

# **INTERNATIONAL LAW COMMISSION**

COMMENTARY TO THE THIRD  
REPORT ON CRIMES AGAINST  
HUMANITY

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# I. INTRODUCTION

In early 2017 the International Law Commission (ILC) Special Rapporteur on crimes against humanity, professor Sean D. Murphy, submitted, for the consideration of the ILC, his Third Report on the matter (advance copy).<sup>1</sup> This Report contains a detailed explanation of the seven new draft articles the Special Rapporteur proposes for the purposes of a potential convention on crimes against humanity (see Annex II below). These draft articles are going to be discussed by the ILC in Geneva, likely in the first week of May. So far, the ILC has provisionally approved ten draft articles for a convention on crimes against humanity.<sup>2</sup> (see Annex I below)

In 2015 Amnesty International published its first paper containing an initial set of recommendations on the matter: 'Initial Recommendations for a Convention on Crimes against Humanity'.<sup>3</sup> A year later, a second paper was made public, welcoming some proposals made by the Special Rapporteur, as well as some provisions provisionally adopted, but also raising some concerns on specific points of law.<sup>4</sup>

In this new paper, Amnesty International notes its serious concerns regarding the existing legal and practical framework for state cooperation in the investigation and prosecution of crimes against humanity, welcomes several positive provisions proposed by professor Sean D. Murphy and suggests some improvements on the draft articles proposed in the Third Report. The concerns raised and recommendations made to the ILC in this document often restate past positions of the organization on international criminal law issues, and relate to the seven new draft articles proposed by the Special Rapporteur.

# II. POSITIVE ASPECTS AND PROVISIONS IN THE THIRD REPORT

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<sup>1</sup> International Law Commission, Third Report on crimes against humanity, by Sean D. Murphy, Special Rapporteur (advance copy) (kindly shared with the organization by the author). Previous Reports are as follows: ILC, First Report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/680, 17 February 2015; ILC, Second Report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/690, 20 January 2016.

<sup>2</sup> ILC, Report on the work of the sixty-eighth session (2016), UN Doc. A/71/10, pp.242-246.

<sup>3</sup> Amnesty International, 'International Law Commission: Initial Recommendations for a Convention on Crimes against Humanity' (AI Index: IOR 40/1227/2015), 28 April 2015.

<sup>4</sup> Amnesty International, 'International Law Commission: Second Report on Crimes against Humanity: Positive Aspects and Concerns' (AI Index: IOR 40/3606/2016), 5 May 2016.

# AND THE NEW DRAFT ARTICLES, RESPECTIVELY

This year the Special Rapporteur has proposed seven new draft articles for the consideration of the ILC. Like in 2016, Amnesty International considers that several draft provisions are positive and therefore recommends that the ILC provisionally adopt them at this stage.

Among the positive provisions, the organization counts the ones on the decision to exclude 'dual criminality' as a requirement for extradition (Amnesty International considers that crimes against humanity are crimes of customary international law of universal jurisdiction which all states should prohibit under their own laws),<sup>5</sup> and the reformulation of the default rule regarding the use of the Convention as the legal basis for cooperation on extradition - thus inverting the rule contained in the model article.<sup>6</sup> Likewise, and in general, despite some concerns on specific provisions or some wordings which may be enhanced, as stated below, Amnesty International welcomes the clause on *non-refoulement* (draft Article 12); the detailed approach to the issue of mutual legal assistance (draft article 13); the provision requiring each state party to provide procedures permitting any victim to obtain reparation for crimes against humanity committed abroad (draft article 14(3)); the application of the Convention to all parts of federal states without any limitations or exceptions (draft article 16); and the draft Preamble, and believes that subject to some amendments they should be provisionally adopted by the ILC.

## III. CONCERNS ARISING FROM THE PROPOSED DRAFT ARTICLES

### 1. ON DRAFT ARTICLE 11 - EXTRADITION

#### A) NEED TO DESIGNATE APPROPRIATE AUTHORITIES

In contrast to the provision on mutual legal assistance which, in draft article 13, paragraph 10, requires the designation of a central authority to receive requests for assistance, there is no requirement in the draft article on extradition to designate a central authority. The article on extradition in the convention, draft article 11, should require designation of an appropriate authority to receive extradition requests and to implement them, or ensure that they are implemented. It would be efficient if the same

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<sup>5</sup> ILC, Third Report, paras.28-36 and 85. On Amnesty International position see: The International Criminal Court, Making the right choices, Part III, Ensuring effective state cooperation (AI Index: IOR 40/13/97), November 1997, p.45.

<sup>6</sup> ILC, Third Report, para.87. While Article 44(6)(a) of the 2003 Convention against Corruption provides that 'At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, [states shall] inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention', draft article 11(4)(a) declares that '[states shall] use the present draft articles as the legal basis for cooperation on extradition with other States, unless it informs the Secretary-General of the United Nations to the contrary at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles'.



authorities were designated both for extradition and for mutual legal assistance. Since some states are still wedded to the outdated, cumbersome and slow diplomatic channel for sending and receiving extradition requests, it will be probably necessary, as in Article 87(1)(a) of the Rome Statute, to include this method of communication as an option for such states.

However, it would be useful if the convention on crimes against humanity were to make clear that the preferred option is direct contacts between the law enforcement officials or courts of the requesting and requested states, subject to judicial review. Such direct contact ensures much speedier and more efficient extradition, as judicial review is an important safeguard to ensure that the rights of the person concerned are protected. In addition, by encouraging such direct professional communication, it may avoid political control over making and granting extradition requests, one of the most serious obstacles to extradition with respect to crimes against humanity.

**Recommendation: Draft article 11 should include a provision whereby states parties to the Convention are encouraged to designate a central law enforcement authority to receive requests for extradition and to implement them, or ensure that they are implemented.**

#### B) PROVISIONAL ARREST

The possibility of provisional arrest, pending presentation of the request, as provided in other treaties, such as Article 92 of the Rome Statute (Provisional arrest), Article 16(9) of the Convention against Transnational Organized Crime<sup>7</sup> and Article 44(10) of the Convention against Corruption<sup>8</sup>, does not appear to be expressly authorized in any of the draft articles. It may be implicit, but it would appear to be useful to provide for provisional arrest, subject to effective human rights safeguards, to ensure that suspects – for example, changing planes at an airport – do not evade arrest simply because of delays in supplying all the required documentation.

**Recommendation: Draft article 11 should include a provision whereby states parties to the Convention on crimes against humanity, in urgent cases, may request - subject to effective human rights safeguards - the provisional arrest of the person sought, and pending presentation of the request for extradition and the documents supporting the request.**

#### C) DRAFT ARTICLE 11(6) - GROUNDS UPON WHICH THE REQUESTED STATE MAY REFUSE EXTRADITION

Draft article 11(6) states that:

Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State may refuse extradition

Amnesty International has two fundamental concerns with draft article 11(6). First, it fails, through the unfortunate expression 'subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties', to address the onerous conditions often found in national law and

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<sup>7</sup> Convention against Transnational Organized Crime (adopted by resolution A/RES/55/25 of 15 November 2000; entry into force: 29 September 2003, in accordance with article 38), 2225 UNTS 209.

<sup>8</sup> Convention against Corruption (adopted on 31 October 2003; entry into force: 14 December 2005, in accordance with article 68(1)), 2249 UNTS 41.

in bilateral and multilateral treaties. Indeed, it reinforces them. Second, this paragraph legitimizes the numerous grounds for refusal of extradition often found in national law and treaties that should not apply to any crime under international law, including crimes against humanity. Such grounds for refusal of extradition that should be excluded in the Convention on crimes against humanity are the following:

- prohibition of extradition of nationals;
- *ne bis in idem* prohibitions (which should not apply when the foreign trial was a sham or unfair);
- inappropriate bars on retrospective criminal legislation (even when the conduct was considered at the time of its commission, according to the general principles of law recognized by the community of nations, a crime against humanity);
- statute of limitations;
- acceptance of foreign amnesties and other measures of impunity, like pre-conviction pardons; and
- recognition of claims by officials and former officials of foreign states to immunity with respect to crimes against humanity.

