punish war crimes. The scope of those conventions is, however, limited to war crimes and genocide. There is no multilateral convention devoted exclusively to stipulating the obligations of States with regard to the prevention and punishment of crimes against humanity. Adopting the draft articles prepared by the Commission would be an important step towards filling that gap.

Peru

[Original: Spanish]

Peru is basically in favour of the draft articles serving as the foundation for a future Convention on the Prevention and Punishment of Crimes against Humanity, as contemplated by the Commission at its 65th session,[93] after their adoption on second reading.

...

In conclusion, aware of the great importance of this issue, Peru supports the Commission, after second reading, recommending to the General Assembly, in accordance with article 23 of its statute, that States Members of the United Nations conclude a Convention. Subsequently, we would consider it desirable for the General Assembly to establish a preparatory process, with a view to a diplomatic conference.

Portugal

[Original: English]

[See comment under general comments]

Sierra Leone

[Original: English]

Sierra Leone strongly supports the International Law Commission'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

[93] *Yearbook of the International Law Commission, 2013*, vol. II (Part Two), annex II, para. 3.

against humanity. In this context, as a state party to the Rome Statute of the International Criminal Court and signatory of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, we also appreciated the International Law Commission'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 International Criminal Court.

Sweden (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The draft articles on crimes against humanity have a significant potential for great practical relevance to the international community. Among the three core international crimes, only crimes against humanity lack a convention. International norms can in turn contribute to national laws, national jurisdiction and cooperation among States in the fight against impunity. The Nordic countries will continue to support this project that we consider a welcome and timely contribution to the fight against impunity. The draft articles may serve as a good basis for a future convention on the prevention and punishment of crimes against humanity.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Currently there is no general multilateral convention establishing a framework for the national prosecution of crimes against humanity, including mutual legal assistance, and that this represents a lacuna given the existing frameworks for other serious crimes such as genocide, war crimes and torture. As such, the United Kingdom sees benefits in developing an extradite-or-prosecute convention in respect of crimes against humanity.

The United Kingdom appreciates the careful consideration that the Special Rapporteur, the Drafting Committee and the International Law Commission as a whole have given to the inter-relationship between their work and the Rome Statute of the International Criminal Court. As the United Kingdom has previously emphasised,[94] and as the Special Rapporteur and Commission clearly intend, a future convention on this subject will need to complement, rather than compete with, the Statute. A new convention could facilitate national prosecutions, thereby strengthening the complementarity provisions of the Statute.

III. Comments and observations received from international organizations and others

A. General comments and observations

Committee on Enforced Disappearances

[Original: English]

Following previous useful consultations with the special rapporteur of the International Law Commission about its draft convention on the crime against

[94] See the statement of the United Kingdom of 24 October 2017 to the Sixth Committee, available from http://statements.unmeetings.org/media2/16154277/united-kingdom.pdf.

humanity (A/CN.4/L.892) and eager to bring a contribution as invited by the ILC in line with the resolution A/RES/72/116 of the United Nations General Assembly;

Welcoming the adoption after a first lecture of the draft convention on the crime against humanity with the objective to reinforce the legal co-operation in the fields of prevention and repression of international crimes,

Recalling that the International Convention on the Protection of all Persons from Enforced Disappearance, adopted by the resolution A/RES/61/177 of the UNGA in 2006 and ratified by 58 States Parties, is a legal milestone in this matter,

Recalling also the progress of the customary law and the importance of the progressive development of international law,

The Committee on Enforced Disappearances

1. Considers that the universal ratification of the Convention on the Protection of all Persons from Enforced Disappearance, following the resolution A/RES/72/183 of the UNGA, ought to be a priority for the member states, as well as the ratification of the Rome Statute of the International Criminal Court.

2. Welcomes the provision of Article 3 paragraph 4 of the draft dealing with more protective instruments, and the importance to maintain the definition enshrined in the Convention on the Protection of all Persons from Enforced Disappearance at its Article 2, according to which enforce disappearance "is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

3. Considers also that the overall consistency of the draft with the Rome Statute ought to be paramount, for the sake of effective co-operation between States Parties in the criminal prosecution of these crimes, and to preserve the developments of international criminal law related to the protection of victims of gross violations of international human rights law and serious violations of international humanitarian law.

4. Recalls that it is its duty, as a treaty body, to deliver a legal interpretation of the provisions of the Convention on the Protection of all Persons from Enforced Disappearance, on the basis of Article 37, as it was done publicly on the issue of military justice, in a substantial statement adopted at its 8° session (A/70/56, annexe III) and regrets the setback which is made by the ILC watering the international guidelines on this matter.

5. Underlines the centrality of the rights of victims which deserve a specific and substantial article in the draft and regrets that the draft is still so weak on the rights and guaranties already enshrined in Article 24 of the Convention on the Protection of all Persons from Enforced Disappearance, as a victim-oriented instrument and in international guidelines.

6. Considers that the gap introduced by the International Law Commission in the draft about the issue of immunities is prejudicious to consistency of principles invocated in its Preamble and that the International Law Commission ought to deliver strong safeguards in this matter, according to the principles of Nuremberg and the provisions of the Rome Statute.

European Union

[Original: English]

The International Law Commission, in the general commentary to the draft articles on crimes against humanity (A/72/10, para. (4) of the general commentary), recalls that the Rome Statute of the International Criminal Court only regulates the relations between States and the International Criminal Court. It further notes in this context that the Statute and other instruments setting up international or hybrid criminal courts or tribunals only address the prosecution of crimes falling under their jurisdiction, but do not require States to prevent and punish crimes against humanity.

As regards the International Criminal Court, the International Law Commission notes that the draft articles on crimes against humanity could therefore contribute to the implementation of the principle of complementarity enshrined in the Rome Statute of the International Criminal Court.

The general commentary also notes that the scope of crimes against humanity goes beyond serious violations of international human rights law, international humanitarian law and existing international criminal law.

The European Union recalls that the support for the rule of law and the principles of international law are among the core objectives of its external action (Article 21 of the Treaty on European Union).

In line with the Global Strategy for the European Union's Foreign and Security Policy (Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy; https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf), prevention of genocide and other atrocity crimes are an integral part of the Foreign Policy of the European Union. The Global Strategy also embodies the European Union's strong commitment to promoting respect for international humanitarian law.

The European Union believes that the strengthening of international courts, tribunals and mechanisms serves the purpose of ensuring accountability for serious violations of international humanitarian law and human rights law. The work of the International Law Commission on crimes against humanity could contribute to enhancing the role of such judicial mechanisms.

For that reason, the European Union and its Member States have from the beginning supported the International Criminal Court in its work and continue to encourage the widest acceptance of its jurisdiction, and to promote the effective implementation of the principle of complementarity.

The preamble of the Rome Statute of the International Criminal Court states that "the most serious crimes of concern to the international community as a whole must not go unpunished". This is a core principle for the European Union. Perpetrators of atrocities need to be brought to justice and held to account, while guaranteeing the rights of the accused. The European Union thus remains firmly committed to the fight against impunity for such serious crimes, including crimes against humanity.

The development of a set of international rules on the prevention and punishment of crimes against humanity would therefore be consistent with the European Union's objectives and policies in matters of international criminal law and justice, including the EU's established position on the death penalty and the prohibition of inhuman or degrading treatment or punishment. It will also contribute to the respect of the principles of *nullum crimen sine lege*, reflected in Article 49 of the Charter on Fundamental Rights of the European Union and Article 7 of the

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

In this context, the European Union also notes the existence of an international initiative supported by a number of European Union Member States aimed at the effective investigation and prosecution at the national level of war crimes, the crime of genocide and crimes against humanity, by enhanced multilateral legal cooperation.

…

For the benefit of the International Law Commission and its work on the draft articles on crimes against humanity, the European Union takes the opportunity to provide information on European Union legislation in criminal justice matters. The legal acts mentioned below are mostly of a procedural nature and concern the cooperation between the Member States of the European Union in criminal justice matters.

As regards their scope, these legal acts cover the crimes falling under the jurisdiction of the International Criminal Court and, hence, also crimes against humanity.

The relevant European Union law is the following:

- Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (*Official Journal of the European Communities*, No. C 197, 12 July 2000, pp. 1–2);

- Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (*Official Journal of the European Communities*, No. L 167, 26 June 2002, pp. 1–2);

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (*Official Journal of the European Communities*, No. L 190, 18 July 2002, pp. 1–20);

- Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (*Official Journal of the European Union*, No. L 118, 14 May 2003, pp. 12–14);

- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (*Official Journal of the European Union*, No. L 196, 2 August 2003, pp. 45–55);

- Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (*Official Journal of the European Union*, No. L 76, 22 March 2005, pp. 16–30);

- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (*Official Journal of the European Union*, No. L 328, 24 November 2006, pp. 59–78);

- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (*Official Journal of the European Union*, No. L 327, 5 December 2008, pp. 27-46);

- Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation

decisions with a view to the supervision of probation measures and alternative sanctions (*Official Journal of the European Union*, No. L 337, 16 December 2008, pp. 102–122);

- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (*Official Journal of the European Union*, No. L 315, 14 November 2012, pp. 57–73);

- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (*Official Journal of the European Union*, No. L 130, 1 May 2014, pp. 1–36).

The European Union stands ready to provide additional information and clarifications on its legislation, should the International Law Commission so wish.

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

I consider that the draft articles on crimes against humanity adopted on first reading by the International Law Commission in 2017 and transmitted, through the Secretary-General, to Governments, international organizations and others for comments and observations, to be submitted by 1 December 2018, contain many valuable provisions that should be strongly supported by States.

Such provisions include those concerning the general obligation to prevent and punish crimes against humanity (articles 2 and 4) and the obligation to extradite or prosecute (*aut dedere aut judicare*) (article 10). The drafting of article 10 takes into account the most advanced formula, known as the “triple alternative”, whereby the State must either extradite the person to another State, surrender the person to a competent international criminal tribunal or have the person appear before its own ordinary courts.

Furthermore, the article on criminalization under national law (article 6) contains a number of provisions that doubtless make an appropriate contribution relevant to the mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. For instance, thanks to the provision on command or other superior responsibility (article 6, paragraph 3), not only persons who physically perpetrate crimes against humanity but also their commanders or other superiors who consent or tolerate the perpetration of those crimes shall be brought to justice. Other examples are the provisions stipulating that an order of a superior or a Government is not a ground for excluding criminal responsibility of a subordinate (article 6, paragraph 4) and that crimes against humanity shall not be subject to any statute of limitations (article 6, paragraph 6), among others.

Moreover, the provisions concerning the right to consular assistance (article 11, paragraphs 2 and 3) undoubtedly constitute a positive contribution with regard to the due process to which any foreign national accused of committing crimes against humanity and deprived of liberty has a right, even if the State in question is not a State party to the Vienna Convention on Consular Relations.

That said, I also note that some improvements could be made to the draft articles on crimes against humanity if States decide to transform them into a treaty instrument in the future, which would be a more effective tool for combating impunity. If some of its provisions were adjusted, the aforementioned instrument could also be a

significant step forward in the promotion of truth, justice, reparation and guarantees of non-recurrence.

