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Fourth report on crimes against humanity

By Sean D. Murphy, Special Rapporteur*

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Introduction

A. Work to date on this topic

1. At its sixty-sixth session in 2014, the International Law Commission placed the topic “Crimes against humanity” on its current programme of work and appointed a Special Rapporteur.¹ The General Assembly subsequently took note of the decision of the Commission.²

2. At its sixty-seventh session in 2015, the Commission held a general debate concerning the Special Rapporteur’s first report³ and provisionally adopted four draft articles with commentaries.⁴ At its sixty-eighth session in 2016, the Commission held a general debate on the Special Rapporteur’s second report⁵ and provisionally adopted six additional draft articles with commentaries.⁶

3. At its sixty-ninth session in 2017, the Commission considered a memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the Commission’s work.⁷ Further, the Commission held a general debate on the Special Rapporteur’s third report⁸ and adopted, on first reading, a complete set of draft articles on crimes against humanity, comprised of a draft preamble, fifteen draft articles and a draft annex, with commentaries.⁹ The Commission decided to transmit the draft articles through the Secretary-General to States, international organizations and others for comments and observations, with the request that they be submitted to the Secretary-General by 1 December 2018.¹⁰

4. During the debate on the annual report of the Commission in the Sixth Committee in 2017, 52 States (including presentations on behalf of the Caribbean Community (CARICOM), on behalf of the Community of Latin American and Caribbean States (CELAC) and on behalf of the Nordic countries) made observations on this topic.¹¹ Observations were also made by the Council of Europe. During the

¹ See the report of the Commission on the work of its sixty-sixth session, *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10 (A/69/10)*, para. 266.

² General Assembly resolution 69/118 of 10 December 2014, para. 7.

³ First report of the Special Rapporteur on crimes against humanity (A/CN.4/680 and Corr.1).

⁴ See the report of the Commission on the work of its sixty-seventh session, *Official Records of the General Assembly, Seventieth session, Supplement No. 10 (A/70/10)*, paras. 110–117.

⁵ Second report of the Special Rapporteur on crimes against humanity (A/CN.4/690).

⁶ See the report of the Commission on the work of its sixty-eighth session, *Official Records of the General Assembly, Seventy-first session, Supplement No. 10 (A/71/10)*, paras. 79–85.

⁷ Memorandum by the Secretariat on crimes against humanity: information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission (A/CN.4/698).

⁸ Third report of the Special Rapporteur on crimes against humanity (A/CN.4/704).

⁹ See the report of the Commission on the work of its sixty-ninth session, *Official Records of the General Assembly, Seventy-first session, Supplement No. 10 (A/72/10)*, paras. 35–46.

¹⁰ *Ibid.*, para. 43.

¹¹ Presentations in 2017 to the Sixth Committee on this topic were made by: Algeria; Argentina; Australia; Austria; Belarus; Brazil; Bulgaria; Chile; China; Croatia; Cuba; the Czech Republic; El Salvador; Estonia; France; Greece; Hungary; Indonesia; the Islamic Republic of Iran; Ireland; Israel; Italy; India; Japan; Jordan; Malawi; Mexico; Mozambique; the Netherlands; New Zealand; Paraguay; Peru (on the behalf of CELAC); Poland; Portugal; the Republic of Korea; Romania; the Russian Federation; Singapore; Slovakia; Slovenia; South Africa; Spain; Sudan; Sweden (on behalf of the Nordic countries); Switzerland; Thailand; Trinidad and Tobago (on behalf of CARICOM); Turkey; Ukraine; the United Kingdom; the United States of America; and Viet Nam.

debate on the annual report of the Commission in the Sixth Committee in 2018, the Holy See made observations on this topic.¹²

5. As of 15 February 2019, written comments upon this topic have been received from 38 States: Argentina; Australia; Austria; Belarus; Belgium; Bosnia and Herzegovina; Brazil; Canada; Chile; Costa Rica; Cuba; the Czech Republic; El Salvador; Estonia; France; Germany; Greece; Israel; Japan; Liechtenstein; Malta; Morocco; the Netherlands; New Zealand; Panama; Peru; Portugal; Sierra Leone; Singapore; Sweden (on behalf of the five Nordic countries: Denmark, Finland, Iceland, Norway and Sweden); Switzerland; Ukraine; the United Kingdom of Great Britain and Northern Ireland; and Uruguay.¹³

6. As of 15 February 2019, written comments upon this topic also have been received from seven international organizations (or offices thereof): the Council of Europe; the European Union; the International Criminal Police Organization (INTERPOL); the International Organization for Migration (IOM); the Office of the United Nations High Commissioner for Human Rights (OHCHR); the United Nations Office on Drugs and Crime (UNODC); and the United Nations Office on Genocide Prevention and the Responsibility to Protect. In addition, comments were received from: the Committee on Enforced Disappearances; a group of 20 United Nations Human Rights Council special procedures mandate holders;¹⁴ a group of 24 United Nations Human Rights Council special procedures mandate holders;¹⁵ the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and the United Nations Working Group on Enforced or Involuntary Disappearances.¹⁶

7. Views on this topic were also received as of 15 February 2019 from or on behalf of approximately 700 non-governmental organizations (NGOs) or individuals.¹⁷

¹² The Holy See, *Official Records of the General Assembly, Seventy-third session, Sixth Committee, 28th meeting (A/C.6/73/SR.28)*, paras. 23–25.

¹³ The comments and observations that have been received from States in response to the Commission's request in 2017 are reproduced and organized thematically in chapter II of the document entitled "Crimes against humanity: Comments and observations received from Governments, international organizations and others" (A/CN.4/726). Such comments and observations from States are referred to in the present report in the following form: "Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), [chapter], [name of State]." Previous comments and observations made orally in the Sixth Committee of the General Assembly by States are quoted from the respective summary records of the relevant meetings in the following form: [Name of State], [Title of summary record] (A/C.6/XX/SR.YY), para. ZZ). Any written comments received after the date of submission of the present report will also be considered by the Commission during its seventy-first session.

¹⁴ Identified in footnote 132 below.

¹⁵ Identified in footnote 200 below.

¹⁶ Such comments and observations are also reproduced and organized thematically in chapter III of the document entitled "Crimes against humanity: Comments and observations received from Governments, international organizations and others" (A/CN.4/726), and are referred to in the present report in the following form: "Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), [chapter], [name of international organization/other]."

¹⁷ In addition to those referred to elsewhere in this report, views from non-governmental organizations or individuals were received from: American University War Crimes Research Office, Letter to the United Nations Legal Counsel (1 December 2018); O. Bekou, University of Nottingham, Letter to the Special Rapporteur (1 December 2018); Cardozo Law Institute in Holocaust and Human Rights, Letter to the United Nations (30 November 2018); Centre de recherche sur l'environnement, la démocratie et les droits de l'homme (CREDDHO), E-mail to the Director of the United Nations Codification Division (28 November 2018); Comisión de Derechos Humanos (COMISEDH), Letter to the Director of the United Nations Codification Division (30 November 2018); C. Ferstman, University of Essex, and M. Lawry-White,

Those views have been carefully reviewed by the Special Rapporteur and some are referred to in the course of this report. Further, various writings have analysed or referred to the draft articles since their adoption in 2017.¹⁸

B. Purpose and structure of the present report

8. The purpose of the present report is primarily to review the comments and observations made by States, international organizations and others since the adoption, on first reading in 2017, of the complete set of draft articles on crimes against humanity. Attention is also paid to comments and observations received prior to the adoption on first reading, where such comments appear to remain pertinent to the current text.

9. For most of the text of the draft articles, the comments and observations have either supported or not addressed the text. Yet the comments and observations have also criticized and called for changes to some provisions of the draft articles and, in some instances, for additional draft articles. This report analyses all such comments and observations, assesses whether such changes to the existing text are warranted and, if so, makes proposals for changes.

10. Chapter I of this report begins with a discussion of general comments and observations received with respect to the topic. Thereafter, a series of subsections proceed through the various components of the draft articles (the draft preamble, each of the draft articles and the draft annex), providing in each instance: (a) the text adopted at first reading; (b) comments and observations received with respect to that text; and (c) the Special Rapporteur's recommendation as to whether, in light of those comments, any changes should be made either to the draft articles or to the Commission's commentary.

11. Chapter II of this report addresses possible additional draft articles prompted by some of the comments received.

12. Chapter III of this report discusses an initiative underway sponsored by several States to develop a new convention that would address not just crimes against humanity, but also genocide and war crimes. Further, this chapter reflects on the

Debevoise and Plimpton LLP, *Fostering Victims' Rights in the Proposed Crimes Against Humanity Convention: Comments to the International Law Commission* (March 2018); R. Morello, International Criminal Court, and L. Pezzano, Universidad de Ciencias Empresariales y Sociales (Argentina), "Recommendations for the draft articles for a convention on crimes against humanity" (November 2018); The Peace and Justice Initiative, "Crimes against humanity convention: submission on speech crimes" (1 December 2018); People for Equality and Relief in Lanka (PEARL), Letter to the United Nations Legal Counsel re: Civil society comments on draft articles on crimes against humanity (2018); and Recommendations from participants in the Latin America Regional Workshop on the Draft Articles of a Convention on Crimes against Humanity, E-mail to the Director of the United Nations Codification Decision (30 November 2018).

¹⁸ See, for example, E. Amani Cirimwami and S. Smis, "Le régime des obligations positives de prévenir et de poursuivre à défaut d'extrader ou de remise prévues dans le texte des projets d'articles sur les crimes contre l'humanité provisoirement adoptés par la Commission du droit international", *Revue Québécoise de droit international*, vol. 30, No. 1 (2017), pp. 1–39; C. Krefß and S. Garibian (eds.), "Special issue: Laying the foundations for a convention on crimes against humanity", *Journal of International Criminal Justice*, vol. 16, No. 4 (2018); T. Meron, "Closing the accountability gap: concrete steps toward ending impunity for atrocity crimes", *The American Journal of International Law*, vol. 112, No. 3 (2018), pp. 433–451; C. Stahn, "Liberals vs romantics: challenges of an emerging corporate international criminal law", *Case Western Reserve Journal of International Law*, vol. 50 (2018), pp. 91–125; and N. Đurić, S. Roksandić Vidlička and G. Bogush, "Legal protection of sexual minorities in international criminal law", *Russian Law Journal*, vol. 6 (2018), pp. 28–57.

relationship of that initiative to the Commission's draft articles on crimes against humanity.

13. Chapter IV of this report addresses the final form of the draft articles and notes that, if the Commission completes the second reading on this topic at its seventy-first session, then it will also need to decide on a recommendation to the General Assembly of the United Nations regarding the draft articles.

14. As a matter of convenience, this report concludes with an annex containing the draft articles adopted by the Commission on first reading, with all the changes recommended by the Special Rapporteur (reflected in "track change" form). Further, an addendum to this report¹⁹ contains a table indicating existing treaty provisions that were considered when developing the texts contained in the draft preamble, draft articles, and draft annex as adopted at first reading.

Chapter I

Comments and observations on the draft articles, as adopted on first reading

A. General comments and observations

15. States provided general comments about the draft articles on crimes against humanity both in writing and in the Sixth Committee at the seventieth, seventy-first and seventy-second sessions of the General Assembly. Those comments typically²⁰ addressed three broad aspects of the topic, as indicated below.

1. Commission's methodology in drafting the articles

16. Several States commented favourably on the Commission's overall methodology with respect to developing the draft articles. Australia noted that "the draft articles draw from, and build on, a wide range of international conventions covering not only ... serious international crimes, but also subject matter including corruption, terrorism, transnational serious and organized crime, trafficking of illicit drugs, extradition and mutual legal assistance. Australia also appreciates the Special Rapporteur's careful regard to a range of national and regional approaches."²¹

17. Chile stated that the "project should be praised for its both comprehensive and responsible formulation, which follows the definition of crimes against humanity enshrined in the Rome Statute [of the International Criminal],^[22] and which draws on provisions from widely ratified treaties in order to shape the content of its obligations".²³ Likewise, Switzerland welcomed the Commission's reliance for extradition and mutual legal assistance provisions "on existing multilateral rules. This

¹⁹ Addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1).

²⁰ Sierra Leone suggested changing the title of the Commission's topic to "Prevention and punishment of crimes against humanity" (Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Sierra Leone). The Special Rapporteur is of the view that the current title is sufficient for this final stage of the Commission's work.

²¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Australia.

²² Rome Statute of the International Criminal Court, signed at Rome on 17 July 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

²³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Chile.

should facilitate their application.”²⁴ Indeed, INTERPOL, which currently has 194 Member States, indicated that: “The International Law Commission’s initiative is timely and important. INTERPOL supports this undertaking and the current drafting of the [d]raft [a]rticles. In particular, it supports the reference made to the use of INTERPOL channels to circulate, in urgent circumstances, requests for mutual legal assistance. The wording proposed is based on existing conventions, notably the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime, and the United Nations Convention against Corruption.”²⁵

18. The Czech Republic appreciated “that the draft articles are elaborated in a complex manner and include both the substantive and procedural aspects of investigation and prosecution of these crimes”.²⁶ At the same time, Switzerland welcomed “the fact that the draft articles are concise and limited to essential matters”.²⁷ Sierra Leone found that it was appropriate for the draft articles to reflect a mix of codification and progressive development.²⁸ Belgium indicated that it would be useful for the commentary to the draft articles to include a list of all judicial decisions finding an individual guilty of crimes against humanity.²⁹ France indicated that the “methodology and approaches adopted have led to an excellent outcome that will be of practical relevance to States”.³⁰

19. In contrast, the Islamic Republic of Iran commented that several of the draft articles represented “deviations from the rules of customary international law and failed to take account of State practice”.³¹ The Special Rapporteur notes that while some aspects of these draft articles may reflect customary international law, codification of existing law is not the primary objective of this topic; rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely-adhered-to treaties addressing crimes,³² as the foundation for a future convention.

2. Consistency with the Rome Statute of the International Criminal Court

20. Several States noted, with appreciation, that the draft articles were consistent with the Rome Statute of the International Criminal Court.³³ Further, some States, such as the United Kingdom, noted that a “new convention could facilitate national prosecutions, thereby strengthening the complementarity provisions of the Statute”.³⁴

21. Likewise, Germany noted that “the Statute is not focused on steps that States should be taking to prevent and punish crimes against humanity”, such that a convention on crimes against humanity “would in this respect close a gap in the existing international legal framework” while contributing “to the implementation of the complementarity provisions of the Rome Statute of the International Criminal

²⁴ *Ibid.*, chapter II.B.14, Switzerland.

²⁵ *Ibid.*, chapter III.B.14, INTERPOL.

²⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, the Czech Republic.

²⁷ *Ibid.*, Switzerland.

²⁸ *Ibid.*, Sierra Leone.

²⁹ *Ibid.*, Belgium.

³⁰ *Ibid.*, France.

³¹ The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 34.

³² See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1).

³³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A: Australia; Brazil; France; Japan; New Zealand; and Portugal.

³⁴ *Ibid.*, chapter II.C, the United Kingdom.

Court by encouraging national prosecutions”.³⁵ Chile noted that the project “intends to bolster the prosecution of these crimes at the national level, an objective which is plainly consistent with the complementarity principle governing the system of the International Criminal Court”.³⁶ The European Union noted that “the strengthening of international courts, tribunals and mechanisms serves the purpose of ensuring accountability for serious violations of international humanitarian law and human rights law. The work of the International Law Commission on crimes against humanity could contribute to enhancing the role of such judicial mechanisms.”³⁷

3. Desirability of a convention on crimes against humanity

22. Almost 40 States (including the Nordic countries) in the Sixth Committee at the seventieth, seventy-first and seventy-second sessions of the General Assembly indicated support for a future convention on crimes against humanity, with many expressly calling for it to be based on the draft articles.³⁸ Further, most States that

³⁵ *Ibid.*, chapter II.A, Germany.

³⁶ *Ibid.*, Chile.

³⁷ *Ibid.*, chapter III.A, European Union.