**Recommendation: Draft article 11(6) should be amended to list, as above, those impermissible grounds for refusal of extradition of persons suspected of criminal responsibility for crimes against humanity.**

D) DRAFT ARTICLE 11(11) - ABSENCE OF SEVERAL EFFECTIVE HUMAN RIGHTS SAFEGUARDS IN EXTRADITION CASES

Draft Article 11(11), based on Article 16(14) of the Transnational Organized Crime Convention and Article 44(15) of the Corruption Convention, contains one useful, but incomplete, human rights safeguard.

That paragraph provides that nothing in the treaty imposes a requirement to extradite when the requested state

[h]as substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons

This paragraph covers many of the prohibited grounds for discrimination under international law, but it would be better to use the list of grounds in Article 7(1)(h) of the Rome Statute, which defines persecution as based on 'political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognized as impermissible under international law'.

Among the other human rights safeguards which should be included in extradition (and, as noted below, in mutual legal assistance) are prohibitions on the granting of extradition or assistance when there is a risk that it would lead to the death penalty, torture and other cruel, inhuman or degrading treatment or punishment, unfair trial (not just when the trial would be on a discriminatory basis) and other human

rights violations. In addition, as the Special Rapporteur notes,<sup>9</sup> the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) contains an ampler protection of persons subject to extradition, since it adds to the list of impermissible grounds the 'membership of a particular social group'.<sup>10</sup> Such as phrase, as well as that of 'or other grounds that are universally recognized as impermissible under international law' or 'other status', as contained in the Rome Statute of the International Criminal Court,<sup>11</sup> may better protect the concerned person from potential human rights violations in the requesting state on account of that person's sexual orientation, language, beliefs, birth, etc.

**Recommendation: Draft article 11(11) should also add, as effective human rights safeguards in extradition cases, grounds like death penalty, torture and other cruel, inhuman or degrading treatment or punishment, other human rights violations, other grounds recognized as impermissible under international law, etc.**

## 2. ON DRAFT ARTICLE 12 - *NON-REFOULEMENT*

Draft article 12 provides:

No State shall expel, return (*refouler*), surrender or extradite 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

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the 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

Draft article 12, mainly based on the text of Article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CPED), must be welcomed.<sup>12</sup>

The decisive element, however, is that of change in jurisdiction, which in some cases may even occur within the same territory, such as when occupying forces hand over a person to another occupying force, or forces of the occupied state. Hence it is submitted that draft article 12 could be simplified by removing the expressions 'territory under' at para.1 and 'in the territory' at para.2.

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<sup>9</sup> ILC, Third Report, para.78.

<sup>10</sup> International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 Dec. 2006, entered into force 26 Dec. 2010), 2716 UNTS 3, Article 13(7) ('Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons').

<sup>11</sup> Rome Statute of the International Criminal Court, Articles 7(1)(h) and 21(3), respectively.

<sup>12</sup> CPED, article 16 (1. No State Party shall expel, return ("*refouler*"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law').

Nevertheless, draft article 12 could be further enhanced: *non-refoulement* should not only be limited to prohibiting extradition or other removals whenever there are substantial grounds for believing that that the person concerned would be in danger of being subjected just to a crime against humanity, but also to any other crime under international law, like genocide, war crimes, torture, enforced disappearance, or extrajudicial execution, or when the person may reasonably face other risks of serious human rights violations, application of the death penalty, trials before military courts or commissions, etc.

**Recommendation: Draft article 12 should refer more broadly to the various forms of *refoulement* and change of jurisdiction, and also make reference to additional safeguards, like the need to protect individuals against other crimes under international law or other serious human rights violations, death penalty, trials before military courts or commissions, etc. In addition, the expressions 'territory under' at para.1 and 'in the territory' at para.2 should be removed from draft article 12.**

### 3. ON DRAFT ARTICLE 13 - MUTUAL LEGAL ASSISTANCE

This section first reviews draft article 13, most of which is based in the Convention against Transnational Organized Crime and the Convention against Corruption. Then it recommends including a range of other mutual legal assistance provisions, many of which are based on provisions in these two treaties.

#### A) DRAFT ARTICLE 13(1) - GENERAL OBLIGATION

The requirement in paragraph 1 of the draft article 13, 'Mutual legal assistance', that states parties must 'afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences referred to in draft article 5 in accordance with this draft article', modelled on Article 18(1) of the Transnational Organized Crime Convention, Article 46(1) of the Corruption Convention, Article 9(1) of the Convention against Torture, Article 14(1) of the Disappearance Convention, and other international treaties, is welcome.

#### B) DRAFT ARTICLE 13(3) - SPECIFIC FORMS OF ASSISTANCE

The list of purposes for which mutual legal assistance to be afforded in paragraph 3 of the draft article, 'Mutual legal assistance', modelled on Article 18(3) of the Transnational Organized Convention and Article 46(3) of the Corruption Convention (which contains a longer list), is too limited, even with the final clause requiring states to afford "[a]ny other type of assistance that is not contrary to the domestic law of the requested State". National law in this field is often antiquated, cumbersome and slow.

Therefore, states parties should be required to take steps to eliminate obstacles in national law to assistance regarding any crime under international law, including crimes against humanity. Consideration should be given to mentioning expressly other specific forms of assistance here that are mentioned in other instruments, such as the Rome Statute. For example, the use of videoconferencing could fall within the following purposes: 'a. Taking evidence or statements from persons' and 'e. Providing information, evidentiary items and expert evaluations', it might be useful to add to each purpose the phrase, 'including through videoconferencing and other techniques'.

The draft article 11(3) would appear to require states parties to provide many of the forms of assistance listed in the more detailed Article 93 of the Rome Statute (Other forms of cooperation). There is a final catch-all category in the draft article, but it is subject to the limitation that it be 'not contrary to the domestic laws of the requested state'. Therefore, there is some merit in amending the list to include expressly such forms of assistance as:

- identification and whereabouts of persons or location of items;<sup>13</sup>
- in the 'examining objects and sites' subparagraph, draft article 11(3)(d), adding 'including the exhumation and examination of grave sites';<sup>14</sup>
- the use of videoconferencing while taking evidence from persons or for the purposes of providing information, evidentiary items and expert evaluations;

**Recommendation: Draft article 13(3) should explicitly provide for the forms of assistance outlined above and should not contain, at subparagraph k), the restrictive phrase 'that is not contrary to the domestic law of the requested State' - on the contrary, it should also require states to take steps to eliminate all obstacles in national law to assistance regarding any crimes against humanity.**

#### C) DRAFT ARTICLE 13(8) - ABSENCE OF PREJUDICE TO OTHER TREATY OBLIGATIONS

Paragraph 8 of the draft article on mutual legal assistance, based on Article 18(6) of the Transnational Organized Crime Convention and Article 46 (6) of the Corruption Convention, provides that the provisions of this draft article 'shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance'. This provision presents two problems.

First, some bilateral and multilateral treaties require requested states to refuse to grant mutual legal assistance on inappropriate grounds, such as amnesties, pardons, ne bis in idem, etc.<sup>15</sup> States parties to the Convention on crimes against humanity that have entered into such bilateral or multilateral treaties should seek to revise them and, if the other parties are parties to this Convention, then such provisions should be considered superseded by the Convention between those parties. Second, multilateral treaties sometimes require states parties to use national procedures, even though some of them are inefficient.