I would make the following proposals to that end:

The draft articles on crimes against humanity should contain a provision expressly prohibiting amnesties, pardons, sentence commutation and any other measures designed to free persons suspected of committing crimes against humanity from individual criminal responsibility or to remove the effects of a conviction. The ad hoc criminal tribunals for the former Yugoslavia and Sierra Leone, the Inter-American Court of Human Rights, the European Court of Human Rights and many national courts have found grounds to affirm that amnesty laws cannot apply to persons responsible for crimes against humanity. In making such statements, they have all agreed that that prohibition amounts to a rule of customary international law. (That prohibition should therefore be reflected in the codification work carried out by the International Law Commission, given the Commission's mandate.) All of the United Nations human rights treaty bodies and a large number of special rapporteurs have taken the same view. I am also aware that more than 20 States, primarily in the Americas and Africa, that used to make frequent use of amnesties have decided to prohibit them, and often pardons as well.

In line with article 24, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance and rule 85 of the Rules of Procedure and Evidence of the International Criminal Court, the draft articles on crimes against humanity should contain a comprehensive definition of the term "victim", rather than leaving the concept to be defined entirely by the domestic laws of States.

The draft articles on crimes against humanity should recognize the right to truth, perhaps drawing inspiration from article 24, paragraph 2, of the International Convention for the Protection of All Persons from Enforced Disappearance, and enshrine the right of victims to know the truth about the facts and circumstances relating to the commission of the crimes against humanity in question.

The draft articles on crimes against humanity should recognize the non-applicability of statutory limitations to any legal action, whether civil or criminal, by victims seeking full reparation. This is a logical consequence of the non-applicability of statutory limitations to crimes against humanity, since the crimes are what give rise to the claims for reparation. I believe that statutory limitations on claims for reparation have been identified as one of the greatest obstacles to reparation.

The draft articles on crimes against humanity should prohibit reservations to the text, as the Rome Statute of the International Criminal Court does.

The draft articles on crimes against humanity should prohibit all extraordinary tribunals, in particular military tribunals and military commissions, from trying cases concerning crimes against humanity. Jurisdiction over such crimes should be exercised only by ordinary civilian criminal courts, not military tribunals.

United Nations Office of the High Commissioner for Human Rights

[Original: English]

The Commentary notes that the instruments establishing the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia provide that an amnesty adopted in national law is not a bar to their respective jurisdictions; and that these courts have recognized that there is a "crystallising international norm" or "emerging consensus". The Commentary further identifies a trend in regional human rights courts and bodies are finding "amnesties to be impermissible or as not

precluding accountability under regional human rights treaties", treaty bodies are interpreting "their respective treaties as precluding a State party from passing, applying or not revoking amnesty laws" and several States have adopted domestic legislation prohibiting amnesties for crimes against humanity (para. (10) of the commentary to draft article 10).[95] The Commentary also highlights that the United Nations Secretariat's position is not to recognize and condone amnesties for genocide, war crimes, crimes against humanity and gross human rights violations for United Nations-endorsed peace agreements, and that since the entry into force of the 1998 Rome Statute of the International Criminal Court, several States have adopted national laws that prohibited amnesties and similar measures with respect to crimes against humanity (pages 87–88), noting that: "an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence. Within the State that has adopted the amnesty, its permissibility would need to be evaluated, inter alia, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others" (para. (11) of the commentary to draft article 10).

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

…

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

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

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

United Nations Office on Genocide Prevention and the Responsibility to Protect

[Original: English]

a. Establishment of a monitoring mechanism for the <u>prevention</u> of crimes against humanity: even though there are already several monitoring mechanisms capable of scrutinizing situations of crimes against humanity, such mechanisms are mostly focused on the occurrence of such crimes and their punishment, rather than on their early prevention. A monitoring mechanism that would regularly request States to report on initiatives taken to build the resilience of their societies to the risk of

[95] See also footnotes 184 and 185 below, and Human Rights Committee, Concluding observations on the initial report of Sierra Leone (CCPR/C/SLE/CO/1), para. 17; Concluding observations on the second periodic report of The former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2), para. 12; and Concluding observations on the fifth periodic report submitted by Yemen (CCPR/C/YEM/CO/5), para. 6. Furthermore, Article 18, paragraph 1, of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance states: "Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction."

these crimes, would crucially contribute to the prevention of the crime. Similar to the Convention on the Prevention and Punishment of the Crime of Genocide, the Draft Articles on Crimes Against Humanity have more focus on the element of punishment or post-criminal conduct, rather than on prevention. Even though what constitutes an effective prevention measure will depend on the specific context and situation, the only concrete measure that is mentioned in the Draft Articles is the criminalization of the crime, in addition to the overall idea that the punishment of the crime also contributes to its prevention. Establishing a specific monitoring mechanism, and requiring States to report on their initiatives, would emphasize the importance of the obligation to prevent and create a space for relevant initiatives to be discussed and recommended.

b. Obligation to prevent crimes against humanity as an extraterritorial obligation: the future convention on crimes against humanity provides an opportunity to explicitly mention in its text that the obligation to prevent such crimes is not limited by territory. Even though the International Court of Justice has affirmed that the obligation to prevent genocide is not limited by territory and, in certain circumstances, can be imputed to other States (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43), that has the value of jurisprudence in a specific case, and on the prevention of the crime of genocide. A determination by an international treaty of the extraterritorial aspect of the obligation to prevent, would avoid any attempt to deny, question or undermine that extension of the obligation. It would also greatly support initiatives aimed at getting States involved in the protection of populations against the most gracious crimes, including the principle of the responsibility to protect, particularly under pillar II (responsibility to assist) and III (responsibility to act).

c. Obligation not to commit crimes against humanity: similar to what was mentioned in the previous paragraph, it would be important to clearly mention that there is an obligation not to commit crimes against humanity, even though it could be presumed from other obligations within the treaty.

United Nations Working Group on Enforced or Involuntary Disappearances

[Original: English]

It is suggested that the draft convention include a provision not allowing amnesties for genocide, war crimes, and crimes against humanity.[96] Article 18, paragraph 1, of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance states: “Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1 … shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.”[97]

It is suggested to expressly include a provision prohibiting that military tribunals are competent for crimes against humanity, in accordance with article 16, paragraph 2, of the 1992 Declaration, which indicates that persons alleged to have committed an enforced disappearance: “shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts”.

[96] See, for example, the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616) of 23 August 2004, paras. 10, 32 and 64 (c).

[97] The Working Group has studied this provision in its general comment to article 18 of the Declaration, E/CN.4/2006/56 and Corr.1, p. 17.

Even if an explicit prohibition has not been included in the International Convention on the Protection of All Persons from Enforced Disappearance, the Committee on Enforced Disappearances has interpreted in its 2015 "Statement on Enforced Disappearances and Military Jurisdiction" that military justice in case of enforced disappearances could violate a number of provisions of the Convention and limit the effectiveness of investigation and prosecutions of enforced disappearances. With a view to ensuring a fair trial before an independent and impartial court, it has thus recommended in its concluding observations to States parties, when relevant, that all cases of enforced disappearance remain expressly outside military jurisdiction and be investigated and prosecuted by, or under control of, civil authorities and tried only by ordinary courts.[98]

We suggest including a provision on the right to truth for victims of crimes against humanity as a State obligation. There has been a wide development of this right at the normative and jurisprudential levels. In this sense, the International Convention on the Protection of All Persons from Enforced Disappearance has adopted it in its article 24, both as a right for victims and as an obligation for states.[99]

The Working Group on Enforced or Involuntary Disappearances has clarified in its general comment on the right to truth[100] that this right means, in relation to enforced disappearances, the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s).[101] It also makes it clear that the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation.[102] The right to the truth has also been defined as inalienable in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity.[103]

B. Specific comments on the draft articles and the draft annex

1. Draft article 2 – General obligation

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

[See comment under general comments]

2. Draft article 3 – Definition of crimes against humanity

Committee on Enforced Disappearances

[Original: English]

[See comment under general comments]

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[98] https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_SUS_7639_E.pdf

[99] See paragraphs 2 and 3 of article 24 of the International Convention on the Protection of All Persons from Enforced Disappearance.

[100] A/HRC/16/48 and Add.1–3 and Add.3/Corr.1, p. 14.

[101] *Ibid.*, para.1.

[102] *Ibid.*, pp. 14–15, para.4.

[103] E/CN.4/2005/102 and Add.1, principle 2: "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."

European Union

[Original: English]

The European Union shares the view that the draft articles on crimes against humanity must ensure consistency with the Rome Statute of the International Criminal Court.

The European Union takes note in this regard of paragraph (8) of the commentaries to draft article 3, which indicates that the definition of crimes against humanity in the first three paragraphs is identical to the one of the Rome Statute of the International Criminal Court, "except for three non-substantive changes, which are necessary given the different context in which the definition is being used". The European Union also notes that paragraph 4 of draft article 3 provides that the definition of crimes against humanity it contains is "without prejudice to any broader definition provided for in any international instrument or national law". This type of language appears to preserve the definitions under the Statute and avoid any inconsistency.

International Organization for Migration

[Original: English]

Article 3, paragraph 1 (*d*), lists deportation as an act that can constitute a crime against humanity when the elements in such paragraph 1 concur. Deportation (or forcible transfer of population) is described, for the purposes of the draft articles, as forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. Please be aware that, in the context of migration, the word deportation is used in respect of forceful return to their countries of origin of migrants who are in an irregular situation, that is, who are not legally present in the country in question. Within the Global Compact for Safe, Orderly and Regular Migration, States' right of deportation of migrants in irregular situations is recognized, only subject to the limitations specifically described in it, namely no forced return of persons who are irregularly present in a country can be made when there is a real and foreseeable risk of death, torture and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm in the country of origin.

As for the principle of *non-refoulement* and in connection with the above, it is a fundamental element of refugee law, applicable also in some cases of migration law. Please note that during the negotiations of the Global Compact for Safe, Orderly and Regular Migration during 2018, there was no agreement between States as to the scope and meaning of this concept as applicable to migrants and whether it could be considered as customary international law. Consequently, notions of *non-refoulement* and return were phrased in the text of the Global Compact for Safe, Orderly and Regular Migration in the above-mentioned terms of a prohibition of collective expulsion and returning of migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with a particular State's obligations under international law. *Non-refoulement* and the compromise language above are very specific treaty obligations under the Convention relating to the Status of Refugees, the Convention against torture and other cruel, inhuman or degrading treatment or punishment, and also partly in the International Covenant on Civil and Political Rights.

United Nations Office of the High Commissioner for Human Rights

[Original: English]

Draft article 3, paragraph 2 (i), defines the underlying criminal act of enforced disappearance of persons as follows: "… the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

The language of this provision and article 7, paragraph 2 (i), of the 1998 Rome Statute of the International Criminal Court is the same, whereas corresponding article 2 of the International Convention on the Protection of All Persons from Enforced Disappearance, adopted after the Statute, defines enforced disappearance as

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

The reference "of removing them from the protection of the law *for a prolonged period of time*" (emphasis added) introduces a minimum time requirement for the crime of enforced disappearances in the Draft Articles (also present in the Rome Statute of the International Criminal Court), which cannot be found in the International Convention on the Protection of All Persons from Enforced Disappearance or the Declaration on the Protection of All Persons from Enforced Disappearance.[104] The International Law Commission's Commentary (hereinafter "The Commentary") does not provide a specific comment on this particular issue.[105]

Likewise, the Draft Articles (and the Rome Statute of the International Criminal Court) introduce an additional requirement by establishing that the act(s) should have the "intention" to remove the person from the protection of the law, which cannot be found in the International Convention on the Protection of All Persons from Enforced Disappearance and the 1992 Declaration. As stated by the international human rights mechanisms tasked with overseeing the implementation of the 1992 Declaration and the Convention, the removal of a person from the protection of the law is a

[104] General Assembly resolution 47/133 of 18 December 1992. See Committee on Enforced Disappearances, *Yrusta* v. *Argentina*, Communication No. 1/2013, Views adopted on 11 March 2016, para 10.3; and Working Group for Enforced or Involuntary Disappearances, General comment on the definition of enforced disappearance, paras. 7-8 (A/HRC/7/2, pp. 11–12). See also Committee against Torture, *Guerrero Larez* v. *Bolivarian Republic of Venezuela*, Communication No. 456/2011, Decision adopted on 15 May 2015, paras. 6.4 and 6.6.