³⁸ Austria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 66, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 30; Brazil, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 11, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 89; Chile, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 86; Croatia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 27, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 47, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 75; Cuba, available from the United Nations PaperSmart portal (2017) at <http://papersmart.unmeetings.org/media2/16154442/cuba.pdf>; the Czech Republic, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 18, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 148; Egypt, *ibid.*, 23rd meeting (A/C.6/71/SR.23), para. 42; El Salvador, *ibid.*, 25th meeting (A/C.6/71/SR.25), para. 50, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 103; Estonia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 73; Germany, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 17, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 34, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 14; Hungary, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 70, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 78, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting (A/C.6/70/SR.21)*, para. 83; Indonesia, *ibid.*, 23rd meeting (A/C.6/70/SR.23), para. 29; Israel, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 43, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting (A/C.6/70/SR.21)*, para. 74; Italy, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 137, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 17th meeting (A/C.6/70/SR.17)*, para. 58; Japan, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 27th meeting (A/C.6/71/SR.27)*, para. 30; Jordan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 21; Mexico, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, paras. 14–15; Mozambique, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 6; the Netherlands, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 21; Paraguay, *ibid.*, para. 31; Peru, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 8, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting (A/C.6/70/SR.21)*, para. 93; Poland, *Official Records of the General Assembly, Seventy-second Session, Sixth*

submitted written comments indicated the desirability of using the draft articles as a basis for a convention on the prevention and punishment of crimes against humanity.

23. Australia stated that it “appreciates the purpose of the International Law Commission’s attention on the subject: to provide a basis for States to consider closing the gap in the current structure of conventions regarding serious international crimes. Unlike genocide, war crimes, and torture, no specific regime governs the prevention and punishment of crimes against humanity.”³⁹ Likewise, Austria indicated its “support for the elaboration of an instrument, preferably a convention, regarding extradition and mutual legal assistance in cases of crimes against humanity.”⁴⁰ Belarus welcomed the possibility of harmonizing national laws, so as to allow for robust inter-State cooperation.⁴¹ Chile maintained that the Commission’s approach of relying on formulations in widely-ratified treaties for the text of the draft articles “will enable these draft articles to gain widespread international acceptance, and hopefully, will also allow them to become the basis of a multilateral convention on the topic.”⁴² The Czech Republic expressed “its support for the elaboration of the convention on crimes against humanity which if concluded would fill the legal gap and complement other conventions on prosecution of the most serious crimes under international law.”⁴³

24. Estonia indicated that the “draft articles take into account the developments of international law, set a realistic outlook for the future and constitute an appropriate basis for the preparation of a convention against crimes against humanity.”⁴⁴ France expressed the hope “that these draft articles may eventually serve as the basis for the conclusion of an international convention on the prevention and punishment of crimes against humanity, and thereby help to strengthen the international criminal justice system.”⁴⁵ Germany acknowledged “that there is no general multilateral framework

Committee, 19th meeting (A/C.6/72/SR.19), para. 92; Portugal, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 93, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 61; the Republic of Korea, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 38; Romania, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 78; Slovakia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 142, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 23rd meeting (A/C.6/70/SR.23)*, para. 12; Sweden (on behalf on the Nordic countries), *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 58; Switzerland, *ibid.*, para. 101, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 67, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, paras. 18 and 20; Thailand, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 62; Timor-Leste, *ibid.*, 22nd meeting (A/C.6/72/SR.22), para. 29; Ukraine, *ibid.*, para. 17; and Viet Nam, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 97. For an analysis of overall support by States for a convention based on statements made in the Sixth Committee, see Whitney R. Harris World Law Institute, “Updated compilation of Government reactions to the International Law Commission’s project on crimes against humanity”, updated on 26 December 2017), available from <http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/updated-compilation-of-government-reactions-to-the-international-law-commissions-project-on-crimes-against-humanity/>.

³⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Australia.

⁴⁰ *Ibid.*, chapter II.C, Austria.

⁴¹ *Ibid.*, chapter II.A, Belarus.

⁴² *Ibid.*, Chile.

⁴³ *Ibid.*, the Czech Republic.

⁴⁴ *Ibid.*, chapter II.C, Estonia.

⁴⁵ *Ibid.*, chapter II.A, France.

governing the prosecution of crimes against humanity and is convinced of the usefulness of the adoption of a specialized [c]onvention on [c]rimes against [h]umanity. The convention would not only complement treaty law on core crimes, but would foster inter-[S]tate cooperation with regard to their investigation, prosecution and punishment”.⁴⁶ The Holy See found that “[s]uch a convention would provide a mechanism to help the international community to fulfill its obligation to protect populations from crimes against humanity through collective and diplomatic actions”.⁴⁷

25. The Netherlands noted that “there is no specific treaty concerning crimes against humanity, in contrast to the existing obligations concerning war crimes and genocide. This lack of specific and adequate international standards ... hampers the effectiveness and speediness of the investigation, prosecution and adjudication of these crimes”.⁴⁸ Panama maintained that adoption of the draft articles “as a convention would represent a major step forward in the codification and progressive development of obligations with regard to the prevention and punishment of crimes against humanity”.⁴⁹ It noted that there “is no multilateral convention devoted exclusively to stipulating the obligations of States with regard to the prevention and punishment of crimes against humanity. Adopting the draft articles prepared by the Commission would be an important step towards filling that gap.”⁵⁰ Peru supported the Commission recommending to the General Assembly that States conclude a convention.⁵¹ Likewise, “Sierra Leone strongly supports the International Law Commission’s stated goal for this project ... to formulate draft articles that could form the basis for a future convention for the prevention and punishment of crimes against humanity”.⁵²

26. Sweden (on behalf of the Nordic countries) indicated that the draft articles “have a significant potential for great practical relevance to the international community”, can “contribute to national laws, national jurisdiction and cooperation among States in the fight against impunity” and “may serve as a good basis for a future convention on the prevention and punishment of crimes against humanity”.⁵³ The United Kingdom acknowledged that there is “a lacuna given the existing frameworks for other serious crimes such as genocide, war crimes and torture”, and as such, “the United Kingdom sees benefits in developing an extradite-or-prosecute convention in respect of crimes against humanity”.⁵⁴

27. In contrast, a few States suggested that a convention on the prevention and punishment of crimes against humanity was not needed or desirable.⁵⁵ For example,

⁴⁶ *Ibid.*, Germany.

⁴⁷ The Holy See, *Official Records of the General Assembly, Seventy-third Session, Sixth Committee, 28th meeting (A/C.6/73/SR.28)*, para. 25.

⁴⁸ The Netherlands, written comments, para. 6.

⁴⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C, Panama.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, chapter II.A, Peru.

⁵² *Ibid.*, chapter II.C, Sierra Leone.

⁵³ *Ibid.*, Sweden (on behalf of the Nordic countries).

⁵⁴ *Ibid.*, the United Kingdom.

⁵⁵ China, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 87; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C, Greece; the Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 42, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 23rd meeting (A/C.6/70/SR.23)*, para. 67; Malaysia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 66; and Sudan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 69.

Greece was “not entirely convinced about the desirability and the necessity of a convention addressing exclusively” crimes against humanity, finding that the Rome Statute of the International Criminal Court “provides a sufficient legal basis for the domestic criminalization and prosecution of” such crimes, through its definition in article 7 of crimes against humanity and the principle of complementarity.⁵⁶ Further, Greece was of the view that “the risk of reopening during a future negotiation of a convention the consensus reached on the definition of crimes against humanity cannot be excluded” and that “such a convention may hamper efforts to achieve the widest possible acceptance of the Statute, since some States may deem it sufficient to ratify the former without adhering to the latter”.⁵⁷ Japan, however, found that, in addition to the Statute, “which regulates ‘vertical relationships’ between the Court and its States Parties, the current work [of the Commission], which creates ‘horizontal relationships’ among [S]tates, will lead to a strengthening of the effort of the international community for preventing those crimes and punishing their perpetrators”.⁵⁸

28. At the same time, some States noted the existence of a separate initiative to develop a new multilateral treaty on mutual legal assistance and the need for the two projects to coexist⁵⁹ (see chapter III of this report).

29. None of the international organizations (or organs thereof) who submitted comments indicated opposition to the adoption of a convention on the prevention and punishment of crimes against humanity. To the contrary, the Working Group on Enforced or Involuntary Disappearances “commend[ed] the Commission’s work on the [d]raft [a]rticles and recognize[d] the contribution that a future convention on this issue would make towards enhancing [States’] efforts to address impunity for the world’s worst atrocities, including enforced disappearances”.⁶⁰

⁵⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C, Greece.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, chapter II.A, Japan.

⁵⁹ Argentina, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 26th meeting (A/C.6/72/SR.26)*, para. 16, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 29th meeting (A/C.6/71/SR.29)*, para. 85, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 23rd meeting (A/C.6/70/SR.23)*, para. 71; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C, Belgium; Chile, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 90, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 100; the Czech Republic, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 18; Ireland, *ibid.*, para. 71, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 27th meeting (A/C.6/71/SR.27)*, para. 16; the Netherlands, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 22, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 41, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting (A/C.6/70/SR.21)*, paras. 41–43; and Slovenia, *ibid.* (A/C.6/70/SR.23), para. 6.

⁶⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.C, Working Group on Enforced or Involuntary Disappearances. The International Bar Association (IBA)’s War Crimes Committee anticipated that the

existence of a Convention would, *inter alia*, set forth a single definition of the crime to provide for consistent prosecutions between jurisdictions, enable inter-State legal assistance and cooperation in relation to investigations and prosecutions, and narrow the loopholes which allow perpetrators to exist with impunity. The Committee notes further that, in light of the limited capacity of international courts and tribunals, the Commission’s

B. 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 crimes against humanity threaten the peace, security and well-being of the world,

Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

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

Recalling the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling also that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance,

Considering as well the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

...

1. Comments and observations

30. Some States provided comments on the draft preamble, both in writing and in statements before the Sixth Committee at the seventy-second session of the General Assembly.

31. Panama and Switzerland expressed their overall support for the draft preamble, noting particularly the emphasis on prevention and the reference made to the Rome Statute of the International Criminal Court.⁶¹ Mexico also expressed its support for the draft preamble and its emphasis on the primary responsibility of States to investigate and prosecute, the importance of prevention, and the recognition of the *jus cogens* nature of the prohibition.⁶² Belgium urged that the commentary to the preamble emphasize that international organizations are also required to cooperate in

creation of a legal framework with horizontal application recognizes the increasingly important role of domestic prosecutions of atrocity crimes, and accords with the principle of complementarity reflected in the Rome Statute [of the International Criminal Court].

IBA War Crimes Committee, *Comments on the International Law Commission's Draft Articles on Crimes Against Humanity*, November 2018, p. 5.

⁶¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, Panama; Switzerland, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 101.

⁶² Mexico, *ibid.*, para. 104.

the prosecution of crimes against humanity, such as by imposing sanctions on States that commit or cover up such crimes.⁶³

32. Six States (Belgium, Estonia, Mexico, Panama, Peru, and Sierra Leone) welcomed the **third preambular paragraph**, which indicates that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*).⁶⁴ At the same time, Belgium indicated that it would be useful for the Commission to analyse the implications of such a peremptory character.⁶⁵ To that end, it noted that the International Court of Justice in *Jurisdictional Immunities of the State*, when referring back to its *Arrest Warrant* decision,⁶⁶ found that

without express reference to the concept of *jus cogens*, [the International Court of Justice had held] that the fact that a Minister of Foreign Affairs was accused of criminal violations of rules which undoubtedly possess[ed] the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf.⁶⁷

33. Citing also *Jurisdictional Immunities of the State*, the United Kingdom noted that “there is no conflict between *jus cogens* rules and the rule of State immunity, as the rules address different matters”.⁶⁸

34. At the same time, five States (China, France, the Islamic Republic of Iran, Turkey and the United Kingdom) expressed doubts regarding the draft preamble’s reference to the *jus cogens*.⁶⁹ China found that the evidence cited in the commentary was not sufficient to establish the general practice and *opinio juris* of States in this regard and that, since the Commission was working separately on the topic of *jus cogens*, any inclusion of *jus cogens* in the draft articles required further study.⁷⁰ France noted that the Rome Statute of the International Criminal Court does not refer to the prohibition of crimes against humanity as *jus cogens*.⁷¹ The Islamic Republic of Iran commented that the practice and *opinio juris* of States remains unclear and so the question of *jus cogens* warrants further study.⁷² Turkey recommended either reviewing or deleting the preambular clause on *jus cogens*, since its use there and the

⁶³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, Belgium.

⁶⁴ *Ibid.*; and *ibid.*, chapter II.B.3, Estonia; Mexico, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting* (A/C.6/72/SR.18), para. 104; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, Panama; *ibid.*, Peru; and chapter II.A, Sierra Leone.

⁶⁵ *Ibid.*, chapter II.B.1, Belgium.

⁶⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3.

⁶⁷ *Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, at p. 141, para. 95.

⁶⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, the United Kingdom.

⁶⁹ China, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting* (A/C.6/72/SR.18), para. 118; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, France; the Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 36; and Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 77.

⁷⁰ China, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 118.

⁷¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, France.

⁷² The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 36.

explanation in paragraph (4) of the commentary⁷³ does not correspond to the international community's common understanding of *jus cogens* or with the Commission's work on peremptory norms.⁷⁴ The United Kingdom indicated that, since the "draft articles are focused on establishing individual criminal liability for crimes against humanity", it was "unclear on the benefits of including a statement on whether the prohibition on crimes against humanity is a peremptory norm of general international law".⁷⁵

35. The Special Rapporteur notes that the Commission has previously taken the view that the prohibition on crimes against humanity is a peremptory norm of general international law.⁷⁶ Further, as noted in the Commission's commentary to this preambular paragraph,⁷⁷ the International Court of Justice has indicated that the prohibition on certain acts, such as torture, has the character of *jus cogens*,⁷⁸ which *a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*. At issue, therefore, appears to be not the peremptory nature of the prohibition of crimes against humanity, but the appropriateness of including a reference to *jus cogens* in the preamble of the present draft articles. It is correct to observe that such a reference typically is not included in the preamble of treaties addressing crimes, such as the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment⁷⁹ or the 2006 International Convention for the Protection of All Persons from Enforced Disappearance,⁸⁰ nor was such a reference included in the Rome Statute of the International Criminal Court. The reason for not including such a reference may relate, at least in part, to uncertainty as to what consequences flow from such a status.⁸¹

36. Panama suggested improving the **fifth preambular paragraph**, arguing that "the causal link between punishment (as a means of ending impunity) and prevention is debatable"; instead, Panama would draft the paragraph so as to recognize prevention as the principal obligation and simply to reiterate the duty to punish in cases of a failure to meet that primary obligation.⁸² Cuba—viewing "put an end to" as too ambitious and impractical and desiring to include the objective of "punishment" —

⁷³ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above) para. 46, paragraph (4) of the commentary to the preamble.

⁷⁴ Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 77.

⁷⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, the United Kingdom.

⁷⁶ See the report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, paragraph (4) of the commentary to the preamble; and the first report of the Special Rapporteur on crimes against humanity (A/CN.4/680 and Corr.1), para. 39.

⁷⁷ See the report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, paragraph (4) of the commentary to the preamble.

⁷⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 99.

⁷⁹ Signed at New York, on 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.

⁸⁰ Signed at New York, on 20 December 2006, United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

⁸¹ While it is widely recognized that States may not conclude treaties that would conflict with such a peremptory norm (see the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, arts. 53 and 64), it is less clear what consequences, if any, the peremptory nature of the prohibition has in the context of the present draft articles. The Special Rapporteur notes that the Commission is currently engaged in work on the topic of "peremptory norms of general international law (*jus cogens*)", but is not expected to complete its work on the topic in 2019.