To some extent, these problems are addressed by paragraph 9 of the draft article on mutual legal assistance, but, as discussed below, some of these provisions are not completely satisfactory and, in any event, that paragraph only strongly encourages states parties to the Convention that are also parties to other treaties to apply these paragraphs if they would facilitate cooperation.

**Recommendation: Draft article 13(8) should encourage states parties to the Convention on crimes against humanity that have entered bilateral or multilateral treaties on mutual legal assistance to seek to revise them and, if the other parties are also parties to this Convention, then such provisions should be considered superseded by the Convention between those parties.**

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<sup>13</sup> Rome Statute, article 93(1)(a). See also International Convention for the Protection of All Persons from Enforced Disappearance, article 15.

<sup>14</sup> Rome Statute, article 93(1)(g).

<sup>15</sup> See, for example, Inter-American Convention on Extradition, adopted at Caracas, Venezuela, 25 February 1981, article 4(1) ('Extradition shall not be granted: 1. When the person sought has completed his punishment or has been granted amnesty, pardon or grace for the offense for which extradition is sought, or when he has been acquitted or the case against him for the same offense has been dismissed with prejudice').

**D) DRAFT ARTICLE 13(9) - APPLICABILITY OF SPECIFIC PROVISIONS**

Paragraph 9 of the draft article on mutual legal assistance, which is modelled on Article 18(7) of the Transnational Organized Crime Convention and Article 46(7) of the Corruption Convention, provides that states parties that are not bound by another mutual legal assistance treaty must implement paragraphs 10 to 28. As discussed below, not all of these paragraphs are fully satisfactory.

In addition, paragraph 9 provides that if a state party to the Convention on crimes against humanity is a party to another treaty, then the provisions of that other treaty – even if wholly inadequate – shall apply, unless that state agrees to apply paragraphs 10 to 28. The draft article does provide that states parties to the Convention “are strongly encouraged to apply these paragraphs if they facilitate cooperation”, but they can continue to apply ineffective provisions, if they choose to do so. At least when one state party to the Convention on crimes against humanity is requesting mutual legal assistance from another state party, the more effective provisions should govern.

**Recommendation: Draft article 13(9) should provide that despite what could be provided for by a treaty on mutual legal assistance, when one state party to the present Convention is requesting mutual legal assistance from another state party, the more effective provision should govern the issue.**

**E) DRAFT ARTICLE 13(10) - DESIGNATION OF A CENTRAL AUTHORITY**

Much of paragraph 10, based on Article 18(13) of the Transnational Organized Crime Convention and Article 46(13) of the Corruption Convention, requiring states parties to designate a central authority with the responsibility and power to receive mutual legal assistance requests and to implement them or see that they are implemented, reflects best practice. However, it does not eliminate one of the most serious obstacles to mutual legal assistance, which is that decisions whether to make or to grant requests for such assistance are often made by political officials, not professional law enforcement officials, prosecutors or judges.

Although it probably is not realistic at this stage in the development of international criminal law to expect that all states would agree to a provision requiring that the central authority be a professional law enforcement official, prosecutor or a judge, this paragraph could encourage states to do so. Similarly, since it is unlikely that all states would agree to exclude the cumbersome diplomatic channel, this paragraph could encourage them to designate such officials. Such contacts, whenever possible, should be directly between law enforcement officials, prosecutors and judges.

**Recommendation: Draft article 13(10) should encourage states parties to the Convention on crimes against humanity to designate a professional law enforcement official, prosecutor or court as the central authority for receiving requests for mutual legal assistance.**

**F) DRAFT ARTICLE 13(24) - HEARING WITNESSES AND EXPERTS BY VIDEOCONFERENCING OR HEARING IN THE REQUESTED STATE**

Paragraph 24 of the draft article on mutual legal assistance, based on Article 18(18) of the Transnational Organized Crime Convention and Article 46(18) of the Corruption Convention, provides that, “wherever possible and consistent with fundamental principles of national law”, the requested state may agree to witnesses and experts providing testimony by videoconferencing when it is not possible or desirable for the witness or expert to appear in person in the requesting state and also that states parties to the Convention may agree to having the hearing conducted by a judicial authority of the requesting state. This provision is to be welcomed.

However, given the value of having the hearing conducted by the authority which is familiar with the case, it would be better to add a sentence encouraging states parties to agree to such a procedure in all cases and to amend any national law that is currently interpreted to preclude the use of videoconferencing. There is sufficient experience in the past two decades and a half of videoconferencing, particularly in international criminal courts and tribunals, and a variety of ways have been devised to address fair trial concerns that arose in the early years of this new technique.

**Recommendation: Draft article 13(24) should encourage states parties to the Convention to amend any national law that may preclude the use of videoconferencing.**

**G) DRAFT ARTICLE 13(16), (17), (18) AND (19) - GROUNDS FOR REFUSAL AND POSTPONEMENT**

Paragraphs 16, 17, 18 and 19, based on Article 18(21), (23), (24) and (25) of the Transnational Organized Crime Convention and Article 46(21), (23), (24) and (25) of the Corruption Convention, list grounds for refusal of mutual legal assistance, require reasons being given for any refusal and permit postponement of assistance. A plausible interpretation of this list of permitted grounds for refusal is that it implicitly excludes all other grounds for refusal not expressly mentioned. However, it is not at all clear whether the grounds for refusal listed in paragraph 16 are an exclusive list, apart from express provisions in other parts of the draft article on mutual legal assistance.

Since improper grounds for refusal of assistance are one of the main problems with the current legal framework, the Convention on crimes against humanity should limit grounds for refusal to the narrowest list possible and only permit refusals when expressly listed in the Convention. Many states do not even include the grounds for refusal listed in paragraph 16(b) ('if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests') in their national law or in bilateral treaties and it is not found in many multilateral treaties, including treaties with regard to crimes under international law, such as the Geneva Conventions, Protocol I, the Convention against Torture and the Enforced Disappearance Convention. It would be counterproductive if this vague and subjective set of grounds for refusal of mutual legal assistance were included in a treaty designed to improve state cooperation with regard to crimes against the entire international community that each state has a duty to investigate and prosecute.

Similarly problematic are the two grounds for refusal based on national law in paragraph (c) ("prohibited by its national law") and (d) ("contrary to the legal system of the requested State"). If these provisions are retained, then there should be language added to paragraph 16 encouraging states parties not to assert these grounds for refusal and to amend any provisions in national law that would preclude cooperation, apart from human rights safeguards.

The requirement in paragraph 17 to provide reasons for any refusal of mutual legal assistance is essential, as it will permit the requesting state to address the concerns raised by the requested state. In addition, the requirement to provide reasons for the refusal will also assist the dispute resolution mechanisms proposed in draft article 17 (Inter-State dispute settlements) to reach a fair and informed decision whether the refusal was warranted under the Convention on crimes against humanity.

Although postponing assistance on the ground that it would interfere with a pending investigation is legitimate in certain circumstances, paragraph 18, based on Article 18(25) of the Transnational Organized Crime Convention and Article 46 (25) of the Corruption Convention, would permit a requested state to postpone providing assistance requested for an investigation of crimes against humanity of hundreds of thousands of persons on the ground that it would interfere with a pending investigation,

prosecution or judicial proceeding for any crime, including ordinary crimes such as bank robbery in a completely different situation. Since criminal investigations and prosecutions even of ordinary crimes can take many years, this provision could seriously impede an investigation, prosecution or other judicial proceeding of crimes against humanity.