[105] It is also worth noting that in its most recent established jurisprudence, the Human Rights Committee has noted that while the International Covenant on Civil and Political Rights does not explicitly use the term "enforced disappearance" in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represent a continuing violation of various rights recognized in the International Covenant on Civil and Political Rights. In this regard, when examining alleged violations of article 16 of the International Covenant on Civil and Political Rights, the Committee has stated that "the intentional removal of a person from the protection of the law constitutes a refusal of the right to recognition as a person before the law", without indicating a temporal element or time requirement. See Human Rights Committee, *Bolakhe* v. *Nepal*, Communication No. 2658/2015, Views adopted on 19 July 2018, paras. 7.7 and 7.18; *El Boathi* v. *Algeria*, Communication No. 2259/2013, Views adopted on 17 March 2017, paras. 7.4 and 7.10 (see original text in French language); 2164/2012, Sabita Basnet v. Nepal, Views adopted on 12 July 2016, paras. 10.4 and 10.9; and *Serna and Others* v. *Colombia*, Communication No. 2134/2012, Views adopted on 9 July 2015, para. 9.4 and 9.5. By contrast, see previous jurisprudence: *Bhandari* v. *Nepal*, Communication No. 2031/2011, Views adopted on 29 October 2014, para. 8.8; *Boudehane* v. *Algeria*, Communication No. 1924/2010, Views adopted on 24 July 2014, para. 8.9; and *Kimouche* v. *Algeria*, Communication No. 1328/2014, Views adopted on 10 July 2007, para. 7.8.

consequence of the enforced disappearance rather than a constitutive element.[106] No explanation is provided in the International Law Commission's Commentary justifying the need for this additional element of "intention" in the definition of enforced disappearance.

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

The definition of enforced disappearance in the International Convention on the Protection of All Persons from Enforced Disappearance also includes a reference to "any other form of deprivation of liberty". It is recommended to amend Draft Article 3, paragraph 2 (*i*), in order to avoid creating a gap of protection in cases of deprivation of liberty or freedom that may not qualify as arrest, detention or abduction, but otherwise meet the definition of enforced disappearance. The relevant part of the **provision should read as follows**: "… the arrest, detention abduction *or any other form of deprivation of liberty* of persons by, or with the authorization, support or acquiescence of, a State or a political organization…."

Draft Article 3, paragraph 1 (*h*), defines the criminal act of persecution as following: "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes".

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

Draft Article 3, contains, as does the Statute, a "connection" requirement: to amount to a crime under the Draft Articles, persecution needs to be "connected" to a crime under the same article, to the crime of genocide or to any war crime, inasmuch as the underlying acts must constitute a crime falling in at least one of these three categories of crimes. However, neither the Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, nor the law establishing the Extraordinary Chambers in the Courts of Cambodia, contain such requirement. In fact, according to International Tribunal for the Former Yugoslavia [107] and International Tribunal for Rwanda [108] jurisprudence, under customary international law, persecution as a crime against humanity does not require that its underlying acts constitute crimes under international law, rather that these underlying acts, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under the article on crimes against humanity in the

[106] See Committee on Enforced Disappearances, Concluding observations on the report submitted by Paraguay under article 29, paragraph 1, of the Convention (CED/C/PRY/CO/1), paras. 13–14; and the Working Group for Enforced or Involuntary Disappearances General comments on the definition of enforced disappearance, para. 5 (A/HRC/7/2, p. 11) and on the right to recognition as a person before the law in the context of enforced disappearances, paras. 1–2 (A/HRC/19/58/Rev.1, p. 10).

[107] See, for example, *Prosecutor* v. *Popović* et al., *Case No. IT-05-88-A, Judgment of 30 January 2015*, Appeals Chamber, International Tribunal for the Former Yugoslavia, paras. 738 and 766.

[108] See, for example, *Nahimana* et al. v. *Prosecutor, Case No. ICTR-99-52-A, Judgment of 28 November 2007*, Appeals Chamber, International Tribunal for Rwanda, para. 985.

statutes of the two tribunals. It follows that the Statute introduced an additional requirement, which goes beyond customary international law, and constitutes a jurisdiction threshold for the purposes of the International Criminal Court. The Draft Articles, on the other hand, should not narrow the definition of persecution as crime against humanity as understood under international customary law.

Based on the above, it is proposed the following **amendment to Draft Article 3, paragraph 1 (*h*)**: "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act, whether considered in isolation or in conjunction with other acts, of gravity equal to the act referred to in this paragraph".

Draft Article 3, paragraph 3, defines "gender" contained in Draft Article 3, paragraph 2 (*h*), as follows: "For the purpose of the present draft articles, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

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

The Committee on the Elimination of Discrimination against Women distinguishes the terms "sex" and "gender". It states that while the term "sex" refers to biological differences between men and women, the term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences, which result in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.[109]

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity maintains that the terms "gender" refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms.[110]

Furthermore, international human rights law recognizes both gender and sex as separated grounds of discrimination based on which an individual might be impeded to exercise his/her human rights, including access to justice and reparations as well as fair trial guarantees. It does so, based on the core principle of non-discrimination, which is embedded in the core international human rights treaties along with a non-exhaustive interpretation of the grounds of discrimination contained therein,

[109] Committee on the Elimination of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28), para. 5. See also the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (A/HRC/35/23), paras. 17 *et seq*. Also, in *Addressing the Needs of Women Affected by Armed Conflict: an ICRC Guidance Document*, the ICRC states clearly this differentiation: "The term 'gender' refers to the culturally expected behaviours of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas 'sex' refers to biological and physical characteristics" (Geneva, ICRC, 2004, p. 7).

[110] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152), para. 2. See also paragraph 6.

aiming at expanding the scope of protection for rights-holders.[111] For example, in reference to article 2, paragraph 2, of the International Covenant of Economic, Social and Cultural Rights, which establishes the guarantee of non-discrimination, the Committee on Economic, Social and Cultural Rights has stated that additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. Thereafter, the Committee expressly recognizes sexual orientation and gender identity among the prohibited grounds of discrimination.[112] Also, the Committee on the Elimination of Discrimination against Women has stated that even though "the Convention [on the Elimination of All Forms of Discrimination Against Women] only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women".[113]

The definition of "gender" as stated in the 2014 "Policy Paper on Sexual and Gender-based Crimes" of the Office of the Prosecutor of the International Criminal Court clearly distinguishes the term "gender" from the term "sex". The policy states that "'[g]ender' in accordance with [article 7, paragraph 3, of the Rome Statute of the International Criminal Court], refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys". It further states that "'[s]ex' refers to the biological and physiological characteristics that define men and women".[114]

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

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[111] As embedded in the nine core international human rights treaties, the principle of non-discrimination requires that the rights set forth be made available to everyone without discrimination, and that States ensure that their laws, policies and programmes are not discriminatory in impact. See the report of the United Nations High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (A/HRC/19/41), paras. 5–6.

[112] Committee on Economic, Social and Cultural Rights, General comment No. 20 (E/C.12/GC/20), paras. 27 and 32. The Human Rights Committee has held that the reference to "sex" in article 2, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights is to be taken as including sexual orientation; and that the prohibition against discrimination under article 26 of the International Covenant on Civil and Political Rights encompasses discrimination on the basis of gender identity, including transgender status. See Human Rights Committee, *G.* v *Australia*, Communication No. 2172/2012, Views adopted on 17 March 2017, para 7.12; *C.* v. *Australia*, Communication No. 2216/2012, Views adopted on 28 March 2017, para. 8.4; *Young* v. *Australia*, Communication No. 941/2000, Views adopted on 6 August 2003, para. 10.4; *X* v. *Colombia*, Communication No. 1361/2005, Views adopted on 30 March 2007, para.7.2; and *Toonen* v. *Australia*, Communication No. 488/1992, Views adopted on 31 March 1994, para. 8.7. See also the reports of: the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), para. 7; the Special Rapporteur on trafficking in persons, especially women and children (A/HRC/32/41), para. 61; the Special Rapporteur on the human rights of migrants (A/71/285), para. 123 (i); and the Special Rapporteur on contemporary forms of slavery, including its causes and consequences (A/73/139), para. 7.

[113] Committee on the Elimination of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28), para. 5.

[114] "Policy Paper on Sexual and Gender-Based Crimes", p. 3.

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

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

Special procedure mandate holders (persecution)[115]

[Original: English]

We write to you regarding the persecutory grounds in the draft crimes against humanity convention that is currently pending with the International Law Commission. We thank you for your work on this draft convention and recognize its invaluable contribution to deter and prevent the worst human rights violations, address impunity and hold perpetrators of heinous crimes accountable.

Among the great achievements of the International Law Commission has been the progressive expansion of persecutory grounds spanning over the last 70 years. During the 1950s and again in the 1990s the Commission broadened the categories, in line with evolving international law. In its last iteration of this succession, the Commission substantially deepened the understanding of persecution when it significantly increased categories under the Rome Statute of the International Criminal Court.

It is our expert opinion that such a time has come again. In the last quarter century there has been great recognition by the international community of additional grounds driving perpetrators' intent to commit heinous crimes against vulnerable groups. Persecution is one of the world's greatest sources of human rights violations and crimes against humanity, and as such there is an obligation for this draft convention to reflect that evolving law and jurisprudence. States should prosecute all crimes, especially the most serious ones and provide justice to the victims, including vulnerable groups that are targeted by perpetrators because of their particular status.

For this reason, we recommend that the following grounds be added to the list of persecutory categories when such discrimination amounts to crimes of persecution: language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics, indigenous, refugee, statelessness and migratory status. We also recommend the deletion of the reference to paragraph 3 in the definition of gender[116], as per our submission to you on the definition of gender.

Article 3 on Definition of Crimes against Humanity, under paragraph 1 (*h*), will thus read as follows**:**

> "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ~~as defined in paragraph 117~~, *language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics, indigenous, refugee, statelessness and migration status,* or other grounds that are universally recognized as impermissible under

[115] See footnote 3 above for a full list of the special procedure mandate holders.

[116] See the joint submission by several Special Procedure mandate holders concerning the definition of gender in the draft crimes against humanity convention.

[117] Ibid.

international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;"

In our expert opinion, there is wide recognition of these impermissible grounds under international law upon which persecution can be based.

Language, Social Origin, and Age Status

Language and social origin statuses appear frequently in human rights documents, harking back to the Universal Declaration of Human Rights.[118] Social origin refers to 'class', 'caste' or 'socio-occupational category', and to factors that a person may adopt or receive from community, family or society, such as how one socializes, lives and works, the parents' or guardians' status of children, place of birth, or income[119]. Age appears less frequently in human rights instruments but it has been widely acknowledged as a consistent basis of discrimination and consequently should be noted in the persecutory categories.