⁸² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, Panama.

would amend this paragraph so as to read: “*Determined* to join forces to combat impunity for the perpetrators of these crimes and thus to contribute to the prevention and punishment of such crimes.”⁸³ The Special Rapporteur favours retaining the existing language, and notes that this clause is identical to the corresponding clause in the Rome Statute of the International Criminal Court, which reads: “*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”⁸⁴

37. Peru welcomed the **sixth preambular paragraph**, with its reference to the definition of crimes against humanity as found in the Rome Statute of the International Criminal Court, but noted that this should not preclude adjustments to that definition to take account of the different purpose for which it was being used in the draft articles.⁸⁵ Peru also welcomed the **ninth preambular paragraph** on the rights of victims, as well as of alleged offenders.⁸⁶

38. Brazil suggested that, if the preamble is to recognize that “crimes against humanity threaten the peace, security and well-being of the world”, it might also balance such language with further preambular paragraphs (as exist in the Statute) addressing the obligations of States to refrain from the use of force against and non-intervention in other States.⁸⁷ The Special Rapporteur agrees that there is nothing in the present draft articles, either in the preamble or in the text of the draft articles, that authorizes States to engage in unlawful uses of force against or intervention in other States. Indeed, the Special Rapporteur notes that draft article 4, paragraph 1, expressly requires that States act “in conformity with international law” when preventing crimes against humanity, while the Commission’s commentary to that provision explains that “the measures undertaken by a State to fulfil this obligation must be consistent with the rules of international law, including the rules on the use of force set forth in the Charter of the United Nations, international humanitarian law and human rights law”.⁸⁸ The existence of preambular language indicating that crimes against humanity “threaten the peace, security and well-being of the world” should not be viewed as carrying any implication to the contrary. In fact, there are several examples of treaties addressing crimes where, in the preamble, the crime is identified as a threat to peace and security, and yet there exists no further preambular language reiterating the fundamental obligations of States under international law with respect to the use of force and non-intervention.⁸⁹ As such, the Special Rapporteur is of the view that the

⁸³ *Ibid.*, Cuba.

⁸⁴ Rome Statute of the International Criminal Court, fifth preambular paragraphs.

⁸⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, Peru.

⁸⁶ *Ibid.*

⁸⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Brazil.

⁸⁸ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, paragraph (8) of the commentary to draft article 4.

⁸⁹ See, for example, International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195, at p. 214 (“*Reaffirming* that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State”); International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973), *ibid.*, vol. 1015, No. 14861, p. 243, at p. 245 (“Observing that the Security Council has emphasized that *apartheid* and its continued intensification and expansion seriously disturb and threaten international peace and security”); and International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), *ibid.*, vol. 2178, No. 38349, p. 197, at p. 229 (“Recalling ... unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States”).

current approach for that text of the preamble and draft articles is appropriate in this context, though the Commission might consider further clarification in the preamble's commentary to address the concern raised.

39. Panama suggested that an additional paragraph be added to the preamble indicating that crimes against humanity should not be subject to any statute of limitations.⁹⁰ The Special Rapporteur agrees that the non-applicability of any statute of limitations is important but notes that the preamble does not seek to capture the specificities of the various draft articles, including draft article 6, paragraph 6. Panama also proposed an additional paragraph “setting forth the distinction between individual criminal responsibility and State responsibility with regard to crimes against humanity”, finding that such a paragraph “would affirm that no provision contained in the draft articles shall be interpreted as substituting individual responsibility for crimes against humanity with that of the State”.⁹¹ The Special Rapporteur notes that none of the treaties that address crimes, by virtue of addressing individual criminal liability, should be viewed as exonerating a State from its responsibility for internationally wrongful acts, yet that fact has not led States to include in the preamble of such treaties a paragraph of the kind suggested by Panama.

2. Recommendation of the Special Rapporteur

40. No changes to the draft preamble are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

C. Draft article 1 [1]: Scope

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

1. Comments and observations

41. States provided comments on draft article 1 both in writing and in statements before the Sixth Committee at the seventieth, seventy-first and seventy-second sessions of the General Assembly.

42. Austria, Italy, Peru and Romania expressed their general support for the inclusion of the draft article on scope.⁹² Spain, however, recommended that the draft

⁹⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, Panama. In this regard, there might be a preambular reference to the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (New York, 26 November 1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73. As of January 2019, that convention has 55 States parties.

A view was also expressed that a paragraph might be added to the preamble containing a “Martens” clause, see Crimes against Humanity Initiative Steering Committee, *Comments and Observations on the 2017 Draft Articles on Crimes against Humanity as Adopted on First Reading at the Sixty-ninth Session of the International Law Commission*, 30 November 2018, pp. 3–4 (the Committee consists of Leila Nadya Sadat, Chairperson; Hans Corell; Richard Goldstone; Juan Méndez; William Schabas; and Christine Van Den Wyngaert; and previously M. Cherif Bassiouni).

⁹¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.1, Panama.

⁹² Austria, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting* (A/C.6/70/SR.20), para. 30; Italy, *ibid.*, 17th meeting (A/C.6/70/SR.17), para. 58; Romania, *ibid.*, 21st meeting (A/C.6/70/SR.21), para. 79; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.2, Peru.

article be deleted, since the phrase “the prevention and punishment of crimes against humanity” could serve as the title of the draft articles and it would be more technically correct to say that the draft articles “concern” the prevention and punishment, rather than “apply”.⁹³ The Special Rapporteur notes that it has been the Commission’s general practice to include at the outset of its projects a draft provision on “scope” that indicates what the topic “concerns”. Such an article, of course, can be deleted or modified by States when negotiating and adopting a treaty based on the draft articles, if they wish to do so.

43. Turkey expressed support for the addition of a non-retroactivity clause to the draft articles.⁹⁴ Chile proposed that this be done via a second paragraph in draft article 1, which would provide that the draft articles only apply with respect to crimes that allegedly occurred after the adoption of the draft articles.⁹⁵ As Chile notes, the Special Rapporteur addressed this temporal issue in his second report, indicating that “the obligations for the State under a new convention would only operate with respect to acts or facts that arise after the convention enters into force for that State”, consistent with the law of treaties.⁹⁶ Among other things, the second report observed that article 28 of the 1969 Vienna Convention on the Law of Treaties (“1969 Vienna Convention”) provides that, “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”.⁹⁷ The International Court of Justice applied article 28 of the 1969 Vienna Convention with respect to a treaty addressing a crime (torture) in *Questions relating to the Obligation to Prosecute or Extradite*, finding that “the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned”.⁹⁸

44. Thus, without a clearly-stated contrary intention, a treaty generally would not apply to acts or facts that took place prior to the State’s acceptance of the treaty. As such, it does not appear necessary, as a legal matter, for an express provision of that nature to be included in this draft article. Further, doing so would not be consistent with the Commission’s usual style when writing draft articles, which does not speak to issues relating to “entry into force” or “adoption” of the draft articles.⁹⁹ The Commission may wish address this issue in its commentary.

⁹³ Spain, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 94.

⁹⁴ Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 81.

⁹⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.2, Chile. An example of this would be article 24, paragraph 1, of the Rome Statute of the International Criminal Court: “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”

⁹⁶ Second report of the Special Rapporteur on crimes against humanity (A/CN.4/690), para. 73. See also *ibid.*, paras. 70–72.

⁹⁷ 1969 Vienna Convention, art. 28.

⁹⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 457, para. 100.

⁹⁹ See the report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, paragraph (3) of the general commentary. But see the draft code of crimes against the peace and security of mankind, *Yearbook of the International Law Commission 1996*, vol. II (Part Two), pp. 17 *et seq.*, at pp. 38–39, art. 13 (“Non-retroactivity 1. No one shall be convicted under the present Code for acts committed before its entry into force. 2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law”).

2. Recommendation of the Special Rapporteur

45. No changes to draft article 1 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

D. Draft article 2 [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.

1. Comments and observations

46. States provided comments on draft article 2 both in writing and in statements before the Sixth Committee at the seventieth, seventy-first and seventy-second sessions of the General Assembly.

47. Several States expressed their support for the draft article as adopted.¹⁰⁰ New Zealand supported the draft article but suggested that the “general obligation” at issue could be more clearly expressed if the draft article read: “States undertake to prevent and punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.”¹⁰¹ Chile proposed the reformulation: “Crimes against humanity are crimes under international law, which States undertake to prevent and punish, regardless of whether or not they are committed in time of conflict.”¹⁰²

48. At the same time, Austria, France and the Islamic Republic of Iran expressed concern regarding the expression “crimes under international law”, suggesting that its meaning was unclear, as it could include crimes such as corruption that are defined under treaties.¹⁰³ France suggested changing the draft article to refer to crimes against humanity as “the most serious crimes of international concern”,¹⁰⁴ which the Islamic Republic of Iran noted would be consistent with paragraph 4 of the preamble.¹⁰⁵ The Special Rapporteur notes that the purpose of the phrase “crimes under international law” is to indicate that crimes against humanity are crimes regardless of whether they are connected to an armed conflict and regardless of whether they have been

¹⁰⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.3: Estonia and Peru; Romania, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting* (A/C.6/70/SR.21), para. 79; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.3, Sierra Leone. See also *ibid.*, chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

¹⁰¹ *Ibid.*, New Zealand.

¹⁰² *Ibid.*, Chile.

¹⁰³ Austria, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting* (A/C.6/70/SR.20), para. 31; France, *ibid.*, para. 20; and the Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 35.

¹⁰⁴ France, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting* (A/C.6/70/SR.20), para. 20.

¹⁰⁵ The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 35. El Salvador recommended replacing, in the Spanish version, *contemplados en el derecho internacional* with *de derecho internacional*, as a more accurate translation of the phrase “under international law” (*Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting* (A/C.6/70/SR.22), para. 104).

characterized as such under national law.¹⁰⁶ The purpose is not to define “crimes against humanity”, which is done in draft article 3.

49. Several States commented on the obligation to prevent and punish crimes against humanity “whether or not committed in time of armed conflict”. Australia, El Salvador and South Africa each supported acknowledging that the obligation applies to crimes against humanity in either situation.¹⁰⁷ In contrast, Croatia suggested that any reference to armed conflict be deleted from the draft article in order to highlight the distinction between crimes against humanity (which can be committed at any time) and war crimes (which can only occur during an armed conflict).¹⁰⁸ China and the Islamic Republic of Iran expressed the view that the removal of the qualifier “in time of war” for crimes against humanity represented a deviation from customary international law and did not adequately take State practice into account.¹⁰⁹ Poland commented that this draft article should also include reference to “a remedy and reparation for victims”.¹¹⁰ Panama proposed an additional sentence that would read: “The present Convention shall be interpreted without prejudice to the individual criminal responsibility of the offender.”¹¹¹ Chile suggested that the commentary make clear that “the Berlin Protocol did not establish a new requirement asserting that [the Nürnberg] offences had to be linked with an armed conflict in order to be considered international crimes. It only excluded from the jurisdiction of the tribunal those crimes which did not possess such a link.”¹¹²

50. Some States raised issues regarding the relationship between draft article 2 and draft article 4. The Netherlands noted the linkage between the two draft articles, but said that “an independent meaning and application for draft article 2 seems to be denied in the current text”.¹¹³ Sierra Leone suggested merging draft article 2 with draft article 4 “because the former could be construed merely as an elaboration of the specific legislative, administrative, judicial or other measures that the state has to

¹⁰⁶ See the report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, paragraph (4) of the commentary to draft article 2.

¹⁰⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Australia; El Salvador, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting* (A/C.6/70/SR.22), para. 104; and South Africa, *ibid.*, 23rd meeting (A/C.6/70/SR.23), para. 14. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 6.

¹⁰⁸ Croatia, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting* (A/C.6/70/SR.22), para. 77.

¹⁰⁹ China, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting* (A/C.6/72/SR.18), para. 119, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting* (A/C.6/70/SR.22), para. 64; and the Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 34.

¹¹⁰ Poland, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 93; *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting* (A/C.6/71/SR.26), para. 54.

¹¹¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.3, Panama.

¹¹² *Ibid.*, Chile. The “Berlin Protocol” (Protocol Rectifying Discrepancy in Text of Charter (Berlin, 6 October 1945), published in International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1 (Nürnberg, 1947), p. 17) amended the definition of “crimes against humanity” in the Charter of the International Military Tribunal, by replacing in the English and French texts a semicolon with a comma after “during the war”, so as to harmonize these versions with the Russian text. The effect of doing so was to link the first part of the provision (“inhumane acts committed against any civilian population”) to the latter part of the provision (“in connection with any crime within the jurisdiction of the Tribunal”), and hence to the existence of an international armed conflict.

¹¹³ The Netherlands, written comments, para. 12.

pursue to discharge the obligation of prevention of crimes against humanity”.¹¹⁴ Alternatively, Sierra Leone proposed that the commentary to draft article 2 provide greater explanation as to the more general aspects of the scope of the duty to undertake to prevent and to undertake to punish crimes against humanity.¹¹⁵

51. In its commentary to draft article 2, the Commission explained that the “content of this general obligation is addressed through the various more specific obligations set forth in the draft articles that follow, beginning with draft article 4”.¹¹⁶ Draft article 2 should not be understood as a repetition of draft article 4 on prevention, such that the two draft articles should be merged, any more than draft article 2 is a repetition of other draft articles subsequent to draft article 4 that address measures for the punishment of crimes against humanity. Moreover, the meaning and explanation of the general obligation set forth in draft article 2 is to be found not in draft article 2 itself, or in the commentary to it, but in the other more specific obligations set forth in the draft articles (and draft annex) that follow. Similar to the International Court of Justice’s understanding of the initial article of a treaty, albeit in a different context, draft article 2 “must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied”.¹¹⁷

2. Recommendation of the Special Rapporteur

52. The Special Rapporteur notes that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,¹¹⁸ which has 150 States parties as of January 2019, provides in article I: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Such formulation, which comes at the outset of the Convention, is well known and firmly entrenched in the historical and conceptual foundation of the crime of genocide. The formulation seeks to emphasize that, whether genocide was committed in time of peace or in time of armed conflict, it is still a crime under international law and, further, that States commit to prevent and punish it. Like the crime of genocide, crimes against humanity can occur whether or not there exists an armed conflict and are crimes under international law whether or not they have been criminalized in a particular State’s national law.¹¹⁹ The Special Rapporteur is of the view that it is appropriate to retain a comparable formulation at the outset of these draft articles on crimes against humanity.

53. As such, no changes to draft article 2 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

¹¹⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.2, Sierra Leone.

¹¹⁵ *Ibid.*

¹¹⁶ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, paragraph (1) of the commentary to draft article 2.

¹¹⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, pp. 803, at p. 814, para. 28.

¹¹⁸ Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

¹¹⁹ *Reservations to the Convention on Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 15, at p. 21; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 43, at pp. 100–113, paras. 161–166.

E. Draft article 3 [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.

1. Comments and observations

54. States provided comments on draft article 3 both in writing and in statements before the Sixth Committee during the seventieth, seventy-first and seventy-second sessions of the General Assembly.

55. Virtually all States that provided comments,¹²⁰ as well as the European Union,¹²¹ supported the definition of crimes against humanity contained in draft article 3, especially as it is almost verbatim the definition provided in the Rome Statute of the International Criminal Court. As the Czech Republic explained, “the definition of crimes against humanity under the [Rome Statute of the International Criminal Court] has already received wide acceptance and is increasingly seen as a codification of customary international law on crimes against humanity”.¹²²

56. Some States, such as China, Israel and Sudan,¹²³ questioned strict adherence to the definition from the Rome Statute of the International Criminal Court, noting that

¹²⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726): chapter II.B.4, Argentina; and chapter II.A, Australia; Austria, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 32; Bulgaria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 8; Croatia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 49; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, the Czech Republic, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 59; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, France, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 20; Germany, *ibid.*, 22nd meeting (A/C.6/70/SR.22), para. 15; Japan, Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, and *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 130; Jordan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 23; the Netherlands, written comments, para. 5, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 37; New Zealand, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 31; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Panama; Peru, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 9; Poland, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting (A/C.6/70/SR.21)*, para. 68; the Republic of Korea, *ibid.*, 23rd meeting (A/C.6/70/SR.23), para. 56; Romania, *ibid.*, 21st meeting (A/C.6/70/SR.21), para. 79; Russian Federation, *ibid.*, 23rd meeting (A/C.6/70/SR.23), para. 18; Slovakia, *ibid.*, para. 12; Slovenia, *ibid.*, para. 4; South Africa, *ibid.*, para. 14; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Sweden (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 6; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Switzerland, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 18; Thailand, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 62; Timor-Leste, *ibid.*, 22nd meeting (A/C.6/72/SR.22), para. 28; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, the United Kingdom, and *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 23rd meeting (A/C.6/70/SR.23)*, para. 36.