One possible modification would be to provide that the investigation of the most serious crime would have precedence over the less serious crime, but require the requesting state to make every possible effort to minimize any interference with a resumption of the investigation, prosecution or judicial proceeding for the less serious crime after completion of proceedings in the requesting state. To some extent, the latter point is addressed in paragraph 19, modelled on Article 18(26) of the Transnational Organized Crime Convention and Article 46(26) of the Corruption Convention, which requires a requested state before postponing its implementation of a request to consult with the requesting state 'to consider whether assistance may be granted subject to such terms and conditions as it deems necessary'.

**Recommendation: Draft article 13(16) should either remove subparagraphs b), c) and d) or strongly encourage states parties not to assert these grounds for refusal and to amend any provisions in national law that would preclude cooperation, apart from human rights safeguards. In addition, paragraph 18 should provide that the investigation of the most serious crime would have precedence over the less serious crime, requiring at the same time the requesting state to make every possible effort to minimize any interference with a resumption of the investigation, prosecution or judicial proceeding for the less serious crime after completion of proceedings in the requesting state.**

H) DRAFT ARTICLE 13(25) - TRANSFER FOR TESTIMONY OF PERSON DETAINED IN REQUESTED STATE

The provisions regarding transfers of witnesses who are in custody serving sentences reflect an outdated approach to mutual legal assistance that should not be necessary today and, in particular, with respect to any crime under international law, including crimes against humanity. Paragraph 25, based on Article 18(10) of the Transnational Organized Crime Convention and Article 46(10) of the Corruption Convention, permits transfer of such a witness for purposes of identification, testimony or other assistance in obtaining evidence only if the person gives his or her consent and the authorities of the requested and requesting state agree, subject to any conditions agreed by the states.

First of all, it is true that courts in some states are not able to compel witnesses to testify in criminal proceedings involving ordinary crimes. However, absent a possible infringement of the right not to be compelled to testify against oneself or to confess guilt, or of a privilege (for example, a public interest privilege in protection of confidential sources), no one should be permitted to refuse to testify in a case involving genocide, crimes against humanity or war crimes. Indeed, although the Rome Statute expressly requires states parties in Article 93(1)(f) and (7) to provide for the voluntary transfer of persons in custody as witnesses, it also expressly provides in Article 64(6)(b) that 'the Trial Chamber may, as necessary... Require the attendance and testimony of witnesses... by obtaining, if necessary, the assistance of States as provided in this Statute.' Thus, the International Criminal Court can compel a person in custody in any state party to the Rome Statute to testify.

Second, the concerns about safety of the person transferred can be addressed by prohibiting transfer when there were substantial grounds for believing that the witness would be in danger of being subjected to a crime under international law or to human rights violations.

Third, any concerns about denying or making difficult access to the person's family will normally be only for the short time that the person's presence is required. Should the proceedings be lengthy, then



arrangements could be made to facilitate the travel of family members to the requesting state.

Fourth, if for some valid reason a person in custody cannot be transferred to the requesting state, for example, because of severe illness, then the witness should be compelled, subject to human rights safeguards, to testify by videoconferencing.

**Recommendation: Draft article 13(25) should provide that, in a state party to the Convention, no one should in principle be permitted to refuse to testify in a case involving crimes against humanity, subject to human rights safeguards.**

**I) DRAFT ARTICLE 13(27) AND (23)- SAFE CONDUCT WHILE IN THE REQUESTING STATE**

Paragraph 27 of the draft article on mutual legal assistance, based on Article 18(12) of the Transnational Organized Crime Convention and Article 46(12) of the Corruption Convention, provides that persons in custody transferred as witnesses to a requesting state, regardless of nationality, may not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the state to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory under the jurisdiction of the state from which he or she was transferred. To the extent that this provision prevents disguised extradition, it is to be welcomed.

However, nothing in this provision should be read to prevent the requested state or other states from prosecuting the person upon his or her return if that person's testimony or other evidence provided in the requesting state indicates that the person is responsible for crimes under international law. In other words, no grant of immunity from prosecution by the requesting state should prevent the requested state or other states from prosecuting the person. Of course, to the extent that the person cooperated with the investigation, prosecution or other proceeding, that cooperation should be taken into account in mitigation of punishment if the person is subsequently convicted of a crime against humanity or any other crime under international law.

Paragraph 23, modelled on Article 18(27) of the Transnational Organized Crime Convention and on Article 46(27) of the Corruption Convention, provides the same guarantees with regard to other witnesses and to experts, subject to certain conditions and presents the same concern.

**Recommendation: Draft article 13(27) and (23) should explicitly provide that no grant of immunity from prosecution by the requesting state should prevent the requested state or other states from prosecuting the person, upon his or her return, for crimes against humanity or other crimes under international law.**

**J) DRAFT ARTICLE 13(28) - COSTS**

The provisions for allocation of costs in paragraph 28, based on Article 18 (28) of the Transnational Organized Crime Convention, Article 46 (28) of the Corruption Convention and other mutual legal assistance treaties, appears to be equitable. However, in some cases, the requesting state may be devastated after an armed conflict. Since the investigation and prosecution of crimes under international law is a shared responsibility of the entire international community, states should be encouraged to take such differences in the resources of the requesting and requested state when agreeing on the allocation of costs. As part of the implementation of draft article 13, a voluntary fund should be established to share costs of investigations, mutual legal assistance, extraditions and, prosecutions.

**Recommendation: Draft article 13(28) should encourage states parties to bear differences in the resources of the requesting and requested state in mind when agreeing on the allocation of costs. In addition, a voluntary fund should be established to share costs of investigations, mutual legal assistance, extraditions and prosecutions.**

#### K) DRAFT ARTICLE 13(20) - PROVISION OF GOVERNMENT RECORDS

The requirement in paragraph 20(a) of the draft article on mutual legal assistance, modelled on Article 18(29)(a) of the Transnational Organized Crime Convention and Article 46(29)(a) of the Corruption Convention, requiring the requested state to provide copies of government records, documents or information in its possession that under its national law is available to the general public, will facilitate cooperation. However, paragraph 20(b), based on Article 18(29)(b) of the Transnational Organized Crime Convention and Article 46(25)(b) of the Corruption Convention, which provides that a requested state may, in its discretion, supply such material in its possession that under its national law is not available to the general public, could be improved. It should provide, instead, that the requested state must provide such information whenever sufficient guarantees of confidentiality can be assured. Article 72 (Protection of national security information) of the Rome Statute establishes a framework for providing the International Criminal Court with information that the requested state believes would prejudice its national security interests. That article, although not perfect, provides a useful model for state cooperation with regard to information not required to be disclosed to the public.

**Recommendation: Draft article 13(20) should provide that the requested state must supply materials in its possession that under its national law are not available to the general public, whenever sufficient guarantees of confidentiality can be assured by the requesting state.**

#### L) DRAFT ARTICLE 13(5) - ENCOURAGEMENT TO ENTER INTO MORE EFFECTIVE TREATIES

Paragraph 5 of the draft article on mutual legal assistance, based on Article 18(30) of the Transnational Organized Crime Convention and 46(30) of the Corruption Convention, provides that states shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of draft article 13. This provision is to be welcomed as far as it goes, but it could be significantly strengthened in a number of respects and consideration could be given to placing it at the beginning of the draft article on mutual legal assistance. The main limitation is that it does not address the existence of flawed bilateral and multilateral mutual legal assistance treaties. As recommended above, states parties to the Convention on crimes against humanity should agree to be bound by the Convention among themselves whenever it provides for more effective assistance than any bilateral or multilateral treaty. In addition, they should agree to seek to amend promptly any flawed bilateral or multilateral treaties with other states.