Disability Status

The Convention on the Rights of Persons with Disabilities recognizes the intricate link between discrimination on grounds of disability and the increased risk of becoming a victim of most serious human rights violations, including violence, abuse and threats to life. Harmful practices based on discrimination, often amounting to torture or cruel, inhuman or degrading treatment or punishment, continue to be promoted through national laws, policies and practices that conflict with the provisions of international human rights instruments.

Furthermore, evidence indicates that States fail to live up to their international commitments to investigate abusive practices commonly perpetrated against persons with disabilities and bring those responsible to justice. Discrimination plays a prominent role in condoning systematic violations of sexual and reproductive rights of girls and women with disabilities[120], and threats, attacks and killings of persons with albinism[121] and other specific groups.

Under Article 1, paragraph 2, of the Convention, "[p]ersons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". Article 5, paragraph 2, affirms that "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds". In the particular context of humanitarian emergencies, armed conflicts and other situations of risk, Article 11 affirms that States shall take all necessary measures, in accordance with their obligations under international law, including international humanitarian law and international human rights law, to ensure the protection and safety of persons with disabilities. Particular attention should be accorded to the protection those persons with disabilities who require more intensive support, since they are often at greater risk of severe human rights violations.

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[118] Universal Declaration of Human Rights, article 2, General Assembly resolution 217A of 10 December 1948.

[119] Convention concerning Discrimination in respect of Employment and Occupation (ILO (International Labour Organization) Convention No. 111).

[120] See the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (A/HRC/35/23), para. 55.

[121] See the report of the Independent Expert on the enjoyment of human rights by persons with albinism: a preliminary survey on the root causes of attacks and discrimination against persons with albinism (A/71/255).

Health Status

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has consistently called attention to the challenges for the realization of the right to physical and mental health from discrimination, intolerance and a selective approach to human rights undermines the full and effective realization of the right to physical and mental health for everyone.[122]

Additionally, the Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members has consistently called attention to the plight of persons affected by leprosy. Both persons affected by leprosy and their family members face numerous forms of discrimination and widespread barriers to their participation as equal members of society, including isolation, discrimination and violations of their human rights. The Special Rapporteur has called for the intensification of efforts to eliminate all forms of prejudice and discrimination against persons affected by leprosy and their family members and to promote policies that facilitate their inclusion and participation.[123]

Congruent to this, General comment No. 14 of the Committee on Economic, Social and Cultural Rights "proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health".[124]

Sexual Orientation, Gender Identity, Sex Characteristics Status

Sexual orientation and gender identity are largely subsumed under the category of gender. Their status under international law warrants, however, their recognition in their own right. The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has concluded that in the last 20 years since the passage of the Rome Statute of the International Criminal Court, "[a]n array of international human rights instruments helps to entrench calls for non-violence and the principle of non-discrimination in international law, with due respect for sexual orientation and gender identity".[125]

"There are now nine core international human rights treaties, complemented by various protocols. All of them interrelate with the issue of sexual orientation and gender identity, to a lesser or greater extent."[126] This is in addition to the recognition of sexual orientation and gender identity under the European Convention on Human Rights[127], the European Union[128] and the inter-American system, which also

[122] See the interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/73/216), para. 1.

[123] See the report of the Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members (A/HRC/38/42), para. 1.

[124] Committee on Economic, Social and Cultural Rights, General comment No. 14 (E/C.12/2000/4), para. 18.

[125] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/35/36), para. 20.

[126] *Ibid*.

[127] *Ibid*. at para. 26, citing the European Convention on Human Rights, Art. 14. See also *Mouta* v. *Portugal, Application no. 33290/96, Judgment of 21 December 1999*, Fourth Section, European Court of Human Rights, *Reports of Judgments and Decisions 1999-IX.*

[128] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/HRC/35/36), para. 26, citing the Charter of Fundamental Rights of the European Union, Art. 21, para. 1.

appointed a regional rapporteur specifically to cover these issues.[129] The General Assembly of the Organization of American States also approved two treaties that refer to sexual orientation and gender identity directly as grounds on which discrimination must be prohibited.[130] "Complementing the measures outlined above [is] resolution 275 of the African Commission on Human and Peoples' Rights, on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity of 2014."[131]

Sex characteristics, each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty are also a significant ground for persecution. As noted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "[c]hildren who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without their informed consent, or that of their parents, 'in an attempt to fix their sex', leaving them with permanent, irreversible infertility and causing severe mental suffering".[132]

Apart from its merit under international human rights law, autonomous recognition of these grounds is required to adequately address the root causes of violence and discrimination and ensure accountability. In effect, proper identification of motive is an essential component of investigation and prosecution, and the design of reparation measures. In this connection, the Independent Expert has concluded that negation hinders proper collection of evidence and data and diligent exploration of all lines of investigation, and fosters a climate where hate speech, violence and discrimination are condoned and perpetrated with impunity.

Indigenous Status

In accordance with the mandate, the Special Rapporteur on the rights of indigenous peoples has continuously raised concerns in her country reports, communications to governments, press releases and other public statements about indigenous leaders and members of indigenous communities, and those who seek to defend their rights, being subject to undue criminal prosecution and other acts, including direct attacks, killings, threats, intimidation, harassment and other forms of violence.[133] The Special Rapporteur also reflects on available prevention and protection measures and calls for improved measures to prevent violations and improve protection.[134] Recognizing indigenous peoples' status as a protected ground from persecution is one such protective measure.

Refugee, Statelessness and Migration status

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families affirms that "the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and

[129] *Ibid*., at para. 27, citing resolution AG/RES. 2435 (XXXVIII-O/08) on human rights, sexual orientation, and gender identity, approved at the fourth plenary session of the Organization of American States, held on 3 June 2008.

[130] *Ibid*., citing the Inter-American Convention against All Forms of Discrimination and Intolerance, art. 1 and the Inter-American Convention on Protecting the Human Rights of Older Persons, Arts. 5 and 9.

[131] *Ibid*., at para. 28, citing resolution 275 of the African Commission on Human and Peoples' Rights on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity, adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights, held in Luanda, Angola from 28 April to 12 May 2014.

[132] Report of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/22/53), para. 77.

[133] See the report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/39/17), para. 6.

[134] *Ibid*., paras. 79–88.

therefore require appropriate international protection"[135] and that "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention".[136]

The 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons both highlight the vulnerability of refugees and stateless persons to discrimination and persecution.

The Special Rapporteur on extrajudicial, summary or arbitrary executions has described the killings of refugees and migrants as a "human rights crisis … characterized by mass casualties globally, a regime of impunity for its perpetrators and an overall tolerance for its fatalities". She has described the mass killings as "an international crime whose very banality in the eyes of so many makes its tragedy particularly grave and disturbing".[137]

We therefore recommend that the grounds for persecution be expanded to include these additional categories and protect the ways in which groups are intentionally and severely deprived of fundamental human rights contrary to international law.

Special procedure mandate holders (gender)[138]

[Original: English]

We commend the Commission's work on the draft convention on crimes against humanity and recognize the invaluable contribution such a convention would make towards enhancing States and others' efforts to deter and prevent the world's worst atrocities and address impunity for them. We also recognize that in order for such a text to be constructive it must reflect current definitions for terms used to describe human rights protections and abuses under international law, including for the definition of gender.

We write to express our concern that the draft crimes against humanity convention adopts the outdated and opaque definition of gender from the Rome Statute of the International Criminal Court. It states, "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society". While we recognize that gender is understood as a social construction under this definition, and while prosecutors have brought charges of various forms of sexual violence, the international criminal court has never successfully prosecuted charges of gender-based persecution. This definition has also never been adopted in any subsequent human rights instrument nor cited in tribunal jurisprudence.

International human rights law recognizes gender as the social attributes associated with being male and female, an evolving social and ideological construct that justifies inequality and provides a means to categorize, order and symbolize power relations.[139] This also reflects the International Criminal Court's Office of the Prosecutor's understanding of the definition of gender as the "social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to

[135] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, preamble.

[136] *Ibid*., article 7.

[137] Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions (A/72/335), para. 1.

[138] See footnote 3 above for a full list of the special procedure mandate holders.

[139] See the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (A/HRC/35/23), para. 16.

women and men, and to girls and boys".[140] Accordingly, gender should not be confused with sex. "Instead, gender helps us to question that which we otherwise take for granted, including the category of sex."[141] Numerous United Nations and regional treaty bodies and courts have echoed this over the last two and half decades,[142] as have our thematic reports:

- The Special Rapporteur on extrajudicial, summary or arbitrary executions affirms that gender is understood as "an evolving social and ideological construct that justifies inequality, and a way of categorizing, ordering and symbolizing power relations".[143] "[G]ender is understood to produce distinct vulnerabilities and risks linked to the way societies organize male and female roles and exclude those who transgress such roles."[144]
- The Working Group on enforced or involuntary disappearances affirms that "[t]he application of the principle of gender equality requires a full understanding of the different roles and expectations of the genders to effectively overcome issues that hinder the attainment of gender equality and full enjoyment of women's rights. … Gender equality in the area of enforced disappearances primarily requires that all individuals – regardless of their sex or gender – enjoy without discrimination the rights enshrined in the Declaration for the Protection of All Persons against Enforced Disappearances".[145]
- The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health constantly refers to the discriminatory grounds that proscribe economic, social and cultural rights, pursuant to article 2 of the International Covenant on Economic, Social and Cultural Rights. "These ... include sexual orientation, gender identity and health status."[146] "Rights to sexual and reproductive health … are further compromised by violence, … and patriarchal and heteronormative practices and values. This reinforces harmful gender stereotypes and unequal power relations … ."[147] "[Health] [s]ervices must be sensitive to gender and lesbian, gay, bisexual, transgender and intersex

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[140] See the "Policy Paper on Sexual and Gender-Based Crimes", p. 3

[141] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (A/HRC/35/23), para. 17.

[142] See, for example, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152); *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory opinion OC-24/17 of 24 November 2017*, Inter-American Court of Human Rights, para. 32; Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/57/4); Committee on the Elimination of Discrimination against Women, General recommendation No. 33 (CEDAW/GC/33); Committee against Torture, General comment No. 3 (CAT/C/GC/3); Committee on the Elimination of Discrimination against Women, General recommendation No. 28 (CEDAW/GC/28); Committee on Economic, Social and Cultural Rights, General comment No. 20 (E/C.12/GC/20); Committee against Torture, General comment No. 2 (CAT/C/GC/2); Committee on Economic, Social and Cultural Rights, General comment No. 16 (E/C.12/2005/4); interim report on the question of torture and other cruel, inhuman or degrading treatment or punishment by the Special Rapporteur of the Commission on Human Rights (A/56/156); Human Rights Committee, General comment No. 28 (CCPR/C/21/Rev.1/Add.10); report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (Beijing Platform for Action) (A/51/322); and Committee on the Elimination of Discrimination against Women, General recommendation No. 19 (A/47/38). See also the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011).

[143] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (A/HRC/35/23), para. 16.

[144] *Ibid*., at para. 22.

[145] Working Group on Enforced or Involuntary Disappearances, General comment on women affected by enforced disappearances (A/HRC/WGEID/98/2), preamble.

[146] Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) (CRC/C/GC/15), para. 8.