¹²¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.2, European Union. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), pp. 6–7.

¹²² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, the Czech Republic.

¹²³ China, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 65; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Israel; and Sudan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 66.

such a definition is not necessarily representative of State practice, including existing national laws. Indeed, Belarus provided detailed comments as to differences between draft article 3 and the Criminal Code and Code of Criminal Procedure of Belarus, which would require changes were Belarus to adhere to a convention based on the draft articles.¹²⁴ Belarus also expressed concern that the language of the draft article used terminology characteristic of international humanitarian law, which it found inconsistent with the idea that crimes against humanity can be committed in the absence of an armed conflict (see draft article 2).¹²⁵ China noted that attention should be paid to the differences among national legal systems when defining specific acts, since certain crimes might not exist in certain States' national laws.¹²⁶ Turkey expressed a view that some of the features of the definition were ambiguous and could use further clarification.¹²⁷

57. The Special Rapporteur is of the view that the very strong support in favour of closely adhering to the definition of crimes against humanity that appears in article 7 of the Rome Statute of the International Criminal Court warrants few, if any, changes to that text. Even so, as noted below, several States suggested specific changes to the definition. Most of these suggestions were advanced by just one or a few States, but there were two proposed changes (concerning paragraph 1 (*h*) and paragraph 3) that garnered significant support from States and others.

58. With respect to **paragraph 1**, Estonia questioned whether, in the *chapeau*, the crime should be limited to attacks upon the “civilian” population.¹²⁸ Sierra Leone suggested that the commentary might be adjusted so as to acknowledge that military personnel who are no longer engaged in combat are also civilians for purposes of this definition.¹²⁹ Sweden (on behalf of the Nordic countries) called for greater discussion in the commentary as to what is meant by an act being committed “as part of” an attack.¹³⁰ The Special Rapporteur is of the view that the *chapeau* should remain unchanged but that the Commission may wish to give consideration to adjustments in the commentary to address the comments received.

59. With respect to **subparagraph (d)** of paragraph 1, the IOM noted “that, in the context of migration, the word deportation is used in respect of forceful return to their countries of origin of migrants who are in an irregular situation, that is, who are not legally present in the country in question”.¹³¹

60. Many States and United Nations experts commented on the language concerning the act of “persecution” as a crime against humanity, which is set forth in **subparagraph (h)**. With respect to the first half of the subparagraph, a group of twenty special rapporteurs and an independent expert, representing a wide array of subject areas, urged that the grounds for persecution set forth at the beginning of subparagraph (*h*) – which currently reads “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” – be expanded and updated so as to include

¹²⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Belarus.

¹²⁵ Belarus, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting* (A/C.6/70/SR.21), para. 31.

¹²⁶ China, *ibid.*, 22nd meeting (A/C.6/70/SR.22), para. 66.

¹²⁷ Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 80.

¹²⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Estonia.

¹²⁹ *Ibid.*, Sierra Leone.

¹³⁰ *Ibid.*, Sweden (on behalf of the Nordic countries).

¹³¹ *Ibid.*, chapter III.B.2, IOM.

persecution on grounds of language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics and indigenous, refugee, statelessness or migratory status.¹³²

61. The Special Rapporteur notes the “catch-all” wording of subparagraph (*h*) (“or other grounds...”) which embraces other and evolving grounds on which persecution may be found. As such, the Special Rapporteur is of the view that the grounds of persecution set forth in paragraph (*h*) should remain unchanged (except for the deletion of the words “as defined in paragraph 3”, for reasons discussed below).¹³³ At the same time, the Commission may wish to consider adjusting the commentary so as to provide a fuller account of what is meant by “other grounds that are universally recognized as impermissible under international law”, taking into consideration the comments received.

62. Separately, several States commented on the second half of subparagraph (*h*). Some States focused on the final phrase of this subparagraph: “in connection with the crime of genocide or war crimes”. The analogous language in the Rome Statute of the International Criminal Court reads “in connection with ... any crime within the jurisdiction of the Court”.¹³⁴ At first reading, the Commission noted that this text “may need to be revisited”.¹³⁵

63. Liechtenstein and Ukraine proposed that the crime of “aggression” be added to this text, as did Brazil in the event that this text is retained.¹³⁶ In contrast, the Czech Republic expressed a preference that this language not be changed so as to include the crime of aggression.¹³⁷ The Islamic Republic of Iran stated that the reference to genocide and war crimes should be deleted from this subparagraph, since they were outside the scope of the topic and did not effectively replace the expression “any crime within the jurisdiction of the Court” used by the Rome Statute of the

¹³² Page 3 of the comments of 30 November 2018 to the draft convention on crimes against humanity by the: Special Rapporteur on extrajudicial, summary or arbitrary executions; Chair-Rapporteur of the Working Group of Experts on People of African Descent; Independent Expert on the enjoyment of human rights by persons with albinism; Special Rapporteur on the situation of human rights in Cambodia; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the right to food; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members; Chair-Rapporteur of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; Special Rapporteur on the human rights of migrants; Special Rapporteur on the situation of human rights in Myanmar; Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice.

¹³³ See paragraphs 101 to 103 below.

¹³⁴ Rome Statute of the International Criminal Court, art. 7, paragraph 1 (*h*).

¹³⁵ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, paragraph (8) of the commentary to draft article 3.

¹³⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Liechtenstein; Ukraine; and Brazil. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), pp. 7–8.

¹³⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, the Czech Republic.

International Criminal Court.¹³⁸ The United Kingdom similarly proposed deletion of the clause, noting *inter alia* that such amendment “would make little practical difference, as in the vast majority of situations any persecution that would occur in connection to the crime of genocide or war crimes would also occur in connection to one of the other crimes referred to in draft [a]rticle 3, paragraph 1”.¹³⁹ France noted that a problem with the existing text was that the draft articles nowhere contained a definition of “genocide” or “war crimes.”¹⁴⁰ Brazil questioned whether “there is actually the need to require such a link”.¹⁴¹ For reasons explained below,¹⁴² the Special Rapporteur proposes deleting the final clause of subparagraph (h), which reads “in connection with the crime of genocide or war crimes”.

64. Chile, France, Peru, Sierra Leone and Uruguay would go even further, by deleting the entire second half of subparagraph (h), which reads “in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes”.¹⁴³ According to Chile, “it may be presumed that persecution was narrowly defined [in the Rome Statute of the International Criminal Court] with the objective of restricting the scope of the offences under the jurisdiction of the Court. The formulation of its [a]rticle 7 does not imply that acts of persecution unconnected with other crimes should not be considered offences under general international law. Since the present draft articles do not confer jurisdiction to an international tribunal, the objective of restricting the scope of the concept of persecution is not necessarily applicable. ... [S]uch a restriction would imply that the intentional and severe deprivation of human rights by reason of the identity of a group is not sufficiently serious to be considered an international crime of itself.”¹⁴⁴

65. While deleting the entire second half of subparagraph (h), Chile would also augment the definition of “persecution” found in **paragraph 2 (g)**, so as to mean “the intentional and severe deprivation of *universal* fundamental rights, *as recognized under general* international law, by reason of the identity of the group or collectivity” (emphasis added).¹⁴⁵ In the view of Chile, doing so would help avoid “different interpretations [by States] regarding which fundamental rights are covered by the notion of persecution and which content they should be given”.¹⁴⁶ The OHCHR proposes transforming the entire second half of subparagraph (h), so as to read: “in connection with any act, whether considered in isolation or in conjunction with other

¹³⁸ The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 33.

¹³⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, the United Kingdom.

¹⁴⁰ *Ibid.*, France.

¹⁴¹ *Ibid.*, Brazil.

¹⁴² See paragraphs 91 to 100 below.

¹⁴³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726): chapter II.B.3, Chile; and chapter II.B.4: France (noting that French law contains no such language); Peru; Sierra Leone (arguing that customary international law requires no such connection, nor is it contained in the instruments of international criminal tribunals other than the International Criminal Court); and Uruguay (also arguing that customary international law does not require connection with another crime). See also Human Rights Watch, Submission to the International Law Commission (1 December 2018), p. 1; Amnesty International, *International Law Commission: the Problematic Formulation of Persecution under the Draft Convention on Crimes against Humanity*, London, 2018, available from www.amnesty.org/en/documents/ior40/9248/2018/en; and Amnesty International, “17-point program for a convention on crimes against humanity”, 2018, p. 1, available from www.amnesty.org/en/documents/ior51/7914/2018/en/.

¹⁴⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Chile.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

acts, of gravity equal to the act referred to in this paragraph”.¹⁴⁷ For reasons explained below,¹⁴⁸ the Special Rapporteur does not favour deleting or modifying the entire second half of subparagraph (h), or making a collateral change to paragraph 2(g).

66. With respect to **paragraph 1, subparagraph (j)**, Croatia favoured a departure from the Rome Statute of the International Criminal Court by replacing the term “apartheid” with “the more general and comprehensive concept of racial discrimination and segregation”, based on the view that the former is very specific and dated, and a belief that the change would serve as an unambiguous confirmation that the draft articles in this regard applied to non-State actors.¹⁴⁹ The Special Rapporteur is of the view that subparagraph (j) should remain unchanged but that the Commission may wish to consider adjustments to the commentary to address this comment.

67. Cuba suggested that the words “or hardship” (*penurias* in Spanish) be inserted in **subparagraph (k)** after the word “suffering” (*sufrimientos* in Spanish) because there are “certain circumstances to which a human being may be subjected that do not fall within the meaning of ‘suffering’ but may very well constitute crimes against humanity, such as the scarcity or absence of material goods and services that are indispensable for his or her life and development”.¹⁵⁰

68. Sweden (on behalf of the Nordic countries) expressed concern that subparagraph (k) invited criminalization by “analogy” (“other inhumane acts of a similar character”), which might run afoul of the principle of legality. It noted that, unlike the Rome Statute of the International Criminal Court,¹⁵¹ the draft articles contain no provision to the effect that, in cases of ambiguity, the definition of a crime shall be interpreted in favour of the person being investigated, prosecuted, or convicted.¹⁵² The Special Rapporteur notes that the principle of legality operates as a part of human rights law¹⁵³ and that, under draft article 11, paragraph 1, any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings “full protection” of his or her rights under “human rights law”. The objective of the draft articles is not to repeat detailed provisions of human rights law nor to seek to prescribe detailed rules of national criminal law, including presumptions, beyond what is necessary to ensure that crimes against humanity are incorporated into national law, and national jurisdiction is established and effectively exercised over them. As such, the Special Rapporteur remains of the view that the text of subparagraph (k), as it exists in subparagraph (k) and in the Rome Statute of the International Criminal Court, is appropriate.

¹⁴⁷ *Ibid.*, chapter III.B.2, OHCHR.

¹⁴⁸ See paragraphs 91 to 103 below.

¹⁴⁹ Croatia, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 79.

¹⁵⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Cuba.

¹⁵¹ See Rome Statute of the International Criminal Court, article 22, paragraph 2.

¹⁵² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Sweden (on behalf of the Nordic countries).

¹⁵³ See, for example, the Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948, art. 11, para. 2 (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”); and the International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, art. 15, para. 1 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”).

69. With respect to the definitions contained in **paragraph 2**, Estonia questioned whether the so-called “policy element” contained in **subparagraph (a)** should be retained, viewing it as a “disputable innovation” in the Rome Statute of the International Criminal Court, which did not exist in the Statute of the International Criminal Tribunal for the Former Yugoslavia or the Statute of the International Tribunal for Rwanda.¹⁵⁴ Cuba urged deletion of the word “multiple”, since its retention “could result in uncertainty and incorrect interpretations of the draft article and give rise to the belief that a crime against humanity is not committed during an attack against a civilian population unless several of the acts listed in draft article 3 [3] are carried out or one of those acts is carried out several times”.¹⁵⁵ Noting the explanation set forth in the Commission’s commentary,¹⁵⁶ Chile proposed modifying the definition in subparagraph (a) so as to read “... pursuant to or in furtherance of a State, group or organizational policy to commit such attack”.¹⁵⁷ Sierra Leone was prepared to see this clause retained without change, but urged that the commentary indicate that this standard “ought to be applied flexibly”, and without prejudice to customary international law on the matter.¹⁵⁸ Mexico remarked that the language should be more precise, such as by specifying that that the organization in question must be State-like.¹⁵⁹

70. The OHCHR, however, welcomed the existing language from a human rights perspective, noting that the language “is understood to extend prosecution ... to non-state actors consistent with the jurisprudence of international criminal tribunals”.¹⁶⁰ The Special Rapporteur remains of the view that the current language of subparagraph (a), which also exists in the Rome Statute of the International Criminal Court, is appropriate, but that the Commission might consider further clarifications in the commentary to address such concerns.

71. With respect to **subparagraph (c)**, the UNODC noted¹⁶¹ that for “the purpose of clarifying the definition of trafficking in persons, the International Law Commission may consider including in its commentary the definition provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, [S]upplementing the United Nations Convention against Transnational Organized Crime”.¹⁶² The Special Rapporteur proposes that the Commission consider referencing this definition in its commentary, as well as taking into account other suggestions by the UNODC with respect to the Commission’s commentary to other provisions.

¹⁵⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Estonia.

¹⁵⁵ *Ibid.*, Cuba.

¹⁵⁶ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 3, paras. (28)–(29).

¹⁵⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Chile.

¹⁵⁸ *Ibid.*, Sierra Leone.

¹⁵⁹ Mexico, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting* (A/C.6/70/SR.21), paras. 52–54; see Mexico, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting* (A/C.6/72/SR.18), para. 110.

¹⁶⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.2, OHCHR. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 7.

¹⁶¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.2, UNODC.

¹⁶² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2237, No. 39574, p. 319, art. 3 (a). As of January 2019, this Protocol has 173 States parties.

72. Chile proposed that, in **subparagraph (d)**, the word “lawfully” be deleted, “since its inclusion would seem to give the [S]tate concerned an unlimited discretion to establish any legal conditions in order to regulate the presence of people in a given territory”.¹⁶³ Further, Chile would replace the phrase “without grounds permitted under international law” with “unless in conformity with international law”.¹⁶⁴ The Special Rapporteur is of the view that subparagraph (d) should remain as it appears in the Rome Statute of the International Criminal Court but that the Commission should give consideration to adjustments in the commentary to address the comments received.

73. Croatia remarked that, for cohesion of international law, the definition of torture in **subparagraph (e)** should replicate the definition used in the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment.¹⁶⁵ The Special Rapporteur notes that the definition of “torture” in the Rome Statute of the International Criminal Court is somewhat shorter than the definition contained in the 1984 Convention, principally by not repeating the purposes for which the torture is being inflicted, but that otherwise the key elements of the definitions are the same. As such, the Special Rapporteur is of the view that States would be able to implement their obligations under the present draft articles using the definition of torture set forth in the 1984 Convention, if they wish to do so. Consequently, the Special Rapporteur favours retention of the existing text of subparagraph (e) (which replicates the Rome Statute of the International Criminal Court) but notes that the Commission might adjust its commentary to address the comment received.

74. In **subparagraph (f)**, Estonia found the second sentence to be confusing, irrelevant or inappropriate and therefore proposed its deletion.¹⁶⁶ The Special Rapporteur is of the view that subparagraph (f) should remain as it appears in the Rome Statute of the International Criminal Court, but that the Commission should give consideration to adjustments in the commentary to address the comments received. With respect to **subparagraph (g)**, see paragraph 65 above.

75. Some comments were received with respect to **subparagraph (i)** which defines the term “enforced disappearance of persons”. Some States,¹⁶⁷ the OHCHR¹⁶⁸ and the United Nations Working Group on Enforced Disappearances¹⁶⁹ expressed concern that this subparagraph (while replicating the Rome Statute of the International Criminal Court) uses a definition of “enforced disappearance of persons” that differs from the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,¹⁷⁰ the 1994 Inter-American Convention on Forced Disappearance of Persons¹⁷¹ and the 2006

¹⁶³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Chile.

¹⁶⁴ *Ibid.*

¹⁶⁵ Croatia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 27.

¹⁶⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Estonia.