**Recommendation: Draft article 13(5) should provide that states parties are to be bound by the Convention among themselves, whenever it provides for more effective assistance than any bilateral or multilateral treaty. In addition, states parties should agree to seek to amend promptly any flawed bilateral or multilateral treaties with other states.**

## 4. ON DRAFT ARTICLE 14 - VICTIMS, WITNESSES AND OTHERS

Amnesty International welcomes the Special Rapporteur's proposal to include draft article 14 setting out states' obligations in relation to victims, witnesses and others, including access to justice, protection, participation, and reparation. The organization recommends a number of amendments to the draft article to ensure that victims' rights are fully recognized and ultimately realised.

#### A) DEFINITION OF VICTIMS OF CRIMES AGAINST HUMANITY

In Amnesty International's more than 50 years of experience of advocating for justice, truth and reparation for victims of crimes under international law, including crimes against humanity, the organization has consistently documented flawed national efforts to address such crimes, which have excluded many victims. In many cases, national authorities and mechanisms give preference to members of dominant or powerful groups; directly discriminate against certain communities; or ignore the needs of marginalized victims. Amnesty International urges the International Law Commission to reconsider the proposal not to include a definition victim in draft article 14 and 'to give States latitude in determining exactly which persons qualify as "victims" of a crime against humanity', which could be used to justify future injustices.

Although, as the Special Rapporteur notes, not all treaties addressing crimes under international law include a definition of victims and different approaches have been taken to recognize the rights of legal entities, over the last three decades numerous treaties, international standards, court decisions and treaty bodies have consistently stated that:

- Victims are persons who have suffered harm through acts or omissions that constitute violations of the applicable treaty or relevant body of law;
- Victims also include the immediate family or dependant of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization;
- Victims can suffer individual and/or collective harm;
- Harm includes: physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights;
- A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

**Recommendation: To ensure that all victims of crimes against humanity have access to justice, truth and reparation, draft Article 14 should define victims of crimes against humanity that, at a minimum, contains these elements.**

#### B) ARTICLE 14(1)(A) – THE RIGHT TO COMPLAIN TO THE COMPETENT AUTHORITIES

##### (i) Complaints of crimes against humanity must be investigated

Recognizing that impunity for crimes under international law in most cases stems from the initial refusal of national authorities to accept complaints or to deter them, Amnesty International welcomes the inclusion of draft Article 14(1)(a) requiring states to ensure that any individual who alleges that a person has been subjected to a crime against humanity has the right to complain to the competent authorities. However, unlike Article 12(1) of the Enforced Disappearance Convention and Article 13 of the Convention against Torture, there is no obligation for the authorities to examine the complaint. When reading draft Article 14(1)(a) with draft Article 7, it is unclear whether, or in which circumstances, a complaint entails the obligation of the state to conduct a criminal investigation. Indeed, a state acting in bad faith could simply dismiss complaints without investigation on the basis that the complainant had not established reasonable grounds to believe that the alleged acts formed part of the commission of crimes against

humanity. All of the prohibited acts in draft Article 3 amount to human rights violations and abuses that states are required under international human rights law to investigate and, where they amount to crimes under domestic or international law, to ensure those suspected of criminal responsibility are brought to justice in fair trials. Therefore, the onus should be on the state party to the Convention to examine and investigate all complaints in order to determine whether they amount to crimes against humanity.

**Recommendation: Article 14(1)(a) should be amended to impose an obligation on states to examine the complaints in order to determine, in accordance with draft Article 7, whether there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed.**

(ii) Complainants and victims have a right to information about the status of examination of a complaint and any subsequent investigation

In many situations, Amnesty International has documented national authorities accepting complaints but failing to provide victims and complainants with further information about its examination of the complaint or the results of any investigations. Such a lack of accountability of the authorities is a major obstacle to access to justice, truth and reparation. The right of victims to information about investigations into certain acts prohibited in draft Article 3 is expressly set out in Article 24(2) of the Enforced Disappearance Convention and Principle 16 of the Principles in the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.<sup>16</sup> The Committee against Torture has found that Article 12 of the Convention is violated when the failure to inform the complainant of the results of an investigation obstructs other legal processes, including private prosecutions, available to victims. The European Court of Human Rights has held that effective remedy for violations of the right to life in Article 13 of the European Convention entails providing effective access for the relatives to the investigatory procedure. Principle 6(a) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that “victims should be informed of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.” To ensure that states can be held accountable to fulfil their obligations under Article 7 and that victims have access to effective remedies, the right of victims to information regarding national authorities’ consideration of complaints should be expressly reflected in the Convention.

**Recommendation: Draft article 14(1)(a) should be further amended or an additional provision should be added to draft article 14(1) to require the state to inform victims of the progress and results of the examination of the complaint and any subsequent investigation pursuant to draft Article 7.**

#### C) DRAFT ARTICLE 14(1)(B) – PROTECTION

Amnesty International welcomes that Article 14(1)(b) recognizes the obligations of states to provide protection against ill-treatment and intimidation during investigation, prosecution, extradition and other proceedings. However, in some places the language should be amended to ensure that protection is provided to all of those who may become at risk during such proceedings and to ensure that protection measures ensure the psychological well-being, dignity and privacy of those at risk.

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<sup>16</sup> Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

The draft article currently covers 'complainants, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceedings. Victims and their relatives, who are not listed, should be expressly covered. The requirement that other persons must be participating in the proceedings to be entitled to protection should also be reconsidered, recognizing that there may be other persons, who are not relatives of the complainants, witnesses or relatives and are not directly participating in the process, who may also be targeted. The Rome Statute, for example, in relation to protection in its cases, uses a broader formulation requiring its Victims and Witnesses Unit to protect 'others who are at risk on account of testimony given by such witnesses.<sup>17</sup>

The focus of the draft on protecting against intimidation and ill-treatment should also be reviewed to ensure that the provision is not interpreted narrowly by states to only provide physical protection. The experience of international and internationalized criminal courts, as reflected in Article 68(1) of the Rome Statute, demonstrates that protection must also include broader measures to protect the psychological well-being, dignity and privacy of victims and to provide support to those at risk, including counselling and other appropriate assistance.

**Recommendation: Article 14(1)(b) should be amended to clarify states' obligations to protect all persons who become at risk on account of investigations and prosecutions of crimes against humanity and to ensure that appropriate measures are taken to protect not only the physical safety of those at risk but also their psychological well-being, dignity and privacy.**

#### D) ARTICLE 14 (2) – PARTICIPATION IN CRIMINAL PROCEEDINGS

Amnesty welcomes the proposal in draft Article 14(2) to enable victims to present their views and concerns to be considered at appropriate stages of criminal proceedings, reflecting the growing practice of victim participation in many national jurisdictions (both common law and civil law) and in international and internationalized criminal courts. Such systems are extremely important to ensure victims have effective access to the justice process and to benefit from engaging in it, if they wish. In a number of cases before the International Criminal Court, judges have opined that when managed effectively victim participation, including large numbers of victims, can be conducted without undermining the rights of the accused and that victims views and concerns can make an important contribution to the process.

As recognized in the Special Rapporteur's Report and the draft article, states take very different approaches to victim participation in criminal proceedings, therefore the draft article needs to be drafted carefully so as not to establish a barrier to ratification. But at the same time, it should promote best practice where possible. Amnesty International makes two recommendations to amend the current draft to achieve this.

Firstly, to ensure that victim participation is effective, as much guidance should be provided as to when they should be permitted to present their views and concerns. Otherwise, victims may be restricted to commenting on matters that they have no interest in which would undermine the purpose of the participation. Amnesty International notes that the current text, which draws significantly from Article 68(3) of the Rome Statute, excludes the proviso 'where the personal interests of victims are affected',

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<sup>17</sup> Rome Statute of the International Criminal Court, Article 43(6).

which could be particularly useful in guiding national courts and help safeguard the meaningfulness of the process for victims.

Secondly, Amnesty International notes that the draft article has removed references in Article 68(3) to legal representation which will be very important to ensure that the views and concerns of large groups of victims, which will be common in crimes against humanity cases, can be presented both effectively and efficiently.