[147] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on the right to health of adolescents (A/HRC/32/32), para. 84.

status, they must be non-judgemental regarding … personal characteristics, lifestyle choices or life circumstances and they must treat all … with dignity and respect, consistent with their status as rights holders."[148]

- The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, affirms that "[h]ousing strategies should identify groups that suffer housing disadvantages and should address the particular barriers they face. These groups include: women; persons with disabilities; people living in poverty; migrants; racial and ethnic minorities; indigenous peoples; youth; older persons; lesbian, gay, bisexual, transgender and intersex persons; and people who are homeless or living in informal settlements".[149]
- The Special Rapporteur on the rights of Indigenous Peoples recognizes "the gendered forms of violations against Indigenous women and the gendered effects of human rights abuses that target Indigenous communities as a whole".[150]
- The Special Rapporteur on the human rights of internally displaced persons affirms that "[internally displaced women] also often experience human rights challenges due to interlinked forms of discrimination based on gender, and intersection of gender with other factors such as age, group affiliation (e.g. membership in minority groups), disability, civil status, socioeconomic status and displacement itself".[151]
- The Special Rapporteur on the human rights of migrants, affirms the need to "[e]nsure a robust gender analysis of the difference in the impacts of policies on men and women, with special attention to the ways in which restrictions on women's mobility as a means of protection violate their rights and create favourable conditions for smuggling networks to thrive, including the use of a gender lens at all stages and in all aspects of the discussion as specific consideration of gender in the context of bilateral agreements".[152]
- The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, affirms that "[t]he notion that there is a gender norm, from which certain gender identities 'vary' or 'depart' is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights. Those misconceptions include: that human nature is to be classified with reference to a male/female binary system on the basis of the sex assigned at birth; that persons fall neatly and exclusively into that system on the same basis; and that it is a legitimate societal objective that, as a result, persons adopt the roles, feelings, forms of expression and behaviours that are considered inherently 'masculine' or 'feminine.' A fundamental part of the system is a nefarious power asymmetry between the male and the female."[153]
- The Special Rapporteur on contemporary forms of slavery, including its causes and consequences, recognizes that "[d]ifferent forms of contemporary slavery are gendered in nature. ... From a binary perspective, gender has historically resulted in a hierarchical distribution of power and rights that favours men and disadvantages women, with important

[148] *Ibid*, para. 32.

[149] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (A/HRC/37/53), para. 36.

[150] Report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/30/41), para. 10.

[151] Report of the Special Rapporteur on the human rights of internally displaced persons (A/HRC/23/44), para. 21.

[152] Report of the Special Rapporteur on the human rights of migrants (A/71/285), para.123(i).

[153] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152), para. 6. The Independent Expert and other Special Rapporteurs have also adopted the definition of gender identity found in the Yogyakarta Principles which reads in the Preamble that gender identity' refers "to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".

consequences for the comprehension of contemporary forms of slavery and the measures to prevent and eradicate the phenomena".[154]

- The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment recognizes that "gender-based violence, endemic even in peacetime and often amplified during conflict, can be committed against any persons because of their sex and socially constructed gender roles. While women, girls, lesbian, gay, bisexual and transgender persons, sexual minorities and gender-non-conforming individuals are the predominant targets, men and boys can also be victims of gender-based violence, including sexual violence stemming from socially determined roles and expectations."[155]
- The Special Rapporteur on trafficking in persons, especially women and children affirms that "the nature and form of trafficking in persons associated with conflict are highly gendered. … [S]exual enslavement, a practice exacerbated by situations of conflict, is highly gendered in that it disproportionately affects women and girls."[156]
- The Working Group on the issue of discrimination against women in law and in practice has consistently "demonstrated the persistence of a global discriminatory cultural construction of gender … and the continued reliance of States on cultural justifications for adopting discriminatory laws or for failing to respect international human rights law and standards".[157]
- The Special Rapporteur on violence against women, its causes and consequences affirms States' obligations "to take positive measures to change harmful stereotypes relating to gender roles conducive to violence".[158]
- The Special Rapporteur on the human rights to safe drinking water and sanitation affirms that "[w]ater and sanitation facilities must be safe, available, accessible, affordable, socially and culturally acceptable, provide privacy and ensure dignity for all individuals, including those who are transgender and gender non-conforming".[159]

These and other expert opinions help demonstrate the wide recognition of gender as a social construct that permeates the context in which human rights abuses take place. We therefore urge the International Law Commission to either remove the definition of gender in article 3, paragraph 3, of the draft crimes against humanity convention (since no other persecutory category comes with a definition) or to insist on the social construction of gender as it is widely recognized to be.[160]

United Nations Office on Drugs and Crime

[Original: English]

- Article 3, paragraph 2 (*c*), page 11: "'enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes

[154] Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences (A/73/139), paras. 7–8.

[155] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), para. 7.

[156] Report of the Special Rapporteur on trafficking in persons, especially women and children (A/HRC/32/41), para. 61.

[157] Report of the Working Group on the issue of discrimination against women in law and in practice (A/HRC/38/46), para. 25.

[158] Report of the Special Rapporteur on violence against women, its causes and consequences (A/HRC/32/42), para. 71. The Special Rapporteur also notes in particular the Council of Europe Convention on preventing and combating violence against women and domestic violence which defines gender as "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men" under Article 3 (c).

[159] Report of the Special Rapporteur on the human rights to safe drinking water and sanitation (A/HRC/33/49), para. 9.

[160] We note particularly the definition of gender proposed by the Council of Europe Convention on preventing and combating violence against women and domestic violence.

the exercise of such power in the course of trafficking in persons, in particular women and children".

Comment: For the purpose of clarifying the definition of trafficking in persons, the International Law Commission may consider including in its commentary the definition provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

- Article 3, commentary, paragraph (31), page 41: "the Commission ... stated 'that the draft article does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code'".

Comment: The Commission may consider adding a footnote to the words "organized in criminal gangs or groups" referring to article 2 of the United Nations Convention against Transnational Organized Crime, which provides definition of "[o]rganized criminal group".

United Nations Working Group on Enforced or Involuntary Disappearances

[Original: English]

Draft Article 3, paragraph 2 *i*, defines the underlying criminal act of enforced disappearance of persons as follows: "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

The definition of enforced disappearances contained in the Draft Articles mirrors the one contained in article 7, paragraph 2, of the Rome Statute of the International Criminal Court and has moved from the consensus developed in the context of international human rights law and the national criminal law that followed it in many countries.

It is crucial for the Working Group to emphasize that the 2006 International Convention for the Protection of All Persons against Enforced Disappearance, adopted eight years after the Rome Statute of the International Criminal Court, the original definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance and the 1994 Inter-American Convention on Forced Disappearance of Persons.

The expansion of the definition of enforced disappearance in the Draft Articles as to include the involvement of "political organizations" in addition to State authorities, can be explained with the fact that crimes under international law involve individual criminal responsibility rather than State responsibility.[161] However, the inclusion of the wording "with the intention of removing them from the protection of the law for a prolonged period of time" is problematic both for the *mens rea* element and for the reference to a "prolonged period of time".

In relation to the intentional element, the Working Group has indicated, in its 2008 General comment on the definition of enforced disappearances, that, "[i]n accordance with article 1, paragraph 2, of the Declaration, any act of enforced

[161] Recognizing the need for protection to those victims of disappearances committed by political organizations or other non-State actors acting without any link to the state, the International Convention established in its article 3 an obligation for the States to take appropriate measures to investigate those conducts.

disappearance has the consequence of placing the persons subjected thereto outside the protection of the law. Therefore, the Working Group admits cases of enforced disappearance without requiring that the information whereby a case is reported by a source should demonstrate, or even presume, the intention of the perpetrator to place the victim outside the protection of the law".[162] This interpretation of the Working Group, i.e. the fact that the placement outside the protection of the law is a direct result of the refusal to acknowledge the deprivation of liberty or denial to give information rather than part of the definition - is confirmed by the text of article 2 of the Convention.[163]

With respect to the requirement of the "prolonged period of time", the Working Group on Enforced or Involuntary Disappearances has consistently recognized that there is no time limit, no matter how short, for an enforced disappearance to occur and that accurate information on the detention of any person deprived of liberty and their place of detention should be made available promptly to family members.[164]

The Committee on Enforced Disappearance agreed to this view while interpreting the Convention. In its first contentious case under its communication procedure,[165] *Yrusta* v. *Argentina*,[166] the Committee understood that Mr. Yrusta was a victim of enforced disappearance for over seven days while being transferred from one prison facility to another under the concealment of his fate. The Committee recalled that "in order to constitute an enforced disappearance, the deprivation of liberty must be followed by a refusal to acknowledge such deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law, regardless of the duration of the said deprivation of liberty or concealment".[167]

It is of crucial importance to express that the Working Group has been observing patterns of "short-term" enforced disappearances in countries in the different regions of the world, and in the context of its mandate is doing a pedagogical effort to clarify that these crimes equally cause grave harm to the disappeared person and their families.

Finally, the Working Group suggests including in the definition of enforced disappearances a reference to "any other form of deprivation of liberty", in accordance with the definition contained in article 2 of the Convention, in order to cover situations of deprivation of liberty other than arrest, detention or abduction.

The Commentary to the Draft Articles[168] has made an attempt - insufficient in the Working Group's view - to solve these differences with the international human rights standards through the introduction of draft article 3, paragraph 4, which states that the definition contained in draft article 3 "is without prejudice to broader definitions in international instruments or national laws". This would leave the possibility for States to adopt the definition contained in the Declaration and the International Convention for the Protection of All Persons from Enforced

[162] Report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/7/2), p. 11, para. 5.

[163] "For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, *which place such a person outside the protection of the law*" (emphasis added).

[164] See, for instance, the report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/39/46), para. 143.

[165] See article 31 of the Convention.

[166] Committee on Enforced Disappearances, *Yrusta* v. *Argentina*, Communication No. 1/2013, Views adopted on 11 March 2016.

[167] *Ibid.,* para. 10.3.

[168] A/72/10, paragraph 41.

Disappearance but *de facto* could leave a number of conducts which constitute enforced disappearance under international human rights law outside the scope of this Convention.

The Working Group understands the strategic position of the International Law Commission to follow the Rome Statute of the International Criminal Court to foresee a high number of ratifications, taking into consideration the wide acceptance the latter has had, though it considers that following that definition may transmit a confusing message to the international community.

The Working Group recognizes that it may be considered that there is no real contradiction between the Statute and the three other international human rights law instruments on enforced disappearances because, while the Declaration and the International and Inter-American Convention define the crime of enforced disappearance, what the Statute does is to select which conduct should be under the jurisdiction of the International Criminal Court. However, both the inclusion of the intentional element and the reference to the "prolonged period of time" may negatively impact on the proper consideration of the nature of crimes against humanity of enforced disappearances, and notably short-term disappearances. A narrow interpretation of enforced disappearance might be suitable for the International Criminal Court which, according to article 1 of the Statute, limits its jurisdiction to "the most serious crimes of international concern" and its complementary nature to national criminal jurisdictions. It cannot be considered though the correct definition of enforced disappearance.

Therefore, we request the International Law Commission to consider our suggestion to drop the definition included in the Rome Statute of the International Criminal Court taking into consideration the specific nature and purpose thereof, and rather follow a definition consistent with the three international human rights law instruments.

3. Draft article 4 – Obligation of prevention

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

[See comment under general comments]

United Nations Office on Drugs and Crime

[Original: English]

- Article 4, commentary, paragraph (3), pages 46 and 47. Comment: the Commission may consider to include the following other treaties containing provisions on prevention: the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (section III) and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (section II), supplementing the United Nations Convention against Transnational Organized Crime.
- Article 4. commentary, paragraph (4), page 47. Comment: The Commission may consider including the United Nations Convention against Corruption among the treaties cited in point (4). In a footnote, reference could be made to chapter II of this treaty, entirely devoted to the prevention of corruption.