¹⁶⁷ *Ibid.*: chapter II.B.4, Argentina; chapter II.B.3, Chile; chapter II.B.4: Costa Rica; Peru; Sierra Leone; and Uruguay.

¹⁶⁸ *Ibid.*, chapter III.B.2, OHCHR.

¹⁶⁹ *Ibid.*, chapter III.A, Working Group on Enforced or Involuntary Disappearances. See also Human Rights Watch, *Submission to the International Law Commission* (1 December 2018), p. 1; and Amnesty International, “17-point program ...” (footnote 143 above), p. 1.

¹⁷⁰ General Assembly resolution 47/133 of 18 December 1992.

¹⁷¹ Inter-American Convention on Forced Disappearance of Persons (Belem, 9 June 1994), Organization of American States, *Treaty Series*, No. 60, art. II (“For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”).

International Convention for the Protection of All Persons from Enforced Disappearance.¹⁷² The principal difference is that such conventions do not include the more restrictive (and subjective) phrase “with the intention of removing them from the protection of the law for a prolonged period of time”, which introduces intentionality and duration requirements. Instead of using that phrase, harmonizing with the 2006 International Convention for the Protection of All Persons from Enforced Disappearance would entail ending subparagraph (i) with a more objective standard, such as: “which place such a person outside the protection of the law” or “thereby removing them from the protection of the law”. The OHCHR would also change “arrest, detention or abduction of persons by” to read “arrest, detention, abduction or any other form of deprivation of liberty”.¹⁷³

76. In contrast, the United Kingdom argued that the definition contained in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (which as of January 2019 had 59 States parties) should not be used, as the 123 States parties to the Rome Statute of the International Criminal Court “would potentially be required to amend their national legislation implementing the Statute to give effect to a future convention based on the draft [a]rticles”.¹⁷⁴ Notably, the Committee on Enforced Disappearances established by the 2006 International Convention for the Protection of All Persons from Enforced Disappearance adopted a statement in June 2018 saying that “the overall consistency of the [Commission’s draft articles] with the Rome Statute [of the International Criminal Court] ought to be paramount, for the sake of effective co-operation between States Parties in the criminal prosecution of these crimes”.¹⁷⁵ Rather than call for a change in subparagraph (i) of this draft article, the Committee on Enforced Disappearances welcomed the Commission’s draft article 3, paragraph 4 (discussed below), “dealing with more protective instruments”, which allowed for maintaining the definition enshrined in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.¹⁷⁶

77. The Special Rapporteur notes the inclusion of the “intention” language in draft article 3, paragraph 2 (i), as compared with other instruments addressing enforced disappearance, may not be as significant as otherwise appears. Draft article 3, paragraph 2 (i), addresses exclusively a widespread or systematic attack against a civilian population in the form of enforced disappearances, meaning enforced disappearances conducted pursuant to or in furtherance of a State or organizational policy to commit such an attack. In such circumstances, the significance of including or not including the “intention” language with its temporal element appears to be quite different than in the context of an instrument that seeks to address *inter alia* just one or a few incidents of enforced disappearance. Further, in the view of some writers, the inclusion of the “intention” language in article 7, paragraph 2 (i), of the Rome

¹⁷² International Convention for the Protection of All Persons from Enforced Disappearance, art. 2 (“For the purposes of this Convention, ‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”).

¹⁷³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.2, OHCHR.

¹⁷⁴ *Ibid.*, chapter II.B.4, the United Kingdom.

¹⁷⁵ Committee on Enforced Disappearances, Statement on the draft articles on crimes against humanity adopted by the International Law Commission, 1 June 2018, para. 3, available from https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_STA_14_27312_E.pdf.

¹⁷⁶ *Ibid.*, para. 2.

Statute of the International Criminal Court does not significantly change what is otherwise required when proving a criminal offence.¹⁷⁷

78. In any event, the Special Rapporteur observes that the Commission was aware, at first reading, of the difference between the Rome Statute of the International Criminal Court and other instruments with respect to enforced disappearance and elected to retain the Statute formulation. In doing so, however, it crafted draft article 3, paragraph 4, precisely to ensure that the definition contained in the draft articles – including with respect to enforced disappearance – would not call into question any broader definitions that may exist in other international instruments or national legislation, including those relating to enforced disappearance.¹⁷⁸ As such, to the extent that States enact national laws that provide for a broader definition of enforced disappearance, perhaps because they are parties to either the 1994 Inter-American Convention on Forced Disappearance of Persons or the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the draft articles do not preclude them from doing so. Noting in particular the comments of the Committee on Enforced Disappearances, which favour retaining the existing language, the Special Rapporteur is of the view that draft article 3, paragraph 2 (i), should remain unchanged.

79. Finally, with respect to paragraph 2, proposals were made for additional definitions. Both the Czech Republic and Turkey suggested that the “crime of genocide” and “war crimes” should be defined, since they are referenced in subparagraph 1 (h) or, at least, explained in the commentary by reference to existing international instruments.¹⁷⁹ If the Special Rapporteur’s proposed deletion of the final clause of subparagraph (h)¹⁸⁰ (“in connection with the crime of genocide or war crimes”) is accepted, then such definitions are not needed.

80. With respect to **paragraph 3**, many States criticized the repetition from the Rome Statute of the International Criminal Court of this paragraph defining “gender”.¹⁸¹ Canada referred to the definition as “under-inclusive and inaccurate”, noting that the “proposed definition tethers the concept of gender to that of sex”, even though “the term ‘sex’ has been used to refer to biological attributes whereas the term

¹⁷⁷ See O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: a Commentary*, 3rd ed., Munich, C.H. Beck/Hart/Nomos, 2016, p. 289, mn 154; and G. Werle and F. Jessberger (eds.), *Principles of International Criminal Law*, 3rd ed., Oxford University Press, 2014, p. 382 (“Formally, the crime ... appears to require specific intent. In fact, however, the intent requirement is always met if the perpetrator acts with intent as defined under [a]rticle 30 of the [Rome Statute of the International Criminal Court]. Deprivation of the victim’s liberty, together with withholding of information, ensures that the human rights requirements for treatment of imprisoned persons are not guaranteed and there can be no monitoring of or sanctions for their violation. This deprives the victim of the ‘protection of the law’. However, cases of simple administrative ‘carelessness’ do not meet the definition of the crime”). For contrary views, see K. Ambos, *Treatise on International Criminal Law*, vol. II: *The Crimes and Sentencing*, Oxford University Press, 2014, p. 112; and R. Cryer, et al. (eds.), *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, 2014, p. 260.

¹⁷⁸ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 3, para. (40).

¹⁷⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, the Czech Republic; and Turkey, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting* (A/C.6/70/SR.22), para. 112.

¹⁸⁰ See paragraphs 91 to 100 below.

¹⁸¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4: Argentina; Belgium; Brazil; Bosnia and Herzegovina; Canada; Chile; Costa Rica; El Salvador; Estonia; Liechtenstein; Malta; New Zealand; Sweden (on behalf of the Nordic countries); the United Kingdom; and Uruguay.

‘gender’ refers to socially constructed roles”.¹⁸² Belgium asserted that this “definition does not take into consideration the developments of the last 20 years in the areas of international human rights law and international criminal law, particularly with regard to sexual and gender-based crimes”.¹⁸³ Likewise, Bosnia and Herzegovina referred to the definition in paragraph 3 as “opaque, outdated and not in line with the recent, more inclusive and gender sensitive definitions of ‘gender’”.¹⁸⁴ Chile found that “the definition would seem to indirectly tolerate persecution by reason of gender identity, an outcome which could be hardly desirable, and one for which scarce reasons would be available”.¹⁸⁵ Estonia asserted that “the Statute was composed 20 years ago”, that “this definition does not reflect the current international human rights law”, and that a future convention should protect “transgender and intersex persons” since they are “more vulnerable to persecution”.¹⁸⁶ Costa Rica viewed paragraph 3 as containing “an obsolete definition of the term ‘gender’ that ignores developments over the last two decades in the areas of human rights and international criminal law, including within the International Criminal Court, in relation to sexual and gender-based crimes”.¹⁸⁷ Sweden stated that the “Nordic countries are of the view that the definition of ‘gender’ contained in draft article 3 paragraph 3, does not reflect current realities and content of international law”.¹⁸⁸

81. In advancing such comments, several States referred to several developments since the adoption of the Rome Statute of the International Criminal Court, notably: (a) the 2004 guidance document by the International Committee of the Red Cross (ICRC);¹⁸⁹ (b) the 2010 Committee on the Elimination of Discrimination against Women General Recommendation No. 25;¹⁹⁰ (c) the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence;¹⁹¹ and (d) recent reports of United Nations special rapporteurs or independent experts.¹⁹² Moreover, particular attention was drawn to the “Policy Paper

¹⁸² *Ibid.*, Canada.

¹⁸³ *Ibid.*, Belgium.

¹⁸⁴ *Ibid.*, Bosnia and Herzegovina.

¹⁸⁵ *Ibid.*, Chile.

¹⁸⁶ *Ibid.*, Estonia.

¹⁸⁷ *Ibid.*, Costa Rica.

¹⁸⁸ *Ibid.*, Sweden (on behalf of the Nordic countries).

¹⁸⁹ ICRC, *Addressing the Needs of Women Affected by Armed Conflict: an ICRC Guidance Document*, Geneva, ICRC, 2004, p. 7 (“The term ‘gender’ refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term ‘sex’ refers to biological and physical characteristics”).

¹⁹⁰ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28). Paragraph 5 of the Recommendation refers to gender as “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences”.

¹⁹¹ Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 11 May 2011), Council of Europe, *Treaty Series*, No. 210. Article 3 (c) of the Convention defines “gender” for purposes of the Convention to “mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.

¹⁹² See, for example, the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (A/HRC/35/23), paras. 17 *et seq.*; and the Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152), para. 2 (“Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms”).

on Sexual and Gender-based Crimes” of the Office of the Prosecutor of the International Criminal Court, which maintained that:

Article 7(3) of the Statute defines “gender” as referring to “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3) [of the Rome Statute of the International Criminal Court].¹⁹³

82. While Chile,¹⁹⁴ Costa Rica¹⁹⁵ and Liechtenstein¹⁹⁶ proposed replacing paragraph 3 with an alternative definition, most States simply recommended the deletion of paragraph 3. Chile, Costa Rica and Liechtenstein also viewed deletion as an acceptable alternative.¹⁹⁷

83. The OHCHR, emphasizing various authorities with respect to the “core principle of non-discrimination”,¹⁹⁸ commented that it “would be advisable” to revise paragraph 3 “to reflect the evolution of international law, in particular international human rights law, in relation to the social construction of gender; or, alternatively, to remove the definition of gender in the [d]raft [a]rticles”.¹⁹⁹ The Commission also received a submission from 24 special rapporteurs and an independent expert, representing a wide array of subject areas. After indicating relevant aspects of their own areas of responsibility, they urged the Commission “to either remove the definition of gender in article 3(3) ... (since no other persecutory category comes with a definition) or to insist on the social construction of gender as it is widely recognized to be”.²⁰⁰

¹⁹³ Office of the Prosecutor of the International Criminal Court, “Policy Paper on Sexual and Gender-based Crimes” (2014), para. 15, available from www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf. Article 21 of the Rome Statute of the International Criminal Court, which sets forth the applicable law of the International Criminal Court, begins in paragraph 3 as follows: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights...”. For a discussion of the Policy Paper, see V. Oosterveld, “The ICC Policy Paper on Sexual and Gender-Based Crimes: a crucial step for international criminal law”, *William and Mary Journal of Women and the Law*, vol. 24, No. 3 (Spring 2018), pp. 443–457.

¹⁹⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Chile (“For the purpose of the present draft articles, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys”).

¹⁹⁵ *Ibid.*, Costa Rica (“For the purpose of the present draft articles, it is understood that the term ‘gender’ acknowledges the social construction of gender and the roles, behaviours, activities, and attributes that are assigned to individuals.”).

¹⁹⁶ *Ibid.*, Liechtenstein (“For the purpose of the present draft articles, it is understood that the term ‘gender’ refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys”).

¹⁹⁷ *Ibid.*: Chile (“in case the suggestion just referred to was not ultimately accepted, paragraph 3 should at least be deleted altogether”); Costa Rica (“...if the International Law Commission decides to include in the draft articles a definition ...”); and Liechtenstein (“if the International Law Commission decides to have a definition”).

¹⁹⁸ *Ibid.*, chapter III.B.2, OHCHR.

¹⁹⁹ *Ibid.*

²⁰⁰ Comments of 30 November 2018 to the draft convention on crimes against humanity convention by the: Special Rapporteur on extrajudicial, summary or arbitrary executions; Chair-Rapporteur

84. Many NGOs and individuals also called for the deletion or replacement of the definition of “gender” contained in paragraph 3.²⁰¹ One submission was signed by 583 NGOs from 103 States worldwide, which “urge[d] the Commission to remove the definition of gender from article 3(3) . . . or in the alternative, replace it with the definition of gender put forth by the Office of the Prosecutor”.²⁰² In support, the submission cited a number of international authorities in addition to those cited above.²⁰³ Another submission signed by four NGOs cited additionally the treatment

of the Working Group of Experts on People of African Descent; Special Rapporteur on the situation of human rights in Cambodia; Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the right to food; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on human rights of internally displaced persons; Special Rapporteur on the situation of human rights in the Islamic Republic of Iran; Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members; Chair Rapporteur of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; Special Rapporteur on the situation of human rights in Myanmar; Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on freedom of religion or belief; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on violence against women, its causes and consequences; Working Group on the issue of discrimination against women in law and in practice; and Special Rapporteur on the human rights to safe drinking water and sanitation.

²⁰¹ Letter to the Secretary-General from Fundación para el Desarrollo y Reivindicación Etno-Cultural de las Comunidades Afrodescendientes (DRECCA) (29 November 2018); Global Justice Center, “Submission to the International Law Commission: the need to integrate a gender-perspective into the draft convention on crimes against humanity”, November 2018, pp. 11–14; Human Rights Watch, Submission to the International Law Commission (1 December 2018), p. 1; interACT-Advocates for Intersex Youth and Intersex Human Rights Australia, Open letter to the Secretary-General re: “Gender” in the Draft Crimes Against Humanity Convention, 1 December 2018); Submission of Asia Pacific Transgender Network and 11 other NGOs (30 November 2018), pp. 1–2; Letter to the United Nations from Women’s Initiatives for Gender Justice on behalf of nine NGOs or individuals (1 December 2018), p. 1; World Federalist Movement – Canada, E-mail to Director of the United Nations Codification Division (11 December 2018); and submission by A. Beringola, Researcher, Transitional Justice Institute, Ulster University (30 November 2018).

²⁰² Letter to the Secretary-General from 583 NGOs, re: Gender in the draft crimes against humanity convention (3 December 2018), p. 1.

²⁰³ *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo* [Gender identity, and equality and non-discrimination against same-sex couples], *Advisory Opinion OC-24/17 of 24 November 2017*, Inter-American Court of Human Rights, para. 32 (available only in Spanish); Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/57/4 and Corr.1); Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties (CAT/C/GC/2); Committee on the Elimination of Discrimination against Women, General recommendation No. 33 on women’s access to justice (CEDAW/C/GC/33); Committee against Torture, General comment No. 3 (2012) on the implementation of article 14 by States parties (CAT/C/GC/3); Committee on Economic, Social and Cultural Rights, *Official Records of the Economic and Social Council, Report on the Thirty-fourth and Thirty-fifth Sessions, Supplement No. 2 (E/2006/22-E/C.12/2005/4)*, annex VIII, General comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the Covenant); Secretary-General, Question of torture and other cruel, inhuman or degrading treatment or punishment (A/56/156); Report of the Human Rights Committee, *Official Records of*

of “gender” in the case law of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Criminal Court.²⁰⁴ A third submission, on behalf of about 70 civil society organizations and human rights activists based throughout Africa, concluded that it “is now time for the international community to take a stand on this issue and ensure that the above treaty, which protects people against the worst atrocities imaginable, by its nature should protect all of us”.²⁰⁵

85. Further, it is noted that the definition of gender in the Rome Statute of the International Criminal Court has also garnered criticism by publicists.²⁰⁶ At the same time, some publicists argue that the phrase “within the context of society” found in article 7, paragraph 3, of the Rome Statute of the International Criminal Court, especially when read in conjunction with its article 21, paragraph 3,²⁰⁷ allows for a broader interpretation than the definition might otherwise suggest.²⁰⁸ Be that as it may, the Commission’s draft articles on crimes against humanity do not have a provision comparable to the Statute’s article 21, paragraph 3.

the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40), General comment No. 28 concerning article 3 (equality of rights between men and women); Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (A/51/322); and Report of the Committee on Elimination of Discrimination against Women, Eleventh Session, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38)*, General recommendation No. 19 on violence against women.