**Recommendation: Article 14(2) should clarify that victims should be able to present their views and concerns where their personal interests are affected and that victims should be provided with legal representation where appropriate.**

#### E) DRAFT ARTICLE 14(3) - REPARATION

All victims of crimes against humanity have a right to full, effective and prompt reparation to address the harm they have suffered. Amnesty International therefore welcomes that draft article 14(3) focusses on the right to reparation. However, the ILC should adopt three amendments to the current text to ensure that it is consistent with states obligations, including under international human rights law and international humanitarian law.

Firstly, the text should further define the scope and extent of reparation that victims have a right to obtain. This is particularly important as in many contexts, victims of crimes under international law complain that reparation measures provided have been ineffective in addressing the harm they have suffered. At present, the text only emphasises that “victims of a crime against humanity have the right to obtain reparation.” Other treaties and standards provide further clarify the extent of states obligations to provide reparation. In particular, the UN Basic Principles and Guidelines on the Right to a Remedy emphasises that victims have a right to “adequate, effective and prompt reparation” and “full and effective reparation”. The Convention on Enforced Disappearance provides that victims have a right to prompt, fair and adequate compensation (which is a form of reparation). The Convention against Torture also provides for the right to fair and adequate compensation. Article 14(3) should as far as possible clarify the extent of states parties’ obligations.

Secondly, although the draft Article importantly lists the five recognized forms of reparation: restitution; compensation; rehabilitation; satisfaction; guarantees of non-repetition; the requirement that reparation should consist “of one or more” of the forms could be used by states to justify ineffective measures to address the harm suffered by victims. Crimes under international law in most cases results in complex harms to victims that require a range of reparative measures. Applying a single form of reparation is unlikely to be effective. For example, as the Committee on Torture notes in General Comment No.3 “monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment”.<sup>18</sup> Other standards, such as the UN Basic Principles and Guidelines on the Right to a Remedy, state the obligation is to provide full and effective reparation ‘which include the following forms’.

Thirdly, the draft article should recognize that crimes against humanity often involves large numbers of victims and that, in practice, many states have established reparation programmes, based on legislative

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<sup>18</sup> General Comment No.3 of the Committee against Torture, Implementation of article 14 by States parties, CAT/C/GC/3, 19 November 2012, para.9.

and administrative measures, to implement their obligations. Such mechanisms are encouraged in international standards, including Article 32 of the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity.<sup>19</sup> Indeed, when such mechanisms are established effectively, including in consultation with victims, they may result in more expeditious effective reparation measures for victims than if they sought reparation through the courts.

**Recommendation: Draft article 14(3) should be amended to recognize that victims of crimes against humanity have a right to “prompt, full and effective” reparation; that multiple measures drawing from all forms of reparation will be required to address the harm suffered by victims; and that, in addition to ensuring that victims can obtain reparation in states’ legal system, states should also establish reparation programs to meet their obligations.**

#### F) THE RIGHT TO TRUTH

The right of victims and their families to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate is currently not addressed in draft Article 14 or elsewhere in the draft Convention. Although the right to truth is a form of reparation (satisfaction), there is a strong legal and purposive basis for the ILC to consider including a separate provision in draft article 14 of the Convention expressly highlighting states’ obligations. The right of victims to know the truth about serious human rights violations is reflected in the International Convention for the Protection of All Persons from Enforced Disappearance, numerous human rights standards, United Nations General Assembly and Human Rights Council resolutions and decisions of regional human rights bodies and courts as well as national courts.

Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance states '[e]ach 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.'

Principle 4 of the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity states '[i]rrespective 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.' In more than 40 countries in recent decades, truth commissions have been established in response to serious human rights violations, including crimes against humanity. Establishing the truth about crimes against humanity is particularly important given that widespread or systematic attacks against civilian populations often involve spreading misinformation that promotes or seeks to justify discrimination against and the targeting of victims. The extent of the crimes is often concealed and contested. The truth about what has happened to the disappeared and the missing is concealed. Indeed, the Inter-American Commission has emphasised that the right extends to society as a whole which 'has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetitions of such acts in the future.' The Updated Set of Principles also states: 'full and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations.'

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<sup>19</sup> E/CN.4/2005/102/Add.1, 8 February 2005.

**Recommendation: A new provision should be included in draft article 14 setting out states obligations to ensure the right to truth of victims of crimes against humanity and their families.**

## 5. ON DRAFT ARTICLE 15 - RELATIONSHIP TO COMPETENT INTERNATIONAL CRIMINAL TRIBUNALS

Aside from the question of the definition of the crime of persecution,<sup>20</sup> there does not seem so far to be any conflicts between the obligations of states under the Convention and the Rome Statute. However, as the Special Rapporteur explains in the Third Report 'there would appear to be value in expressly addressing an unforeseen situation where a conflict might arise'.<sup>21</sup> To that end, the Special Rapporteur has proposed draft article 15, which provides:

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

Amnesty International believes that draft article 15 is on the whole progressive, since it solves in the right direction the question of a potential conflict between the rights and obligations of states under the Convention and the rights and obligations of states under a treaty establishing an international criminal tribunal which, according to the Vienna Convention on the Law of Treaties, may depend at first on which treaty is later-in-time.<sup>22</sup>

However, draft article 15 may be strengthened. The wording of the draft provision, as it is, may allow a state party to the Convention on crimes against humanity to be relieved from some stringent obligations under the Treaty by adhering to a treaty establishing, for example, a regional criminal court whose provisions may collide with fundamental principles of international law or basic human rights.<sup>23</sup> To that end the addition of an expression, for example, in the sense that such an international criminal court must have been established in full accordance with fundamental principles of international law or in agreement with the general principles of law recognized by the community of nations would be

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<sup>20</sup> The definition of the crime against humanity of persecution under the Rome Statute (Article 7(1)(h)) and in Article 3 of the draft Convention, differs. The new definition, as provisionally adopted, restricts persecution to certain acts committed in connection with a crime against humanity ('in this paragraph'), or '[i]n connection with the crime of genocide or war crimes' and, therefore, to the exclusion of any possible connection with the crime of aggression, unlike under the Rome Statute. As such, the indispensable link for persecution to another crime within the jurisdiction of the International Criminal Court, that is, genocide, crimes against humanity, war crimes or aggression (once this crime is accepted as falling within the competence of the Court), is scaled down to the first three categories of crimes.

<sup>21</sup> *Third Report*, para.205.

<sup>22</sup> Vienna Convention on the Law of Treaties (adopted on 22 May 1969; entry into force: 27 January 1980, in accordance with article 84(19)), 1135 UNTS 331.

<sup>23</sup>As an example, Amnesty International has publicly expressed several concerns regarding the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) which, if it comes into force, will provide the African Court of Justice and Human Rights (ACJHR) with jurisdiction to try 14 crimes, including genocide, crimes against humanity, war crimes, and aggression and, therefore, may become a sort of international criminal tribunal to some extent. See: Amnesty International, 'Malabo Protocol: legal and institutional implications of the merged and expanded African Court', AFR 01/3063/2016, 2016.



welcomed.