United Nations Office of the High Commissioner for Human Rights

[Original: English]

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

4. Draft article 5 – *Non-refoulement*

Council of Europe

[Original: English]

We welcome the inclusion of an express obligation of *non-refoulement* in Draft Article 5, paragraph 1, prohibiting the expulsion, return, surrender or extradition of a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity. As mentioned in paragraph 3 of the Commentary to Draft Article 5, the European Court of Human Rights has firmly established an obligation of *non-refoulement* under Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights.[169] A State's responsibility thus arises where there are substantial grounds for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights if expelled, returned, surrendered or extradited to the country of destination. In our opinion the prohibition of *refoulement* under Draft Article 5, paragraph 1, should also apply in cases where there are substantial grounds to believe that the person to be expelled, returned, surrendered or extradited will be in danger of persecution or other specified harm, such as torture or inhuman or degrading treatment or punishment, upon his or her return even if the expected harm falls short of reaching the threshold of a crime against humanity.

According to the European Court of Human Rights, the assessment of the existence of a real risk of ill-treatment in the country of destination triggering the prohibition of *refoulement* must focus on the foreseeable consequences of the individual's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances.[170] Additionally, if applicable, the Court furthermore has regard to whether there is a general situation of violence existing in the country of destination.[171] With regard to the assessment of evidence, the Court has established in its case-law that "the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion".[172] The Contracting State therefore has the obligation to take into account not only the evidence submitted by the individual to be removed but also all other facts, which are relevant in the case under

[169] The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (*European Treaty Series*, No. 5) was opened for signature on 4 November 1950 and entered into force on 3 September 1953.

[170] See *Vilvarajah and Others* v. *the United Kingdom, Application nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991*, Chamber, European Court of Human Rights, para. 108.

[171] See *Sufi and Elmi* v. *the United Kingdom, Application nos. 8319/07 and 11449/07, Judgment of 28 June 2011*, Fourth Section, European Court of Human Rights, para. 216.

[172] *F. G.* v. *Sweden, Application no. 43611/11, Judgment of 23 March 2016*, Grand Chamber, European Court of Human Rights, para. 115.

examination.[173] In assessing the weight to be attached to country material, the Court has found in its case-law that consideration must be given to the source of such material, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.[174]

We welcome the fact that the abovementioned requirements established by the European Court of Human Rights appear to lie also at the heart of Article 5, paragraph 2, of the Draft Articles which instructs the States' competent authorities to "take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law", when determining whether there are substantial grounds for believing that the person to be expelled, returned, surrendered or extradited would be in danger of being subjected to a crime against humanity.

The Commentary to Draft Article 5 refers in paragraph (10) to the practice of the United Nations Human Rights Committee when determining the weight to be given to diplomatic assurances from the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law. We would like to draw attention to the fact that also the European Court of Human Rights has dealt extensively with the issue of diplomatic assurances in its case-law holding that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment.[175] In its assessment, the Court will examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment by looking at the quality of the assurances given, and, whether, in light of the receiving State's practices, they can be relied upon.[176] In doing so the Court will have regard, *inter alia*, to factors such as whether the assurances are specific or general and vague,[177] whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms,[178] and, whether there is an effective system of protection against torture in the receiving State.[179]

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[173] See *J. K. and Others* v. *Sweden, Application no. 59166/12, Judgment of 23 August 2016*, Grand Chamber, European Court of Human Rights, para. 87.

[174] See *Saadi* v. *Italy, Application no. 37201/06, Judgment of 28 February 2008*, Grand Chamber, European Court of Human Rights, para. 143; *NA.* v. *the United Kingdom, Application no. 25904/07, Judgment of 17 July 2008*, Fourth Section, European Court of Human Rights, para. 120; and , *Sufi and Elmi* v. *the United Kingdom* (see footnote 171 above), para. 230.

[175] See *Othman (Abu Qatada)* v. *the United Kingdom, Application no. 8139/09, Judgment of 17 January 2012*, Fourth Section, European Court of Human Rights, para. 187.

[176] *Ibid*., para. 189.

[177] See *Saadi v. Italy* (see footnote 174 above), paras. 147–148; *Klein* v. *Russia, Application no. 24268/08, Judgment of 1 April 2010*, First Section, European Court of Human Rights, para. 55; and *Khaydarov* v. *Russia, Application no. 21055/09, Judgment of 20 May 2010*, First Section, European Court of Human Rights, para. 111.

[178] See *Chentiev and Ibragimov* v. *Slovakia, Application nos. 21022/08 and 51946/08, Decision of 14 September 2010*, Fourth Section, European Court of Human Rights; and *Gasayev* v. *Spain, Application no. 48514/06, Decision of 17 February 2009*, Third Section, European Court of Human Rights.

[179] See *Ben Khemais* v. *Italy, Application no. 246/07, Judgment of 24 February 2009*, Second Section, European Court of Human Rights, paras. 59–60; *Soldatenko* v. *Ukraine*, *Application no. 2440/07, Judgment of 23 October 2008*, Fifth Section, European Court of Human Rights, para. 73; and *Koktysh* v. *Ukraine, Application no. 43707/07, Judgment of 10 December 2009*, Fifth Section, European Court of Human Rights, para. 63.

International Organization for Migration

[Original: English]

[See comment on draft article 3]

5. Draft article 6 – Criminalization under national law

Council of Europe

[Original: English]

We welcome the text of Draft Article 6, paragraph 6, which obliges States to take the necessary measures to ensure that, under their national criminal law, offences constituting crimes against humanity shall not be subject to any statute of limitations. The Council of Europe attaches great importance to actions to be taken under national law to ensure the end of impunity for offences constituting crimes against humanity. Indeed, the Council of Europe was one of the first actors to address the prevention of impunity for crimes against humanity with the adoption in 1974 of its European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.[180] This Convention aims at ensuring that the punishment and prosecution of crimes against humanity and the most serious violations of the laws and customs of war is not prevented by statutory limitations.

Moreover, the European Court of Human Rights has in its case law dealt with the issue of extensive time lapses between the commission of such offences and their prosecution. In the case of *Kolk and Kislyiy* v. *Estonia*,[181] for example, the Court, in declaring the application inadmissible, noted that the acts of which the applicants had been accused in 2003 under the national Criminal Code had even been expressly recognised as crimes against humanity in the Charter of the International Military Tribunal established at Nürnberg of 1945. This was especially true of crimes against humanity, the Court reasoned, in respect of which the Charter of the International Military Tribunal established at Nürnberg had laid down a rule that they could not be time-barred. In its case law on other international crimes (e.g. *Sawoniuk* v. *United Kingdom*[182] in 2001, and *Kononov* v. *Latvia*[183] in 2010) the Court has consistently held that those who committed war crimes during the Second World War did not have a human right for them to be statute barred, and noted a number of international conventions that now prohibit statutory limitations for war crimes.

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

[See comment under general comments]

[180] The European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (*European Treaty Series*, No. 82) was opened for signature on 25 January 1974 and entered into force on 27 June 2003. To date, the Convention has received 8 ratifications and 1 signature.

[181] *Kolk and Kislyiy* v. *Estonia, Application nos. 23052/04 and 24018/04, Decision of 17 January 2006*, Fourth Section, European Court of Human Rights.

[182] *Sawoniuk* v. *the United Kingdom, Application no. 63716/00, Decision of 29 May 2001*, European Court of Human Rights.

[183] *Kononov* v. *Latvia, Application no. 36376/04, Judgment of 17 May 2010*, Grand Chamber, European Court of Human Rights.

United Nations Office on Drugs and Crime

[Original: English]

- Article 6, commentary, paragraph (36), page 71: "Many treaties addressing crimes in national law other than crimes against humanity have not contained a prohibition on a statute of limitations".

Comment: In this context, it may be relevant to note that other treaties have required especially long statutory periods. Article 3, paragraph 8, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances stipulates that "[e]ach Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice". Similar provisions are contained in article 11, paragraph 5, of the United Nations Convention against Transnational Organized Crime and article 29 of the United Nations Convention against Corruption.

- Article 6, commentary, "Appropriate penalties", paragraphs (37)–(40).

Comment: To reinforce the point, the Commission may consider the following additional references: article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; article 11, paragraph 1 of the United Nations Convention against Transnational Organized Crime; as well as article 30, paragraphs 1, 5 and 7 of the United Nations Convention against Corruption; article 2 of the International Convention against the taking of hostages; article 5 of the Convention for the suppression of unlawful acts against the safety of maritime navigation; articles 4 (b) and 5 *(in fine),* of the International Convention for the Suppression of Terrorist Bombings; article 4 (b) of the International Convention for the Suppression of the Financing of Terrorism; and articles 5 (*b*) and 6 *(in fine)* of the International Convention for the Suppression of Acts of Nuclear Terrorism.

United Nations Office of the High Commissioner for Human Rights

[Original: English]

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

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

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

from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.[184] The Committee has also stated that immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.[185]

While acknowledging that immunity of heads of State, head of government, ministers of foreign affairs or other State officials from foreign criminal jurisdictions is governed by conventional and customary international law and the ongoing work by the International Law Commission on the immunity of state officials from foreign criminal jurisdiction,[186] it is recommended that the Draft Articles provide that such immunities do not constitute in practice a barrier to a general system of accountability and to the obligation to provide effective remedies to the victims of crimes against humanity, including criminal investigations and prosecutions.

[See also comment on draft article 3]

6. Draft article 7 – Establishment of national jurisdiction

United Nations Office on Drugs and Crime

[Original: English]

- Article 7, commentary, paragraph (5), page 78: "Provisions comparable to those appearing in draft article 7 exist in many treaties addressing crimes."

Comment: To reinforce the point, the Commission may consider the following additional references in footnote 381: article 42 ("Jurisdiction") of the United Nations Convention against Corruption and article 4 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

- Article 7, commentary, paragraph (10), page 79: Footnote 383 refers to document A/AC.254/4/Rev.4, containing the revised draft of the United Nations Convention against Transnational Organized Crime for consideration by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime at its fifth session.

Comment: For a more comprehensive overview of the matter, the Commission may also want to reference, in footnote 383, the "Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto" (2006). The Travaux préparatoires (pages 129–139) offer an account of the evolving iterations of article 15 (Jurisdiction) of the Convention against Transnational Organized Crime and of the positions of the negotiating delegations.

[184] See Human Rights Committee, General comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (CCPR/C/21/Rev.1/Add.13), para. 18. See also Human Rights Committee, Concluding observations on the fifth periodic report submitted by Yemen (CCPR/C/YEM/5), para. 6.

[185] See Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36), para. 27.

[186] For a status and summary of the International Law Commission's work on the issue, see http://legal.un.org/ilc/summaries/4_2.shtml.

7. Draft article 8 – Investigation

United Nations Office on Drugs and Crime

[Original: English]

- Article 8, commentary, paragraph (4), page 81: "The requirement of impartiality means that States must proceed with their investigations in a serious, effective and unbiased manner."

Comment: In relation to the requirement of impartiality mentioned in the commentary to draft article 8, the Commission may wish to refer to the Bangalore Principles of Judicial Conduct, Value 2 (Economic and Social Council resolution 2006/23, annex).

8. Draft article 9 – Preliminary measures when an alleged offender is present

United Nations Office on Drugs and Crime

[Original: English]

- Article 9, commentary, paragraph (1), page 82: refers to national measures to take a person into custody or ensure presence of an alleged offender as necessary to enable criminal, extradition or surrender proceedings, including to avoid further criminal acts and risk of flight.