²⁰⁴ Joint Letter to the Secretary-General from the Human Rights and Gender Justice Clinic at the City University of New York, MADRE, OutRight Action International, and the Center for Socio-Legal Research at Universidad de Los Andes School of Law, Bogotá, Colombia (1 December 2018), pp. 1–4 (citing *Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence of 3 December 2003*, Trial Chamber I, International Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 2003*, p. 376, at p. 1116, para. 1079; *Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment of 2 November 2001*, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 327; *ibid.*, *Case No. IT-98-30/1-A, Judgment of 28 February 2005*, Appeals Chamber, International Tribunal for the Former Yugoslavia, paras. 369–370; and *Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision of 7 August 2012 establishing the principles and procedures to be applied to reparations*, Trial Chamber I, International Criminal Court, para. 191).

²⁰⁵ Letter to the United Nations from the Southern Africa Litigation Centre and other civil society organizations and human rights activists (29 November 2018), p. 3.

²⁰⁶ See, for example, V. Oosterveld, “The definition of ‘gender’ in the Rome Statute of the International Criminal Court: a step forward or back for international criminal justice?”, *Harvard Human Rights Journal*, vol. 18 (Spring 2005), pp. 55–84, at pp. 55–56 (finding that “opinions vary widely about the definition of ‘gender’ adopted in the Rome Statute [of the International Criminal Court], and include some sharp criticism. Some describe it as ‘stunningly narrow,’ a ‘failure,’ ‘puzzling and bizarre,’ ‘peculiar,’ ‘restraining,’ and having ‘limited transformative edge’); see also Triffterer and Ambos (eds.) (footnote 177 above), p. 293, mn 159; B. Kritz, “The global transgender population and the International Criminal Court”, *Yale Human Rights and Development Law Journal*, vol. 17 (2014), pp. 1–38, at p. 36; and V. Oosterveld, “Gender-based crimes against humanity”, in L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge University Press, 2011, pp. 78–101, at p. 83.

²⁰⁷ See footnote 193 above.

²⁰⁸ See B. Bedont, “Gender-specific provisions in the Statute of the International Criminal Court”, in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, vol. I, Ripa Fagnano Alto, Editrice il Sirente, 1999, pp. 183–210, at pp. 187–188; Oosterveld, “The definition of ‘gender’ ...” (see footnote 206 above), pp. 77–78; and Triffterer and Ambos (eds.) (footnote 177 above), p. 293, mn 159.

86. In light of the comments received, and for reasons explained below,²⁰⁹ the Special Rapporteur recommends that the Commission delete paragraph 3 of draft article 3.

87. Several States²¹⁰ and the European Union²¹¹ expressed support for the inclusion of the **paragraph 4** “without prejudice” clause, especially as it aligned with article 10 of the Rome Statute of the International Criminal Court.²¹² Turkey, however, questioned the usefulness of paragraph 4,²¹³ while the Russian Federation thought that the mention of “any broader definition” in the draft article could hinder effective cooperation between States who had varying standards under domestic law.²¹⁴ The Islamic Republic of Iran also expressed concern that paragraph 4 could create a risk of fragmentation of international law.²¹⁵

88. Noting article 10 of the Rome Statute of the International Criminal Court, Chile viewed a clearer formulation to be: “This draft article shall not prevent the application of broader definitions of crimes against humanity provided for in national laws or other international instruments, insofar as that they are consistent with the content of the present draft articles.”²¹⁶ Moreover, Chile recommended a further “without prejudice” clause, stating that “the definitions contained in the present draft article shall not be understood as precluding other offences from being considered crimes against humanity under general international law or other international agreements”.²¹⁷ Sierra Leone believed that it could be better aligned by reading: “This draft article is without prejudice to any broader definition provided for under customary international law or in any international instrument or national law.”²¹⁸ The Special Rapporteur agrees that the latter formulation is an improvement to the current text.

89. The United Kingdom²¹⁹ favoured including in the text of paragraph 4 certain language contained in the Commission’s commentary: “Any elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.”²²⁰ Doing so, according to the United Kingdom, would help avoid any disputes between States in the context of extradition and mutual legal

²⁰⁹ See paragraphs 101 to 103 below.

²¹⁰ Belarus, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting (A/C.6/70/SR.21)*, para. 33; France, *ibid.*, 20th meeting (A/C.6/70/SR.20), para. 20; Greece, *ibid.*, para. 50; New Zealand, *ibid.*, 22nd meeting (A/C.6/70/SR.22), para. 31; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Switzerland. Switzerland further noted that the commentary might indicate that account be taken of relevant developments in case law, including that of the International Criminal Court (*ibid.*).

²¹¹ *Ibid.*, chapter III.B.2, European Union (“This type of language appears to preserve the definitions under the Statute and avoid any inconsistency”).

²¹² Rome Statute of the International Criminal Court, art. 10 (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”).

²¹³ Turkey, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 112.

²¹⁴ Russian Federation, *ibid.*, 23rd meeting (A/C.6/70/SR.23), para. 19.

²¹⁵ The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 33.

²¹⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.4, Chile.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*, Sierra Leone.

²¹⁹ *Ibid.*, the United Kingdom.

²²⁰ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 3, para. (41).

assistance. The Special Rapporteur agrees that the proposition set forth in the commentary is correct but regards the current language of the draft article, as a whole, as sufficient for indicating what is meant by “crimes against humanity” when applying the draft articles; any broader elaboration of the meaning of such crimes falls outside the scope of the draft articles.

2. Recommendations of the Special Rapporteur

90. The Special Rapporteur recommends four changes to draft article 3, relating to paragraph 1 (*h*), paragraph 3 and paragraph 4.

Draft article 3, paragraph 1 (h)

91. In light of the comments received,²²¹ the Special Rapporteur recommends the deletion in paragraph 1 (*h*) of the clause “in connection with the crime of genocide or war crimes”.

92. The Commission indicated at first reading that it might need to revisit this clause.²²² The Special Rapporteur notes that the clause appears designed to establish a form of jurisdiction unique to the International Criminal Court, and not to indicate the ambit of what constitutes crimes against humanity more generally.²²³ Indeed, such a clause does not operate as a part of the national laws of States,²²⁴ nor is it used as a jurisdictional threshold for other contemporary international criminal tribunals.²²⁵ Rather, such tribunals have indicated that the Rome Statute of the International Criminal Court, to the extent that it requires such a connection, is not reflective of customary international law.²²⁶

93. Deletion of the *entire* second half of subparagraph (*h*) (“in connection with any act referred to in this paragraph or in connection with...”) would appear, however, to go too far in widening the definition of crimes against humanity. The reason that some kind of “connection” element was deemed necessary in the Rome Statute of the International Criminal Court was due to a concern that, without it, a wide range of

²²¹ See paragraphs 62 to 65 above.

²²² See the report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, commentary to draft article 3, para. (8).

²²³ See, for example, K. Kittichaisaree, *International Criminal Law*, Oxford University Press, 2002, p. 121; and W. A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, pp. 194–202.

²²⁴ See the various comments by Governments regarding their national laws submitted to the Commission with respect to this topic in 2015–2016, available from http://legal.un.org/ilc/guide/7_7.shtml. See also *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment of 14 January 2000, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, pp. 1399 *et seq.*, at p. 1781, para. 577.

²²⁵ See, for example, the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council resolution 827 (1993) of 25 May 1993, art. 5 (h) (although it is noted that this Statute’s definition of crimes against humanity includes “when committed in armed conflict”); the Statute of the International Tribunal for Rwanda, adopted by Security Council resolution 955 (1994) of 8 November 1994, annex, art. 3 (h); the Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000 (the text of the Statutes is available from <http://www.rscsl.org/documents.html>), art. 2 (h); the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 5; and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 28C, para. 1 h) (the text of the Protocol is available from <https://au.int>).

²²⁶ See, for example, *Prosecutor v. Kupreškić et al.* (footnote 224 above), p. 1783, paras. 580–581, and p. 1809, para. 615.

discriminatory practices might be swept into the definition of crimes against humanity.²²⁷ If the entire “connection” element of paragraph 1 (*h*) is deleted, then the effect of the remaining portion of paragraph 1 (*h*), in combination with the definition of “persecution” in paragraph 2 (*g*) and with the *chapeau* to paragraph 1, would be as follows: a crime against humanity would exist whenever there is, (1) an intentional and severe deprivation of fundamental rights contrary to international law, (2) by reason of the identity of a group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, (3) when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. If that were the case, then the denial of certain rights – such as the right of a particular ethnic group to form trade unions²²⁸ – might be understood as falling within the scope of such a definition. While denial of such rights on a widespread or systematic basis would be of great concern, it would not traditionally be viewed as constituting crimes against humanity. In short, retention of the “in connection with any act referred to in this paragraph” clause provides guidance as to the nature of the persecution that constitutes a crime against humanity.

94. Some writers contend that customary international law may not require such a connection with other acts.²²⁹ While recognizing that such a connection was required

²²⁷ See H. von Hebel and D. Robinson, “Crimes within the jurisdiction of the Court”, in R. S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations, Results*, The Hague, Kluwer, 1999, pp. 79–126, at p. 101 (finding that the “connection” requirement was incorporated at Rome “to avoid a sweeping interpretation criminalizing all discriminatory practices”); D. Robinson, “Defining ‘crimes against humanity’ at the Rome Conference”, *American Journal of International Law*, vol. 93 (1999), pp. 43–57, at p. 54 (“many delegations strongly felt that such a connection was a necessary element of the crime of persecution, because of the vague and potentially elastic nature of this crime and the need to ensure an appropriate focus on its criminal nature”); Werle and Jessberger (eds.) (footnote 177 above), pp. 376–377 (“The requirement of a connection was intended to take account of concerns about the breadth of the crime of persecution”); Cryer, *et al.* (eds.) (footnote 177 above), p. 257 (“This requirement was included because of the concern of several States about the possible elasticity of the concept of persecution. The fear was that any practices of discrimination, more suitably addressed by human rights bodies, would be labelled as ‘persecution’, giving rise to international prosecutions. The connection requirement was inserted to ensure at least a context of more recognized forms of criminality”); and C. Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2018, p. 70 (“The definition specifies that the acts must be committed ‘in connection’ with other acts or crimes within the jurisdiction of the [International Criminal Court]. This requirement was introduced to limit ‘sweeping interpretation criminalizing all discriminatory practices’”).

²²⁸ See article 8 of the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

²²⁹ See, for example, K. Ambos and S. Wirth, “The current law of crimes against humanity: an analysis of UNTAET Regulation 15/2000”, *Criminal Law Forum*, vol. 13 (2002), pp. 1–90, at p. 72 (“Considered as a whole, the connection requirement is highly questionable”); A. Cassese *et al.* (eds.), *Cassese’s International Criminal Law*, 3rd ed., Oxford University Press, 2013, p. 107 (“Article 7 [of the Rome Statute of the International Criminal Court] is less liberal than customary international law with regard to one element of the definition of persecution. ... Under general international law, persecution may also consist of acts not punishable as war crimes or crimes against humanity, as long as such acts (a) result in egregious violations of fundamental rights; (b) are part of a widespread or systematic practice; and (c) are committed with discriminatory intent. Article 7(1)(h) imposes a further burden on the prosecution: it must be proved that, in addition to discriminatory acts based on one of the grounds described in this provisions, the *actus reus* consists of one of the acts prohibited in Article 7(1) or of a war crime or genocide (or aggression, if this crime is eventually accepted as falling under the jurisdiction of the Court), or must be ‘connected’ with such acts or crimes. Besides adding a requirement not provided for in general international law, Article 7 uses the phrase ‘in connection with’, which is unclear and susceptible to many interpretations”); Werle and Jessberger (eds.) (footnote 177 above), p. 377 (“With this accessory design, the [Rome Statute of the International Criminal

under the Charter of the International Military Tribunal²³⁰ and the Charter of the International Military Tribunal for the Far East,²³¹ and in the Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,²³² those writers typically point out that such a connection was not included in the constituent instruments of the International Tribunal for the Former Yugoslavia,²³³ the International Tribunal for Rwanda,²³⁴ the Special Court for Sierra Leone²³⁵ or the Extraordinary Chambers in the Courts of Cambodia,²³⁶ nor in the Commission's 1996 draft code of crimes against the peace and security of mankind.²³⁷

95. Not surprisingly, international tribunals whose constituent instruments do not require a connection between persecution and some other act, do not regard such a connection as necessary when finding the persecution to be a crime against humanity.²³⁸ Thus, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia in *Prosecutor v. Nuon Chea and Khieu Samphan* dismissed a defence application that a link must exist between the acts of persecution and any other underlying offence within the jurisdiction of those Chambers, holding that such a link was not required under the definition of persecution as a crime against humanity as it existed under customary international law in 1975.²³⁹ Even so, such tribunals typically *do* require that the persecution be of "equal gravity" to other acts that can constitute crimes against humanity. Thus, the Trial Chamber in *Prosecutor v. Nuon*

Court] lags behind customary international law, since the crime of persecution, like crimes against humanity in general, has developed into an independent crime"); and Cryer, *et al.* (eds.) (footnote 177 above), p. 257 ("The customary law status of this requirement is open to doubt").

²³⁰ Agreement for the prosecution and punishment of the major war criminals of the European Axis, Charter of the International Military Tribunal (as amended by the Berlin Protocol) (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, p. 280, at p. 288, article 6 (c) (referring to "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal"). By contrast, Control Council Law No. 10, Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity (Berlin, 20 December 1945), in article 2, paragraph 1 c), did not include such a connection, referring solely to "persecutions on political, racial or religious grounds" (*Official Gazette of the Control Council for Germany*, No. 3 (1946), p. 51).

²³¹ Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946, amended 26 April 1946), in C. I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776-1949*, vol. 4: *Multilateral 1946-1949*, p. 28, art. 5 c).

²³² Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, *Yearbook of the International Law Commission 1950*, vol. II, p. 374.

²³³ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5 (h) (referring solely to "persecutions on political, racial and religious grounds").

²³⁴ Statute of the International Tribunal for Rwanda, art. 3 (h) (referring solely to "[p]ersecutions on political, racial and religious grounds").

²³⁵ Statute of the Special Court for Sierra Leone, art. 2 (h) (referring solely to "[p]ersecution on political, racial, ethnic or religious grounds").

²³⁶ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 5 (referring solely to "persecutions on political, racial, and religious grounds").

²³⁷ See also the draft code of crimes against the peace and security of mankind, *Yearbook of the International Law Commission 1996*, vol. II (Part Two), pp. 17 *et seq.*, at pp. 47-50, art. 18 (e) (referring solely to "Persecution on political, racial, religious or ethnic grounds").

²³⁸ See, for example, *Prosecutor v. Kupreškić et al.* (footnote 224 above), p. 1783, para. 580; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment of 26 February 2001, Trial Chamber, International Tribunal for the Former Yugoslavia, paras. 193-197; *Prosecutor v. Kaing Guek Eav*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment of 3 February 2012, Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, paras. 241-262; and *Prosecutor v. Nuon Chea and Khieu Samphan*, Case No. 002/19-09-2007/ECCC/TC, Judgment of 7 August 2014, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, paras. 431-433.

²³⁹ *Prosecutor v. Nuon Chea and Khieu Samphan* (see footnote above), para. 432.