**Recommendation: Draft article 15 should be amended so as to state that in the event of a conflict between the rights or obligations of a state under the Convention and its rights or obligations under the constitutive instrument of a competent international criminal tribunal established in full agreement with the general principles of law recognized by the community of nations and which complies with international human rights law and the spirit of the Rome Statute, the latter shall prevail.**

## 6. ON DRAFT ARTICLE 16 - FEDERAL STATES OBLIGATIONS

### A) DRAFT ARTICLE 16

Draft article 16 provides:

The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions

Draft article 16, inspired into Article 29 of the Vienna Convention on the Law of Treaties (VCLT),<sup>24</sup> and which reflects customary international law,<sup>25</sup> is to be welcomed. In addition, as the Special Rapporteur explains in the Third Report,<sup>26</sup> similar provisions are contained in the 1966 International Covenant on Civil and Political Rights, the 1989 International Covenant on Civil and Political Rights Second Optional Protocol, aiming at the Abolition of the Death Penalty, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

**Recommendation: the ILC should provisionally adopt draft article 16.**

### B) RESERVATIONS TO ARTICLE 16

The language contained at paragraph 214 of the Third Report suggesting that the clause on federal states obligations may be subject to reservations or declarations (amounting to reservations) by states and, if that happens, states 'may react by accepting or rejecting such reservations or declarations', is a matter of serious concern for Amnesty International. The organization has explained in the past why the VCLT system of objections to reservations is inadequate in the field of human rights or international criminal law,<sup>27</sup> which

are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality,

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<sup>24</sup> VCLT, Article 29 (Territorial scope of treaties) ('Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory').

<sup>25</sup> S. Karagiannis, in: O. Corten et P. Klein (ed.), *Les Conventions de Vienne sur le droit des traités* (Bruylant, 2006), Article 29, pp.1196-1197.

<sup>26</sup> *Third Report*, para.216.

<sup>27</sup> Amnesty International, 'International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute' (AI Index: IOR 40/032/2005), November 2005, p.13.

both against the State of their nationality and all other contracting States<sup>28</sup>

Likewise, as the ILC itself has observed '[t]here is well-established practice in this area: there are more reservations to human rights treaties and codification treaties than to any other type of treaty'.<sup>29</sup>

In full accordance with the Rome Statute, and as extensively explained before,<sup>30</sup> Amnesty International supports a total ban on reservations in the Convention on crimes against humanity.

**Recommendation: The Convention on crimes against humanity should prohibit any reservations to its text.**

## 7. ON THE DRAFT PREAMBLE

The seven draft paragraphs for the Preamble of the Convention on crimes against humanity are inspired into the Preamble of the Rome Statute of the International Criminal Court and are to be welcomed. There are, however, some provisions which, if incorporated, may also stress some other core elements of the Convention and, therefore, improve the Preamble.

First, the Preamble of the Convention on crimes against humanity does not make any reference to the Rome Statute of the International Criminal Court – the first conventional instrument after the 1946 Charter of the Nuremberg International Military Tribunal (which was an annex to the London Agreement of August 8th 1945), where crimes against humanity were first defined. It may be advisable to include a new paragraph which, for example, bears in mind the provisions of the Rome Statute of the International Criminal Court.

Second, the Preamble may contain a provision, adapted, like the one in the International Convention for the Protection of All Persons from Enforced Disappearance, which recalls the fact that no person shall 'be subjected to enforced disappearance' and also recalling the 'right of victims to justice and to reparation'.

Third, the Convention, like the International Convention for the Protection of All Persons from Enforced Disappearance, may affirm 'the right of any victim to know the truth' about the crime and the right to freedom to seek, receive and impart information to this end.

**Recommendation: The Preamble of the Convention on crimes against humanity should include an explicit references to the Rome Statute of the International Criminal Court, and to the right of victims to justice, truth and reparation.**

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<sup>28</sup> Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, 24 September 1982, para.29.

<sup>29</sup> Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011), A/66/10/Add.1, p.373.

<sup>30</sup> See Amnesty International, 'International Law Commission: Initial Recommendations for a Convention on Crimes against Humanity', 27-29.

## IV. RECOMMENDATIONS

Amnesty International makes the following recommendations on the draft articles and Preamble proposed in the Third Report on crimes against humanity:

### On draft article 11

- Draft article 11 should include a provision whereby states parties to the Convention are encouraged to designate a central law enforcement authority to receive requests for extradition and to implement them, or ensure that they are implemented.
- Draft article 11 should include a provision whereby states parties to the Convention on crimes against humanity, in urgent cases, may request - subject to effective human rights safeguards - the provisional arrest of the person sought, and pending presentation of the request for extradition and the documents supporting the request.
- Draft article 11(6) should be amended to list, as above, those impermissible grounds for refusal of extradition of persons suspected of criminal responsibility for crimes against humanity.
- Draft article 11(11) should also add, as effective human rights safeguards in extradition cases, grounds like death penalty, torture and other cruel, inhuman or degrading treatment or punishment, other human rights violations, other grounds recognized as impermissible under international law, etc.

### On draft article 12

- Draft article 12 should refer more broadly to the various forms of refoulement and change of jurisdiction, and also make reference to additional safeguards, like the need to protect individuals against other crimes under international law or other serious human rights violations, death penalty, trials before military courts or commissions, etc. In addition, the expressions 'territory under' at para.1 and 'in the territory' at para.2 should be removed from draft article 12.

### On draft article 13

- Draft article 13(3) should explicitly provide for the forms of assistance outlined above and should not contain, at subparagraph k), the restrictive phrase 'that is not contrary to the domestic law of the requested State' - on the contrary, it should also require states to take steps to eliminate all obstacles in national law to assistance regarding any crimes against humanity.
- Draft article 13(8) should encourage states parties to the Convention on crimes against humanity that have entered bilateral or multilateral treaties on mutual legal assistance to seek to revise them and, if the other parties are also parties to this Convention, then such provisions should be considered superseded by the Convention between those parties.

- Draft article 13(9) should provide that despite what could be provided for by a treaty on mutual legal assistance, when one state party to the present Convention is requesting mutual legal assistance from another state party, the more effective provision should govern the issue.
- Draft article 13(10) should encourage states parties to the Convention on crimes against humanity to designate a professional law enforcement official, prosecutor or court as the central authority for receiving requests for mutual legal assistance.
- Draft article 13(24) should encourage states parties to the Convention to amend any national law that may preclude the use of videoconferencing.
- Draft article 13(16) should either remove subparagraphs b), c) and d) or strongly encourage states parties not to assert these grounds for refusal and to amend any provisions in national law that would preclude cooperation, apart from human rights safeguards. In addition, paragraph 18 should provide that the investigation of the most serious crime would have precedence over the less serious crime, requiring at the same time the requesting state to make every possible effort to minimize any interference with a resumption of the investigation, prosecution or judicial proceeding for the less serious crime after completion of proceedings in the requesting state.
- Draft article 13(25) should provide that, in a state party to the Convention, no one should in principle be permitted to refuse to testify in a case involving crimes against humanity, subject to human rights safeguards.
- Draft article 13(27) and (23) should explicitly provide that no grant of immunity from prosecution by the requesting state should prevent the requested state or other states from prosecuting the person, upon his or her return, for crimes against humanity or other crimes under international law.
- Draft article 13(28) should encourage states parties to bear differences in the resources of the requesting and requested state in mind when agreeing on the allocation of costs. In addition, a voluntary fund should be established to share costs of investigations, mutual legal assistance, extraditions and prosecutions.
- Draft article 13(20) should provide that the requested state must supply materials in its possession that under its national law are not available to the general public, whenever sufficient guarantees of confidentiality can be assured by the requesting state.
- Draft article 13(5) should provide that states parties are to be bound by the Convention among themselves, whenever it provides for more effective assistance than any bilateral or multilateral treaty. In addition, states parties should agree to seek to amend promptly any flawed bilateral or multilateral treaties with other states.

#### On draft article 14

- To ensure that all victims of crimes against humanity have access to justice, truth and reparation, draft Article 14 should define victims of crimes against humanity that, at a

minimum, contains these elements.