Comment: The Commission may wish to add to the sentence "in particular to avoid further criminal acts and a risk of flight by the alleged offender" the following instance: "and to prevent tampering of evidence by the alleged offender". In relation to custody, including at the pre-trial stage, the Commission may also consider referring to the nonbinding United Nations Standard Minimum Rules for Non-custodial Measures (also known as the "Tokyo Rules"; General Assembly resolution 45/110 of 14 December 1990, annex) as well as the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (also known as the "Bangkok Rules"; General Assembly resolution 65/229 of 21 December 2010, annex).

9. Draft article 10 – *Aut dedere aut judicare*

Council of Europe

[Original: English]

[See comment on draft article 13]

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

[See comment under general comments]

United Nations Office of the High Commissioner for Human Rights

[Original: English]

Draft Article 10 states that: "The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State." This language defers from Article 7, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or

punishment according to which authorities must "take their decision in the same manner as in the case of *any ordinary offence of a serious nature*" under domestic law (emphasis added). Nonetheless, no **adverse practical implications** appear to derive from it. Draft Article 10 is **welcomed and should be retained**.

[See also comment under general comments]

10. Draft article 11 – Fair treatment of the alleged offender

Council of Europe

[Original: English]

We are pleased to note the inclusion in Draft Article 11 of the rights of an alleged offender with regard to fair treatment, including a fair trial and full protection of his or her rights. Paragraph (4) of the Commentary to Draft Article 11 makes clear that the term "fair treatment" is to be viewed as incorporating rights such as those under Article 14 of the 1966 International Covenant on Civil and Political Rights. We would like to draw attention to the fact that in this connection reference could also be made to the pertinent jurisprudence of the European Court of Human Rights under Article 6 of the European Convention on Human Rights for instance with regard to the right to free assistance of an interpreter under Article 6, paragraph 3 (e), of the European Convention on Human Rights.[187]

Furthermore, Draft Article 11, paragraph 2, affords an alleged offender, who is in prison, custody or detention and who is not of the State's nationality, the right to have access to a representative of his or her State thus summarily reaffirming the more detailed rights accorded in the 1963 Vienna Convention on Consular Relations. We welcome the acknowledgement of such rights and would like to draw attention in this regard to the 1967 European Convention on Consular Functions,[188] which, in its Article 6, is equally concerned with consular functions in a case where a national of the sending State is deprived of his liberty.

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

[See comment under general comments]

[187] See, for instance, *Hermi* v. *Italy, Application no. 18114/02, Judgment of 18 October 2006*, Grand Chamber, European Court of Human Rights, paras. 69–72; *Hokkeling* v. *the Netherlands, Application no. 30749/12, Judgment of 14 February 2017*, Third Section, European Court of Human Rights; *Baytar* v. *Turkey, Application no. 45440/04, Judgment of 14 October 2014*, Second Section, European Court of Human Rights, paras. 46–59; *Protopapa* v. *Turkey, Application no. 16084/90, Judgment of 24 February 2009*, Fourth Section, European Court of Human Rights, paras. 77–82; *Isyar* v. *Bulgaria, Application no. 391/03, Judgment of 20 November 2008*, Fifth Section, European Court of Human Rights, paras. 45–49; *Cuscani* v. *the United Kingdom, Application no. 32771/96, Judgment of 24 September 2002*, Fourth Section, European Court of Human Rights, paras. 34–40; *Kamasinski* v. *Austria*, Application no. 9783/82, Judgment of 19 December 1989, Chamber, European Court of Human Rights, paras. 72–86; and *Luedicke, Belkacem and Koç* v. *Germany*, Application nos. 6210/73, 6877/75 and 7132/75, Judgment of 28 November 1978, Chamber, European Court of Human Rights, paras. 38–50.

[188] The European Convention on Consular Functions (*European Treaty Series*, No. 61) was opened for signature on 11 December 1967 and entered into force on 9 June 2011. To date, the Convention has received 5 ratifications/accessions and 4 signatures.

United Nations Office on Drugs and Crime

[Original: English]

- Article 11, commentary, page 89.

Comment: In relation to the fair treatment of alleged offenders in prison, custody or detention, the International Law Commission may also consider referring to the non-binding Standard Minimum Rules for the Treatment of Prisoners (also known as the "Nelson Mandela Rules", General Assembly resolution 70/175 of 17 December 2015, annex), including its Rule 62, and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (also known as the "Bangkok Rules"; General Assembly resolution 65/229 of 21 December 2010, annex), including its Rule 2.1. The Commission may also consider referring to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187 of 20 December 2012, annex), in particular Principles 3 and 6. The Commission may consider indicating in its commentary on Article 11 that access to legal aid should not be conditioned on the severity of the offense.

- Article 11, commentary, paragraphs (7) and (8), page 90.

Comment: The Commission may also consider referring to Economic and Social Council resolution 1998/22 of 28 July 1998 on the status of foreign citizens in criminal proceedings.

United Nations Office of the High Commissioner for Human Rights

[Original: English]

The Draft Articles do not contain any specific provision on military tribunals. Draft Article 11, paragraph 1, states that "[a]ny person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law."

United Nations human rights treaties bodies have found that a trial of a civilian in a military court may constitute a fair trial violation. The Human Rights Committee has noted that while the International Covenant on Civil and Political Rights does not prohibit the trial of civilians in military or special courts, "it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned [; ...] that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned [and that t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".[189] The Committee on Enforced Disappearances has stated that,

[189] Human Rights Committee, General comment No. 32 on International Covenant on Civil and Political Rights article 14: right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 22. In the last decade, however, the Human Rights Committee has recommended several States Parties to ensure that civilian are not tried by military courts, and that the jurisdiction of military courts does not extend to cases of human rights violations. See Human Rights Committee, Concluding observations on the third periodic report of Lebanon (CCPR/C/LBN/CO/3), paras. 43–44; Concluding observations on the fifth periodic report of Cameroon (CCPR/C/CMR/CO/5), paras. 37 (b) and 38 (d); Concluding observations on the fourth periodic report of the Democratic Republic of the Congo

"[t]aking into account the provisions of the Convention and the progressive development of international law in order to assure the consistency in the implementation of international standards, the Committee reaffirms that military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance".[190] In addition, Article 16, paragraph 2, of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance indicates that persons alleged to have committed an enforced disappearance "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts". Indeed, some national laws prohibit trying allegations of crimes against humanity before military tribunals.[191]

In his Second Report, the Special Rapporteur states that: "While such developments at the national and international levels remain ongoing, they may suggest an emerging view that the guarantee of a 'fair trial' means that a military court, tribunal, or commission should not be used to try persons alleged to have committed crimes against humanity, unless the alleged offender is a member of the military forces and the offence was committed in connection with an armed conflict" (para. 192).

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

11. Draft article 12 – Victims, witnesses and others

Committee on Enforced Disappearances

[Original: English]

[See comment above under general comments]

Council of Europe

[Original: English]

We welcome Draft Article 12, which addresses the rights of victims, witnesses and other affected persons. The protection and assistance of victims as well as reparation to them are key elements of a successful rule of law-based criminal justice response to the most serious crimes of concern to the international community. The Council of Europe has a long-standing practice and experience in this field and has created a legal corpus where the victims – and the witnesses – are placed at the very heart of the justice system. For instance, the 1983 European Convention on the

(CCPR/C/COD/CO/4), paras. 37 and 38 (e); Concluding observations on the initial report of Pakistan (CCPR/C/PAK/CO/1), paras. 23–24; Concluding observations on the fourth periodic report of Rwanda (CCPR/C/RWA/CO/4), paras. 33 and 34 (d); Concluding observations on the sixth periodic report of Chile (CCPR/C/CHL/CO/6), para. 22; Concluding observations on the fourth periodic report of Sudan (CCPR/C/SDN/CO/4), para. 19; Concluding observations on the second periodic report of Tajikistan (CCPR/C/TJK/CO/2), para. 19; Concluding observations on the fifth periodic report of Peru (CCPR/C/PER/CO/5), para. 17; and Concluding observations on the fifth periodic report of Mexico (CCPR/C/MEX/CO/5), para. 18.

[190] See the report of the Committee on Enforced Disappearances on its eighth session (A/70/56), annex III, para. 10.

[191] A 2004 report of the International Commission of Jurists acknowledges that military personnel who have committed human rights violations are often tried in military courts, but identifies a global trend towards abolition or at least reform of military courts. Reforms aim at achieving consistency with the rules of procedure used in civilian courts and at legislation barring use of military courts to try civilians). See International Commission of Jurists, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, vol. 1, Geneva, 2004, p. 160.

Compensation of Victims of Violent Crimes[192] obliges States Parties to compensate the victims of intentional and violent offences resulting in bodily injury or death. In addition, the Committee of Ministers of the Council of Europe adopted in 2005 a *Recommendation on the protection of witnesses and collaborators of justice*,[193] which provides that member States should take appropriate legislative and practical measures to ensure that witnesses and collaborators of justice may testify freely and without being subjected to any act of intimidation. Furthermore, in 2006, it adopted a *Recommendation on assistance to crime victims*[194] which sets forth principles that should guide member States when taking measures to ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights. These principles concern, *inter alia*, the role of public services, State compensation, assistance, trainings and victim support services. Moreover, several conventions concluded within the framework of the Council of Europe contain binding provisions in relation to the assistance and compensation to victims of most serious crimes such as terrorism[195] or trafficking in human beings.[196] The rights of victims of international crimes have further been addressed by the European Court of Human Rights. For instance, in the *Jelić* v. *Croatia*[197] case in 2014 the Court held that the relatives of victims of a war crime had a right to an investigation into the circumstances in which their relatives died, and a prosecution against those responsible.

Finally, we would like to draw attention to the fact that the Guidelines on the protection of victims of terrorist acts,[198] as mentioned in footnote 236 on page 16 of the Special Rapporteur's third report on crimes against humanity, have recently been revised in order to incorporate additional elements in light of the new face of terrorism. The Revised Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts[199] aim at recalling the measures to be taken by the member States in order to support and protect the fundamental rights of any person who has suffered direct physical or psychological harm as a result of a terrorist act, and, in appropriate circumstances, of their close family by incorporating the following four lines of action: implementing a general legal framework to assist victims, providing assistance to victims in legal proceedings, raising public awareness of the need for societal recognition of victims – including the role of the media –, and involving victims of terrorism in the fight against

[192] The European Convention on the Compensation of Victims of Violent Crimes (*European Treaty Series*, No. 116) was opened for signature on 24 November 1983 and entered into force on 1 February 1988. To date, the Convention has received 26 ratifications/accessions and 8 signatures.

[193] Recommendation Rec(2005)9 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice, adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies.

[194] Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies.

[195] See, Article 13 of the Council of Europe Convention on the Prevention of Terrorism (*Council of Europe Treaty Series*, No. 196). The Convention was opened for signature on 16 May 2005 and entered into force on 1 June 2007. To date, the Convention has received 39 ratifications/accessions and 9 signatures.

[196] See, Chapter III of the Council of Europe Convention on Action against Trafficking in Human Beings (*Council of Europe Treaty Series*, No. 197). The Convention was opened for signature on 16 May 2005 and entered into force on 1 February 2008. To date, the Convention has received 47 ratifications/accessions.

[197] *Jelić* v. *Croatia, Application no. 57856/11, Judgment of 12 June 2014*, First Section, European Court of Human Rights.

[198] As elaborated by the Council of Europe Directorate General of Human Rights and adopted by the Committee of Ministers of the Council of Europe on 2 March 2005.