Chea and Khieu Samphan relied on the ruling of the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia in *Prosecutor v. Kaing Guek Eav*, in which it concluded that persecution could consist of other acts outside of a tribunal's charter as long as the conduct "rose to the level of gravity and severity of other underlying crimes against humanity".²⁴⁰ Other tribunals have similarly held that, while the alleged persecution need not be connected to the other punishable acts of crimes against humanity, they must be of equal gravity.²⁴¹

96. There are several reasons for retaining the phrase "in connection with any act referred to in this paragraph" in draft article 3, subparagraph 1 (*h*). First, it is noted that the constituent instruments of contemporary tribunals other than the International Criminal Court, which do not contain such a "connection" requirement, also do not contain the broad range of grounds of persecution that appear in the Rome Statute of the International Criminal Court or in draft article 3, paragraph 1 (*h*). Second, not all contemporary tribunals have eliminated the connection element. Thus, the United Nations Transitional Administration in East Timor Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences did replicate the language in article 7, paragraph 1 (*h*) of the 1998 Rome Statute of the International Criminal Court to the extent relevant here.²⁴²

97. Third, some writers have observed that, as a practical matter, the requirement of a "connection with any act referred to in this paragraph" roughly equates to the "equal gravity" requirement used in the jurisprudence of contemporary international tribunals.²⁴³ For example, in *Prosecutor v. Popović et al.*, the Appeals Chamber of the International Tribunal for the Former Yugoslavia analysed the findings of the Trial Chamber as follows:

761. The Appeals Chamber recalls that the Trial Chamber correctly stated that the crime of persecution requires an act or omission that "discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law". The Trial Chamber correctly stated that "[n]ot every denial of a human right is serious enough to constitute a crime against humanity" and that "acts or omissions need to be of equal gravity to the crimes listed in Article 5 [of the Statute] whether considered in isolation or in

²⁴⁰ *Prosecutor v. Kaing Guek Eav* (see footnote 238 above), para. 261 ("it was clear under post-World War II case law that persecution may consist of 'other acts' outside of the Tribunals' charters in addition to other underlying crimes against humanity or war crimes as long as under the doctrine of *ejusdem generis* the conduct rose to the level of gravity and severity of other underlying crimes against humanity, resulting in breaches to fundamental human rights").

²⁴¹ *Prosecutor v. Kupreškić et al.* (see footnote 224 above), pp. 1811–1813, paras. 619–621, and p. 1817, para. 627; *Prosecutor v. Kordić and Čerkez* (see footnote 238 above), para. 195; *Prosecutor v. Kvočka et al.*, *Case No. IT-98-30/1-T* (see footnote 204 above), paras. 184–185; *ibid.*, *Case No. IT-98-30/1-A* (see footnote 204 above), para. 321; *Prosecutor v. Krnojelac*, *Case No. IT-97-25-T, Judgment of 15 March 2002*, Trial Chamber II, International Tribunal for the Former Yugoslavia, para. 434; *ibid.*, *Case No. IT-97-25-A, Judgment of 17 September 2003*, Appeals Chamber, International Tribunal for the Former Yugoslavia, paras. 199 and 221; *Prosecutor v. Brđanin*, *Case No. IT-99-36-A, Judgment of 3 April 2007*, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 296; and *Nahimana et al. v. The Prosecutor*, *Case No. ICTR-99-52-A, Judgment of 28 November 2007*, Appeals Chamber, International Tribunal for Rwanda, para. 985.

²⁴² United Nations Transitional Administration in East Timor, Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), section 5.1 (*h*) (referring to "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels").

²⁴³ See Schabas, *The International Criminal Court* (footnote 223 above), p. 199.

conjunction with other acts”. It also correctly stated that “[i]t is not required that acts or omissions underlying persecution be considered crimes under international law”.

762. To establish the *actus reus* of persecution in the present case, the Trial Chamber was required to establish that the underlying acts of terrorising civilians: discriminated in fact, denied or infringed upon a fundamental right laid down in international customary or treaty law, and were “of equal gravity to the crimes listed in Article 5 whether considered in isolation or in conjunction with other acts.” In this regard, the Appeals Chamber notes that the Trial Chamber found that the [Bosnian Serb Forces] discriminated against Bosnian Muslim civilians, and that “the terrorising of civilians [...] is of equal gravity to the crimes listed in Article 5 and constitutes a gross denial of fundamental rights, *inter alia*, the right to security.”²⁴⁴

98. Similarly, in *Nahimana et al. v. The Prosecutor*,²⁴⁵ the Appeals Chamber for the International Tribunal for Rwanda found that it was not necessary to determine whether a persecution campaign in the form of hate speeches was of a level of gravity equivalent to that of other crimes against humanity since, on the facts of the case, the hate speeches were in conjunction with acts of violence and destruction of property.

99. Finally, the rough equation of the “connection with any act referred to in this paragraph” requirement and the “equal gravity” requirement used by many tribunals is especially apparent when contrasted with the requirement of a connection with “other crimes” (such as genocide or war crimes). For the latter, the persecution must be connected to another complete crime; that other crime, with all of its required elements, must be proven for the persecution to be a crime against humanity. In contrast, the requirement of a “connection with any act referred to in this paragraph” does not require a connection with another crime,²⁴⁶ nor does it require any additional mental element.²⁴⁷ Rather, it requires a connection between persecution that is occurring on a widespread or systematic basis against any civilian population, and any one of specified acts listed elsewhere in the paragraph, which are the types of acts that would exist when persecution of an especially grave nature is occurring.²⁴⁸

²⁴⁴ *Prosecutor v. Popović et al., Case No. IT-05-88-A, Judgment of 30 January 2015*, Appeals Chamber, International Tribunal for the Former Yugoslavia, paras. 761–762. See also *Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment of 1 September 2004*, Trial Chamber II, International Tribunal for the Former Yugoslavia, paras. 1032–1041 and 1055 (holding that the cumulative effect of a campaign of persecution, including the denial of the right to employment for Bosnian Muslims and Bosnian Croats, was of equal gravity to other crimes listed in article 5 of the Tribunal’s Statute because such acts were in the context of a plan ethnically to “cleanse” persons from territory claimed by the Bosnian Serb authorities). The defendant did not appeal the finding of fact that the denial of rights was of equal gravity to other crimes listed under article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (see *Prosecutor v. Brđanin, Case No. IT-99-36-A* (footnote 241 above), para. 297).

²⁴⁵ See footnote 240 above, paras. 987–988.

²⁴⁶ See von Hebel and Robinson (footnote 227 above), pp. 101–102; and Cryer, *et al.* (eds.) (footnote 177 above), p. 257.

²⁴⁷ See International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II: Finalized draft text of the Elements of Crimes (PCNICC/2000/1/Add.2), footnote 22. See also Ambos and Wirth (footnote 229 above), pp. 71–72.

²⁴⁸ See Robinson, “Defining ‘crimes against humanity’ at the Rome Conference” (footnote 227 above), p. 55 (finding that “[i]n practical terms, the requirement should not prove unduly restrictive, as a quick review of historical acts of persecution shows that persecution is inevitably accompanied by such inhumane acts”); Ambos, *Treatise on International Criminal Law* (footnote 177 above), at p. 106 (finding that such a “connection requirement serves the sole purpose of limiting the Court’s jurisdiction to forms of persecution which are of an elevated objective dangerousness”).

100. In light of these considerations, the Special Rapporteur proposes the deletion in draft article 3, paragraph 1 (*h*), only of the words “or in connection with the crime of genocide or war crimes”.

Draft article 3, paragraph 3 (and paragraph 1 (h))

101. With respect to the paragraph 3 definition of gender, the Special Rapporteur notes the strong and numerous comments and criticisms by both States and others in favour of deleting or amending paragraph 3.²⁴⁹ Those comments generally advance compelling arguments that the definition of gender contained in article 7, paragraph 3, of the Rome Statute of the International Criminal Court is not used in contemporary international law, even by the International Criminal Court.

102. In addition to these comments and criticisms, the Special Rapporteur notes that, even if paragraph 3 were to be viewed as an adequate definition for the functioning of an international court, a question still arises as to whether it is necessary or appropriate to impose the same definition on all States for the purpose of their national laws relating to crimes against humanity. In that regard, there is merit in the following assessment of the Council on Human Rights’ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity:

Concepts of gender identity vary greatly across the world and a wide range of gender identities and gender expressions exist in all regions as a result of long-established cultures and traditions. Some of the terms used include *hijra* (Bangladesh, India and Pakistan), *travesti* (Argentina and Brazil), *waria* (Indonesia), *okule* and *agule* (Democratic Republic of the Congo and Uganda), *muxe* (Mexico), *fa’afafine* (Samoa), *kathoey* (Thailand) and two-spirit (indigenous North Americans). Some of these and other identities transcend Western concepts of gender identity, gender expression or sexual orientation and, depending on the language, the terms “sex”, “gender”, “gender identity” and/or “sexual identity” are not always used or distinguished. Cultures and countries from all over the globe, including Australia, Bangladesh, Canada, India, Nepal, New Zealand and Pakistan – together representing a quarter of the world’s population – recognize in law and in cultural traditions genders other than male and female.²⁵⁰

103. In light of these considerations, the Special Rapporteur proposes the deletion of paragraph 3 of draft article 3, as well as the deletion in paragraph 1 (*h*) of the words “as defined in paragraph 3.”

Draft article 3, paragraph 4

104. Third, in light of the comments received,²⁵¹ the Special Rapporteur proposes that the first sentence of this paragraph be adjusted so as to refer as well to customary international law. As such, the paragraph might read as follows: “This draft article is without prejudice to any broader definition provided for in customary international law or in any international instrument or national law.” Further, in the event that the current draft article 3, paragraph 3, is deleted, then this paragraph 4 should be renumbered as paragraph 3.

²⁴⁹ See paragraphs 80 to 86 above.

²⁵⁰ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152), para. 3 (footnotes omitted).

²⁵¹ See paragraph 88 above.

F. Draft article 4 [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; 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.

1. Comments and observations

105. States provided comments on draft article 4 both in writing and in statements before the Sixth Committee during the seventieth, seventy-first and seventy-second sessions of the General Assembly.

106. Several States expressed their general support for draft article 4 as adopted on first reading.²⁵² Likewise, the OHCHR found this obligation of prevention to be “one of the major assets of this draft treaty”.²⁵³ At the same time, Sweden (on behalf of the Nordic countries) noted that the obligations under draft article 4 should not be construed so as to limit existing obligations related to other crimes.²⁵⁴ Further, the United Kingdom suggested that the undertaking to prevent crimes against humanity, as set out in both this draft article and draft article 2, constitutes a proposal for the progressive development of the law, and should be indicated as such in the commentary.²⁵⁵

107. With respect to the obligation of prevention set forth in **paragraph 1**, some States expressed a desire for greater detail as to what is expected of States when “preventing” crimes against humanity. In particular, New Zealand indicated that a more explicit statement that States themselves are prohibited from committing acts that are crimes against humanity would be desirable, rather than leaving that point to

²⁵² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Australia; Austria, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 33; the Czech Republic, *ibid.*, para. 59; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Estonia; France, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 19; Greece, *ibid.*, para. 50; Romania, *ibid.*, 21st meeting (A/C.6/70/SR.21), para. 79; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Sierra Leone; Slovakia, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 23rd meeting (A/C.6/70/SR.23)*, para. 12; South Africa, *ibid.*, para. 14; Sweden (on behalf of the Nordic countries), *ibid.*, 20th meeting (A/C.6/70/SR.20), para. 7; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Switzerland. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 8.

²⁵³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.3, OHCHR. See also *ibid.*, chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

²⁵⁴ Sweden (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 7.

²⁵⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, the United Kingdom.

the explanation contained in the commentary.²⁵⁶ Similarly, Panama favoured indicating that States shall not commit such acts through their own organs, or through persons over whom they have such firm control that their conduct is attributable to the State concerned under international law, and further that States shall employ the means at their disposal to prevent persons or groups not directly under their authority from committing such acts.²⁵⁷ Relatedly, Australia urged that somewhere in the draft articles there be stated that it is the “primary responsibility” of each State to prevent and punish serious crimes that occur within its jurisdiction.²⁵⁸ In contrast, the Russian Federation expressed concern that paragraph 1 was already too detailed and suggested that the draft article could instead include just a general reference to the obligation of States to prevent crimes against humanity.²⁵⁹

108. The United Kingdom also urged that the Commission include within the text whatever specific obligations exist in this regard and not leave the matter open-ended through text such as “including...”. In the view of the United Kingdom, the current approach creates “a broad, and potentially ever expanding, set of obligations for States in relation to crimes against humanity”, which “increases the risks of dispute about the exact requirements”, and it would be preferable to have “a longer but exhaustive list of obligations” rather than “a shorter but unlimited one”.²⁶⁰ Likewise, China and the Islamic Republic of Iran noted that, as currently drafted, the obligation of prevention was too broad.²⁶¹ To address such a concern, Cuba suggested changing “including through” so as to read “through the following actions”.²⁶²

109. The Special Rapporteur notes that the Commission’s approach at first reading was to view as implicit, in the obligation to prevent the crimes against humanity, a State’s obligation not to commit acts, through its organs or otherwise, that constitute crimes against humanity. Prior conventions, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide or the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment do not expressly provide that States shall not commit the acts at issue in those conventions. Nevertheless, such an obligation could be made more explicit in the draft article itself, with further elaboration in the commentary as to its meaning. Moreover, if such an obligation is explicitly recognized, then it may be possible to redraft the current paragraph 1 so as to be less open-ended. If this is done, however, no implication should be drawn as to the absence of such an express obligation in other treaties of a similar nature.

110. With respect to the text of **subparagraph (a)**, France and the Czech Republic suggested that any specific “preventive measures” be identified in the draft article itself,²⁶³ while Greece proposed that such examples could be expanded in the

²⁵⁶ *Ibid.*, New Zealand. See also *ibid.*, chapter III.A, United Nations Office on Genocide Prevention and the Responsibility to Protect.

²⁵⁷ *Ibid.*, chapter II.B.5, Panama.

²⁵⁸ *Ibid.*, chapter II.A, Australia. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 6.

²⁵⁹ Russian Federation, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 23rd meeting (A/C.6/70/SR.23)*, paras. 20–21.

²⁶⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, the United Kingdom.

²⁶¹ China, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 22nd meeting (A/C.6/70/SR.22)*, para. 67; the Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 37.

²⁶² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Cuba.

²⁶³ France, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 19; and the Czech Republic, *ibid.*, para. 59.

commentary.²⁶⁴ Chile suggested inserting “appropriate” before “preventive measures”.²⁶⁵ The Czech Republic favoured greater specificity in both the draft article and the commentary; thus, the draft article might address some specific preventive measures (such as the training of officials),²⁶⁶ while the commentary might explain the meaning of “administrative measures”, so as to guide future implementation.²⁶⁷ Sierra Leone also provided various suggestions for improvement to the commentary.²⁶⁸ Indonesia favoured greater specificity but then also favoured deletion of the phrase “other preventive measures”, which it thought could lead to legal uncertainty.²⁶⁹ Sweden (on behalf of the Nordic countries) suggested that an entirely new article might be crafted that would detail the concrete nature and methods of prevention.²⁷⁰ The Special Rapporteur notes that it might be useful, in guiding States, to provide somewhat greater specificity, by means of illustration, as to what kinds of “preventive measures” are at issue in this subparagraph.

111. Several States commented on the phrase “**territory under [a State’s] jurisdiction**”, which is used in subparagraph (a) and in other draft articles.²⁷¹ The Commission’s commentary explains that this phrase refers not just to a State’s own territory, over which it exercises *de jure* jurisdiction, but also to territory where a State is exercising *de facto* jurisdiction, such when it occupies foreign territory during an armed conflict.²⁷² Greece welcomed this explanation,²⁷³ and the OHCHR spoke favourably about obligations not being limited to the State’s territory, but extending as well to territory under its jurisdiction.²⁷⁴ Austria and Chile welcomed this scope of application but indicated a preference for using the formula “jurisdiction or control”.²⁷⁵ The United Nations Office on Genocide Prevention and the Responsibility to Protect proposed that the scope be expanded to cover more than just territory under a State’s jurisdiction.²⁷⁶ In contrast, the United Kingdom proposed that the scope be restricted to just the State’s own territory (“in its territory”) because doing so would provide greater certainty as to where the relevant obligations operate and because it

²⁶⁴ Greece, *ibid.*, para. 51.