- Article 14(1)(a) should be amended to impose an obligation on states to examine the complaints in order to determine, in accordance with draft Article 7, whether there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed.
- Draft article 14(1)(a) should be further amended or an additional provision should be added to draft article 14(1) to require the state to inform victims of the progress and results of the examination of the complaint and any subsequent investigation pursuant to draft Article 7.
- Article 14(1)(b) should be amended to clarify states' obligations to protect all persons who become at risk on account of investigations and prosecutions of crimes against humanity and to ensure that appropriate measures are taken to protect not only the physical safety of those at risk but also their psychological well-being, dignity and privacy.
- Article 14(2) should clarify that victims should be able to present their views and concerns where their personal interests are affected and that victims should be provided with legal representation where appropriate.
- Draft article 14(3) should be amended to recognize that victims of crimes against humanity have a right to "prompt, full and effective" reparation; that multiple measures drawing from all forms of reparation will be required to address the harm suffered by victims; and that, in addition to ensuring that victims can obtain reparation in states' legal system, states should also establish reparation programs to meet their obligations.
- A new provision should be included in draft article 14 setting out states obligations to ensure the right to truth of victims of crimes against humanity and their families.

#### On draft article 15

- Draft article 15 should be amended so as to state that in the event of a conflict between the rights or obligations of a state under the Convention and its rights or obligations under the constitutive instrument of a competent international criminal tribunal established in full agreement with the general principles of law recognized by the community of nations and which complies with international human rights law and the spirit of the Rome Statute, the latter shall prevail.

#### On draft article 16

- The ILC should provisionally adopt draft article 16.
- The Convention on crimes against humanity should prohibit any reservations to its text.

#### On the draft Preamble

- The Preamble of the Convention on crimes against humanity should include an explicit references to the Rome Statute of the International Criminal Court, and to the right of victims

to justice, truth and reparation.

# **ANNEX I. TEXT OF THE DRAFT ARTICLES ON CRIMES AGAINST HUMANITY PROVISIONALLY ADOPTED SO FAR BY THE INTERNATIONAL LAW COMMISSION**

## **ARTICLE 1 SCOPE**

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

## **ARTICLE 2 GENERAL OBLIGATION**

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

## **ARTICLE 3 DEFINITION OF CRIMES AGAINST HUMANITY**

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender 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;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.



3. 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.

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

#### ARTICLE 4 OBLIGATION OF PREVENTION

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

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

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

2. 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.

The placement of this paragraph will be addressed at a further stage.

#### ARTICLE 5 CRIMINALIZATION UNDER NATIONAL LAW

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

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

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

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

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

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

## ARTICLE 6 ESTABLISHMENT OF NATIONAL JURISDICTION

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in

accordance with its national law.

## ARTICLE 7 INVESTIGATION

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

## ARTICLE 8 PRELIMINARY MEASURES WHEN AN ALLEGED OFFENDER IS PRESENT

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

## ARTICLE 9 *AUT DEDERE AUT JUDICARE*

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.

## ARTICLE 10 FAIR TREATMENT OF THE ALLEGED OFFENDER

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 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.

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

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

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

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

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



# ANNEX II. DRAFT ARTICLES AND PREAMBLE PROPOSED IN THE THIRD REPORT

## DRAFT ARTICLE 11. EXTRADITION

1. Each of the offences referred to in draft article 5 shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. For the purposes of extradition between States, an offence referred to in draft article 5 shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.
3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence referred to in draft article 5.
4. A State that makes extradition conditional on the existence of a treaty shall:
  - (a) use the present draft articles as the legal basis for cooperation on extradition with other States, unless it informs the Secretary-General of the United Nations to the contrary at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles; and
  - (b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States to the present draft articles in order to implement this draft article.
5. States that do not make extradition conditional on the existence of a treaty shall recognize offences to which this draft article applies as extraditable offences between themselves.
6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State may refuse extradition.
7. 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 5.
8. If necessary, the offences set forth in draft article 5 shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 6, paragraph 1.

9. Whenever a State is permitted under its national law to extradite or otherwise surrender one of its nationals only upon condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State and the State seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in draft article 9.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons.

12. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

13. States shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

## DRAFT ARTICLE 12. *NON-REFOULEMENT*

1. No State shall expel, return (*refouler*), surrender or extradite 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.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the 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.

## DRAFT ARTICLE 13. MUTUAL LEGAL ASSISTANCE

### General cooperation

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences referred to in draft article 5 in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 5, paragraph 7, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

- (a) taking evidence or statements from persons;

- (b) effecting service of judicial documents;
- (c) executing searches and seizures;
- (d) examining objects and sites;
- (e) providing information, evidentiary items and expert evaluations;
- (f) providing originals or certified copies of relevant documents and records;
- (g) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) facilitating the voluntary appearance of persons in the requesting State; or
- (k) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this draft article.

Transmission of information without a prior request

6. Without prejudice to national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The transmission of information pursuant to paragraph 6 of this draft article shall be without prejudice to investigations, prosecutions and judicial proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State shall notify the transmitting State prior to the disclosure and, if so requested, consult with the transmitting State. If, in an exceptional case, advance notice is not possible, the receiving State shall inform the transmitting State of the disclosure without delay.

Relationship to treaties on mutual legal assistance between the States concerned

8. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

9. Paragraphs 10 to 28 of this draft article shall apply to requests made pursuant to this article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the

provisions of that treaty shall apply instead, unless the States agree to apply paragraphs 10 to 28 of this draft article in lieu thereof. States are strongly encouraged to apply those paragraphs if they facilitate cooperation.

Designation of a central authority

10. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

11. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State at the time it deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

12. A request for mutual legal assistance shall contain:

- (a) the identity of the authority making the request;
- (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;
- (e) where possible, the identity, location and nationality of any person concerned; and
- (f) the purpose for which the evidence, information or action is sought.

13. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.



Response to the request by the requested State

14. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

15. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

16. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft article;

(b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

17. Reasons shall be given for any refusal of mutual legal assistance.

18. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

19. Before refusing a request pursuant to paragraph 16 of this draft article or postponing its execution pursuant to paragraph 18 of this draft article, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

20. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

21. The requesting State shall not transmit or use information or evidence furnished by the requested State for

investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

22. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

23. Without prejudice to the application of paragraph 27 of this draft article, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

24. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in requested State

25. A person who is being detained or is serving a sentence in the territory of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences referred to in draft article 5, may be transferred if the following conditions are met:

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

26. For the purposes of paragraph 25 of this draft article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) The person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

27. Unless the State from which a person is to be transferred in accordance with paragraphs 25 and 26 of this draft article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

#### Costs

28. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

### **DRAFT ARTICLE 14. VICTIMS, WITNESSES AND OTHERS**

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

(a) any individual who alleges that a person has been subjected to a crime against humanity has the right to complain to the competent authorities; and

(b) complainants, 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. These measures shall be without prejudice to the rights of the alleged offender referred to in draft article 10.

2. Each State shall, subject to 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 10.

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, on an individual or collective basis, consisting of one or more of the following forms: restitution; compensation; rehabilitation; satisfaction; guarantees of non-repetition.

### **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.

## DRAFT ARTICLE 16. FEDERAL STATE OBLIGATIONS

The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions.

## DRAFT ARTICLE 17. INTER-STATE DISPUTE SETTLEMENT

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiation.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States, be submitted to arbitration. If, six months after the date of the request for arbitration, those States are unable to agree on the organization of the arbitration, any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State may, at the time of signature, ratification, acceptance or approval of or accession to the present draft articles, declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

## DRAFT PREAMBLE

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that such crimes against humanity threaten the peace, security and well-being of the world,

Affirming that crimes against humanity, one of the most serious crimes of concern to the international community as a whole, must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

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,

Emphasizing in this connection that nothing in the present draft articles shall be taken as authorizing any State to intervene in an armed conflict or in the internal affairs of any other State,

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