[199] Revised Guidelines of the Committee of Ministers on the protection of victims of terrorist acts, document prepared by the Steering Committee for Human Rights (CDDH) adopted at the 127th session of the Committee of Ministers of the Council of Europe on 19 May 2017 in Nicosia (Cyprus).

terrorism.[200] It is recommended that Draft Article 12 adopt an equally holistic approach in addressing the different needs of victims of crimes.

European Union

[Original: English]

In relation to draft Article 12, the European Union notes that this draft article reflects similar provisions contained in recent international treaties regarding serious crimes.

As far as its own practice is concerned, the European Union wishes to inform the International Law Commission on relevant provisions contained in European Union law on the rights of victims of crimes, in particular those set out in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (*Official Journal of the European Union*, No. L 315, vol. 55 (14November 2012), pp. 57–73). This Directive contains substantive and detailed provisions on victim's rights in the context of criminal proceedings (e.g., right to be understood, right to receive information, right to interpretation and translation, specific participation rights in criminal proceedings, right to protection, right to legal aid, etc.).

As regards the victims' rights to obtain reparation, the European Union notes that draft Article 12, paragraph 3, provides in a comprehensive manner several forms of reparation which appear to be tailored to the specific needs of victims of crime against humanity, including restitution, which goes beyond mere compensation. Moreover, in terms of the scope of reparation, the European Union notes that draft Article 12, paragraph 3, covers both material and moral damages.

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

[See comment under general comments]

United Nations Office on Drugs and Crime

[Original: English]

- Article 12, commentary, page 92.

Comment: In the commentary, the Commission may wish to take into account the special measures for child victims or witnesses of crime. In doing so, the Commission may wish to refer to the non-binding Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex), and the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 69/194 of 18 December 2014, annex). The Commission may also wish to refer to Principles 4 and 5 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187 of December 2012, annex).

[200] Report of the Secretary General of the Council of Europe on the "Fight against violent extremism and radicalisation leading to terrorism" (CM(2016)64) presented at the 126th session of the Committee of Ministers (Sofia, 18 May 2016).

United Nations Office of the High Commissioner for Human Rights

[Original: English]

[See comment under general comments]

United Nations Working Group on Enforced or Involuntary Disappearances

[Original: English]

It would be advisable to adopt a broad definition of victim for all the crimes against humanity included in the Draft Articles, along the lines of that contained under article 24, paragraph 1, of the International Convention on the Protection of All Persons from Enforced Disappearance.

12. Draft article 13 – Extradition

Council of Europe

[Original: English]

We are pleased to note that under Draft Article 13 paragraph 2 a request for extradition based on an offence constituting a crime against humanity may not be refused on the sole ground of the alleged crime constituting a political offence, an offence connected with a political offence or an offence inspired by political motives. Article 1 of the 1975 Additional Protocol to the European Convention on Extradition[201] concluded in the framework of the Council of Europe takes a similar approach in declaring that certain crimes against humanity and war crimes shall not be considered as political offences for which extradition may be refused under Article 3 of the 1957 European Convention on Extradition.[202]

The inclusion in Draft Article 13 paragraph 9 of the possibility for States to refuse extradition in cases where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognised as impermissible under international law is to be welcomed. Article 3 paragraph 2 of the 1957 European Convention on Extradition incorporates a similar exception to the duty to extradite. The European Court of Human Rights has further held that it may be "inhuman treatment" to extradite an individual where there is good reason to believe that the extradition process is being abused by the requesting State in order to prosecute him for a political offence or even simply because of his political opinions.[203] Finally, it merits to be emphasised, as is done in paragraph (27) of the Commentary to Draft Article 13, that if a requested State does not extradite, that State is still required to submit the matter to its own prosecutorial authorities in accordance with Draft Article 10, which incorporates the principle of *aut dedere aut judicare*.

[201] The Additional Protocol to the European Convention on Extradition (*European Treaty Series*, No. 86) was opened for signature on 15 October 1975 and entered into force on 20 August 1979. To date, the Convention has received 40 ratifications and 1 signature.

[202] The European Convention on Extradition (*European Treaty Series*, No. 24) was opened for signature on 13 December 1957 and entered into force on 18 April 1960. To date, the Convention has received 50 ratifications/accessions.

[203] *Altun* v. *Germany, Application no. 10308/83, Decision of 3 May 1983*, European Commission on Human Rights.

United Nations Office on Drugs and Crime

[Original: English]

- Article 13, commentary, point (22), page 106.

Comment: When referring to United Nations Convention against Transnational Organized Crime, the Commission may wish to cite the interpretative note approved by the Ad Hoc Committee (see A/55/383/Add.1, paras. 28–35), which reads as follows: "States parties should also take into consideration the need to eliminate safe havens for offenders who commit heinous crimes in circumstances not covered by paragraph 10. Several States indicated that such cases should be reduced and several States stated that the principle of *aut dedere aut judicare* should be followed" (*Travaux préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, pp. 162–163).

13. Draft article 14 – Mutual legal assistance

Council of Europe

[Original: English]

We concur with the Commission holding in paragraph (5) of the Commentary to Draft Article 14 that in the field of mutual legal assistance detailed provisions are essential to provide States with extensive guidance. In our view Draft Article 14 combined with the applicability of the Draft Annex pursuant to Draft Article 14 paragraph 8 in cases where the States in question are not bound by a treaty of mutual legal assistance lives up to this standard of specificity. Such a detailed approach is also followed in the 1959 European Convention on Mutual Assistance in Criminal Matters[204] and its two Additional Protocols. Having been ratified/acceded to by all forty-seven member States of the Council of Europe and three non-member States this Convention has proven to be a useful tool to facilitate cooperation between States with regard to requests of mutual legal assistance.

The intention of the Commission to take account of privacy concerns in Draft Article 14 paragraph 3 (*a*) as stated in paragraph (12) of the Commentary to the said Draft Article is commendable. Similar motivation certainly lies at the heart of Paragraph 14 of the Draft Annex, which allows the requesting State to require the requested State to keep the fact and substance of the request confidential, except to the extent necessary to execute the request. In our opinion the importance of issues involving data protection could, however, equally warrant the adoption of a separate regulation on this matter - at least in the Draft Annex - as is done by Article 26 of the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.[205]

United Nations Office on Drugs and Crime

[Original: English]

- Article 14, commentary, point (5), page 111. Comment: At the time of generating the present set of comments, the parties to United Nations Convention

[204] The European Convention on Mutual Assistance in Criminal Matters (*European Treaty Series*, No. 30) was opened for signature on 20 April 1959 and entered into force on 12 June 1962.

[205] The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (*European Treaty Series*, No. 182) was opened for signature on 8 November 2001 and entered into force on 1 February 2004. To date, the Protocol has received 37 ratifications/accessions and 6 signatures.

against Transnational Organized Crime were 189, and the parties to United Nations Convention against Corruption were 186.

United Nations Office on Genocide Prevention and the Responsibility to Protect

[Original: English]

d. Cooperation with international mechanisms established by intergovernmental bodies of the United Nations: Consider including language (in draft Article 14 – Mutual legal assistance) to facilitate States cooperation with international mechanisms established by the intergovernmental bodies of the United Nations, with a mandate to conduct criminal investigations on crimes against humanity. In December 2016, the General Assembly created the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. This mechanism is mandated to conduct criminal investigations into international crimes, including crimes against humanity, committed in Syria. The Mechanism is building case files with the aim that they will be used for indictments in national or international tribunals with the relevant jurisdiction. In 2018, in its latest progress report to the General Assembly (A/73/295), the Mechanism noted that some States require legislative changes or formal frameworks in order to cooperate with the mechanism on investigations and prosecutions. In September 2018, the Human Rights Council established a similar mechanism for Myanmar. Including language in the draft Convention to facilitate this type of mutual legal assistance could encourage States to make standing provisions for such cooperation at the national level for existing or future similar mechanisms.

14. Draft annex

Council of Europe

[Original: English]

[See comment above on draft article 14]

INTERPOL

[Original: English]

The International Law Commission's initiative is timely and important. INTERPOL supports this undertaking and the current drafting of the Draft Articles. In particular, it supports the reference made to the use of INTERPOL channels to circulate, in urgent circumstances, requests for mutual legal assistance. The wording proposed is based on existing conventions, notably the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime, and the United Nations Convention against Corruption.

In that regard, it is suggested to consider introducing a broader reference to the use of INTERPOL policing capabilities. Indeed, various international and regional conventions mention the possible use of INTERPOL channels for the purpose of information exchange beyond the circulation of requests for mutual legal assistance. Some examples include:

1. **The International Convention for the Suppression of the Financing of Terrorism**, Article 18, paragraph 4:

"States Parties may exchange information through the International Criminal Police Organization (INTERPOL)."

2. **The Rome Statute of the International Criminal Court**, Article 87, paragraph 1 (b):

"When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization - INTERPOL".

3. **The European Convention on Extradition**, Article 16, paragraph 3:

"A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol)".

4. **The ECOWAS Convention on Extradition**, Article 22, paragraph 3:

"A request for provisional arrest shall be sent to the competent authorities of the requested State either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol)".

5. **The Commonwealth Scheme for the Rendition of Fugitive Offenders**, Clause 4, paragraph (1):

"Where a fugitive offender is, or is suspected of being, in or on his way to any part of the Commonwealth but no warrant has been endorsed ... , the competent judicial authority in that part of the Commonwealth may issue a provisional warrant for his arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the returnable offence of which the fugitive is accused has been an offence committed within the authority's jurisdiction and for the purposes of this paragraph information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a fugitive may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that fugitive."

Additional examples of conventions mentioning the use of INTERPOL channels can be found on the INTERPOL website (www.interpol.int/About-INTERPOL/Legal-materials/Conventions-mentioning-INTERPOL).

The use of INTERPOL channels for sending requests for provisional arrests is also referenced in the **United Nations Model Treaty on Extradition** (Article 9, paragraph 1, of the Model Treaty) and was incorporated in a number of extradition agreements, for example in the 2010 Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Democratic Republic of Algeria on Extradition. Article 8, paragraph (2), of the Convention reads as follows: "The request for provisional arrest shall be transmitted by the International Criminal Police Organization (INTERPOL), or by post, telegraph or any other means affording a record in writing."

As evidenced by the aforementioned examples, the use of the INTERPOL network and policing capabilities is especially relevant for sending requests for a provisional arrest, including through the publication of an INTERPOL Red Notice, as well as extradition requests. However, it is also noteworthy that INTERPOL channels are regularly used by member countries to exchange information related to investigations. A general reference to the use of INTERPOL channels to facilitate communication in the prevention and investigation of crimes against humanity may therefore be useful for States.

C. Comments on the final form of the draft articles

European Union

[Original: English]

[See comment under general comments]

Special procedure mandate holders (persecution)[206]

[Original: English]

[See comment on draft article 3]

Special procedure mandate holders (gender)[207]

[Original: English]

[See comment on draft article 3]

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

[Original: Spanish]

[See comment under general comments]

United Nations Office of the High Commissioner for Human Rights

[Original: English]

[See comment under general comments]

United Nations Working Group on Enforced or Involuntary Disappearances

[Original: English]

We commend the Commission's work on the Draft Articles and recognize the contribution that a future convention on this issue would make towards enhancing states efforts to address impunity for the world's worst atrocities, including enforced disappearances.

[206] See footnote 3 above for a full list of the special procedure mandate holders.

[207] *Ibid*.