²⁶⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Chile.

²⁶⁶ In this regard, the Czech Republic cites article 10 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, article 23 of the International Convention for the Protection of All Persons from Enforced Disappearance, and the United Nations Convention against Corruption (New York, 31 October 2003), United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.

²⁶⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, the Czech Republic.

²⁶⁸ *Ibid.*, Sierra Leone.

²⁶⁹ Indonesia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting* (A/C.6/72/SR.21), para. 8.

²⁷⁰ Sweden (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting* (A/C.6/70/SR.20), para. 7.

²⁷¹ In addition to draft article 4, para. 1 (a), see draft article 5, paras. 1–2; draft article 7, paras. 1 (a) and 2; draft article 8; draft article 9, para. 1; draft article 10; draft article 11, para. 3; and draft annex, paras. 15–17 and 19.

²⁷² See Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, commentary to draft article 4, para. (18).

²⁷³ Greece, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 29.

²⁷⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.3, OHCHR.

²⁷⁵ Austria, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 82; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Chile.

²⁷⁶ *Ibid.*, chapter III.A, United Nations Office on Genocide Prevention and the Responsibility to Protect.

may not always be practical to apply the relevant draft articles where a State exercises *de facto* control over territory.²⁷⁷ The Special Rapporteur believes that the current scope of application strikes the right balance among these views and that the phrase is clear and appropriate for this and other draft articles.

112. Australia did not propose any change to the phrase but urged clarification that obligations arising under the draft articles “would not, for example, arise with respect to places of detention outside the territory of the State in circumstances where the State had control over the place of detention but not over the surrounding territory. Australia’s position is that international obligations are primarily territorial, and that a high degree of control over territory is required for territory to be considered under a State’s jurisdiction.”²⁷⁸ The Special Rapporteur regards the Commission’s current commentary as consistent with the interpretation by Australia of the meaning of the term.

113. With respect to **subparagraph (b)** on cooperation, the Russian Federation noted that the wording was too vague; it suggested moving the provision to draft article 7.²⁷⁹ Singapore also said that “the scope of a State’s obligation in this regard is not clear” and suggested that “some explanation of the scope of the obligation in the commentary on this draft article would assist States to understand the nature of the commitment”.²⁸⁰ Likewise, the Czech Republic maintained that “the obligation to cooperate with non-governmental organizations is not well established in treaties on criminal matters”, and therefore “more elaboration and explanation” on this obligation is needed.²⁸¹ The Islamic Republic of Iran questioned the legal basis for the obligation to cooperate with “other organizations”, including non-governmental organizations, and suggested that the Commission reconsider the issue.²⁸² In contrast, Estonia welcomed the provision, finding that “impunity for crimes against humanity cannot be stopped without the cooperation of States and relevant intergovernmental and other [organizations]”.²⁸³

114. The Special Rapporteur notes that a number of widely-adhered-to conventions contain general provisions addressing cooperation among States or with international organizations concerning the prevention of international or transnational crimes.²⁸⁴ Precedent for cooperation with other organizations, however, is not as well established, which is why draft article 4 indicates that such cooperation need only be “as appropriate”. The Special Rapporteur is, again, of the view that this paragraph strikes the right balance and should remain unchanged, but that the Commission might consider further explanation as to its meaning in its commentary.

115. Regarding **paragraph 2**, Belarus, Greece, Slovenia and Spain commented that the provision was not specific to the obligation of “prevention” and should be moved

²⁷⁷ *Ibid.*, chapter II.B.5, the United Kingdom.

²⁷⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Australia, p. 2.

²⁷⁹ Russian Federation, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 65.

²⁸⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Singapore.

²⁸¹ *Ibid.*, the Czech Republic.

²⁸² The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 37.

²⁸³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Estonia.

²⁸⁴ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 10–13.

elsewhere,²⁸⁵ while the Russian Federation recommended that it be moved to draft article 3.²⁸⁶ Poland, on the other hand, did not propose that it be moved but recommended that the final phrase be changed to read “as justification of failure to prevent crimes against humanity”.²⁸⁷ Chile favoured the following reformulation: “No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification for failing to prevent or for tolerating crimes against humanity.”²⁸⁸

116. The Special Rapporteur agrees that the placement of the paragraph might be improved by associating it with a State’s obligation not to commit acts that constitute crimes against humanity, rather than a State’s obligation to take measures or to cooperate with others so as to prevent crimes against humanity. If that is done, then the text as it currently exists, which is derived from text used in other treaties addressing crimes,²⁸⁹ is appropriate.

2. Recommendation of the Special Rapporteur

117. The Commission’s commentary to draft article 4 explains that the obligation to prevent crimes against humanity, as indicated in the *chapeau* of the current paragraph 1, implies an obligation that a State not “commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law”.²⁹⁰ To address comments by some States that this obligation be made more explicit,²⁹¹ the Special Rapporteur recommends that an obligation not to engage in such acts be expressed in a new paragraph 1 of draft article 4. An obligation that “each State undertakes” not to “engage in” certain acts is a formula used in other contexts²⁹² so as to capture the different ways that acts might be attributed to the State under international law. The commentary could then explain the parameters of a State’s obligation not to commit such acts through its organs, or through persons over whom it has such control that their conduct is attributable to the State under international law, and not to assist in the commission of such acts by others. A formula that calls for not engaging in acts that “constitute” crimes against humanity would be appropriate for recognizing that States themselves do not commit crimes; rather, crimes are committed by persons, but the “acts” that “constitute” such crimes may be acts attributable to the State under rules of State responsibility.

118. Further, the text of the current paragraph 2 is intended to be associated with the State’s obligation not to commit such acts,²⁹³ rather than possible defenses by individuals in the course of criminal proceedings. In theory, the text of current

²⁸⁵ Belarus, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 21st meeting (A/C.6/70/SR.21)*, para. 33; Greece, *ibid.*, 20th meeting (A/C.6/70/SR.20), para. 51; Slovenia, *ibid.*, 23rd meeting (A/C.6/70/SR.23), para. 5; and Spain, *ibid.*, 22nd meeting (A/C.6/70/SR.22), para. 95.

²⁸⁶ Russian Federation, *ibid.*, para. 21.

²⁸⁷ Poland, *ibid.*, 21st meeting (A/C.6/70/SR.21), para. 68; see Poland, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 54.

²⁸⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Chile.

²⁸⁹ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), p. 13.

²⁹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 43, at p. 113, para. 166.

²⁹¹ See paragraphs 107 to 109 above.

²⁹² See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, para. 1 (a) (“Each State Party undertakes to engage in no act or practice of racial discrimination...”).

²⁹³ See paragraph 115 above.

paragraph 2 might also be associated with denying certain justifications to a non-State organization, but the concept of “public emergency” is principally associated with justifications that would be asserted by a State. Consequently, the Special Rapporteur recommends moving the text of the current paragraph 2 so as to be a second sentence in the new paragraph 1. If this is done, then the first paragraph of this draft article would read:

“1. Each State undertakes not to engage in acts that constitute crimes against humanity. 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.”

119. The current paragraph 1 of draft article 4 might then become paragraph 2, with the word “also” inserted after “Each State” in the *chapeau*. To address concerns raised by States regarding the open-ended nature of this paragraph,²⁹⁴ and in light of the addition of the new language indicated above, the Special Rapporteur recommends that the term “including” be deleted from the *chapeau*. Further, to address concerns raised by States regarding the lack of specificity in this paragraph, the Special Rapporteur recommends providing somewhat greater guidance to States in subparagraph (a) as to what is meant by “other preventive measures” by inserting “such as education and training programmes,” after “preventive measures.” Such programmes are already highlighted in the existing commentary. If this is done, then the second paragraph of this draft article would read:

“2. Each State also undertakes to prevent crimes against humanity, in conformity with international law, through:

“(a) effective legislative, administrative, judicial or other preventive measures, such as education and training programmes, in any territory under its jurisdiction; and

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

120. No other changes to draft article 4 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

G. Draft article 5: *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.

²⁹⁴ See paragraphs 108 and 110 above.

1. Comments and observations

121. States provided comments on draft article 5 both in writing and in statements before the Sixth Committee during the seventy-second session of the General Assembly. Virtually all States commenting on the draft article expressed their general support.²⁹⁵

122. Jordan, however, remarked that the text constituted progressive development of international law.²⁹⁶ Similarly, the United Kingdom expressed concern that the approach went “beyond the protections of the Convention relating to the Status of Refugees”.²⁹⁷ Other States viewed the obligation as overlapping with existing obligations; indeed, due to such overlap, Greece questioned the utility of the draft article.²⁹⁸ While acknowledging such overlap (including with respect to the 1951 Convention relating to the Status of Refugees, the 1966 International Covenant on Civil and Political Rights and the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment), Australia did not see any difficulty in the draft article, maintaining “that compliance with these existing obligations would, in the majority of instances, constitute compliance with the proposed obligation”.²⁹⁹ Likewise, Sweden indicated that “the Nordic countries do not believe that the draft provision seeks to extend obligations of [S]tates regarding *non-refoulement* beyond existing obligations”.³⁰⁰ The Special Rapporteur is of the view that the obligation is consistent with *non-refoulement* provisions contained in numerous treaties and both reinforces and strengthens them in the context of crimes against humanity.

123. A few States made specific drafting proposals. With respect to both **paragraph 1** and **paragraph 2**, Greece wondered whether the Commission’s “territorial” formulation was adequate in this context.³⁰¹ In that regard, Spain

²⁹⁵ See Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Australia; Chile, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 89; Cuba, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 33; Indonesia, *ibid.*, para. 8; the Republic of Korea, *ibid.*, para. 39; Mexico, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 105; Peru, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 9; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Sierra Leone; Slovakia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 56; Sweden (on behalf of the Nordic countries), *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 55; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Sweden (on behalf of the Nordic countries). The International Organization for Migration noted that the “notions of *non-refoulement* and return were phrased in the text of the Global Compact for Safe, Orderly and Regular Migration in ... terms of a prohibition of collective expulsion and returning of migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with a particular State’s obligations under international law” (Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.2, International Organization for Migration).

²⁹⁶ Jordan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting* (A/C.6/72/SR.22), para. 25.

²⁹⁷ The United Kingdom, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 3.

²⁹⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Greece; and Greece, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 49.

²⁹⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Australia.

³⁰⁰ *Ibid.*, Sweden (on behalf of the Nordic countries).

³⁰¹ *Ibid.*, Greece.

suggested that the reference to “territory under the jurisdiction of another State” be changed to “territory of another State”,³⁰² while Sierra Leone and Uruguay proposed that it read “the jurisdiction of another State”.³⁰³ Alternatively, Sierra Leone proposed that the term be clarified in the commentary, along with the term “another State”.³⁰⁴ The Special Rapporteur agrees that, in this context, the “territorial” formula used elsewhere in the draft articles (see paragraphs 111 to 112 above) is not appropriate for paragraph 1, in that the central issue is not whether a State expels returns, surrenders or extradites a person from that State’s territory (*de jure* or *de facto*) to the territory (*de jure* or *de facto*) of another State, but whether a State places the person within the control of another State. Thus, for example, a surrender of a person from one State to another State might occur within the same territory. In contrast, the “territorial” formula in paragraph 2 appears of continuing relevance, by indicating to competent authorities the relevant geographic range when assessing “patterns” of human rights or international humanitarian law violations.

124. Brazil and Uruguay, as well as the Council of Europe, proposed that paragraph 1 be expanded to cover not just crimes against humanity but any other crime under international law, such as genocide, war crimes, torture, enforced disappearance, or extrajudicial execution.³⁰⁵ The Special Rapporteur is of the view that the purpose of this draft article is not to set forth a general *non-refoulement* obligation that seeks to synthesize all other existing *non-refoulement* obligations but, rather, to highlight the obligation of *non-refoulement* in the context of the subject of these draft articles: crimes against humanity.

125. With respect to the first half of **paragraph 2**, Cuba suggested replacing the phrase “all relevant considerations” with “relevant evidence or proof”, in order to remove the subjective element.³⁰⁶ The Special Rapporteur notes that the current formulation exists in the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, to which there is widespread adherence and was replicated more recently in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.³⁰⁷

126. With respect to the second half of paragraph 2 (“including...”), Belarus suggested that there was an inconsistency between paragraphs 1 and 2, since the former refers to crimes against humanity and the latter refers to mass violations of human rights. As such, Belarus proposed that the second half refer to the crimes against humanity as defined in draft article 3.³⁰⁸ Chile proposed replacing “consistent pattern of gross, flagrant or mass violation of human rights” with “consistent pattern

³⁰² Spain, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 13.

³⁰³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6: Sierra Leone and Uruguay. See also Amnesty International, “17-point program ...” (footnote 143 above), pp. 2–3.

³⁰⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Sierra Leone.

³⁰⁵ *Ibid.*, Brazil; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Uruguay; and chapter III.B.4, Council of Europe. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 3; and Commission nationale consultative des droits de l’homme, *Avis sur le projet de convention sur les crimes contre l’humanité*, pp. 16–17 (available in French from www.cncdh.fr).

³⁰⁶ Cuba, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 33.

³⁰⁷ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), p. 14.

³⁰⁸ Belarus, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 54.

of severe and intentional deprivation of universal fundamental rights”.³⁰⁹ In contrast, Germany found the second half of the paragraph superfluous, viewing it as unnecessary to look beyond a situation of crimes against humanity, so as to additionally consider whether there exists a consistent pattern of human rights violations or serious violations of international humanitarian law.³¹⁰

127. The Special Rapporteur notes that the text of paragraph 2 also appears in 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment and in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the latter of which addresses, *inter alia*, crimes against humanity in the form of enforced disappearance. While there may appear to be a degree of inconsistency or duplication as between paragraphs 1 and 2, the purpose of paragraph 2 is to provide a measure of guidance to States (and in particular to certain authorities within States, such as judges) as to what types of information should be considered when deciding whether there exist the “substantial grounds” indicated in paragraph 1. The information that should be taken into account by States when conducting the latter analysis is not necessarily the existence of proven crimes against humanity; it includes, where applicable, information about patterns of human rights or international humanitarian law violations. In short, proving the occurrence of crimes against humanity in a criminal prosecution is a different exercise than determining in an extradition or return proceeding whether there are substantial grounds for believing that a person is in danger of being subjected to such crimes in the future.

2. Recommendation of the Special Rapporteur

128. In light of the comments received regarding draft article 5, the Special Rapporteur proposes that the phrase “territory under the jurisdiction of” be deleted in paragraph 1. No other changes to draft article 5 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

H. Draft article 6 [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

³⁰⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Chile.

³¹⁰ *Ibid.*, Germany.

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 fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. 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.

7. 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.

8. 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.

1. Comments and observations

129. States provided comments on draft article 6 both in writing and in statements before the Sixth Committee during the seventy-first and seventy-second sessions of the General Assembly.

130. A number of States expressed their general support for the draft article.³¹¹ Greece, however, recommended that the draft article be split so that “distinct issues, such as the responsibility of superiors and the imprescriptibility of crimes against humanity” would be contained in separate articles.³¹² The Commission considered such an approach in the course of drafting this article but concluded that there was value in keeping together these relatively short paragraphs, which are all focused on changes that may be needed to a State’s substantive criminal law.

131. Argentina,³¹³ Uruguay³¹⁴ and the OHCHR³¹⁵ called for a provision that would prevent military courts or tribunals from exercising jurisdiction over crimes against humanity, since only “civilian courts are in a position to guarantee the right to a fair trial and due process”.³¹⁶ At first reading, the Commission opted not to include such a provision, in recognition that some States have military justice systems that are charged, in part, with the investigation and prosecution of military personnel who are alleged to have committed crimes during an international armed conflict.

132. Sweden (on behalf of the Nordic countries) indicated that more detail should be included regulating the mental element of the offence, such as appears in Part III of the Rome Statute of the International Criminal Court.³¹⁷ Chile suggested exploring either in the draft article or in the commentary “the possibility of including grounds

³¹¹ Bulgaria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 7; Croatia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 48; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, El Salvador; El Salvador, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 28; Hungary, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 78; Jordan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 23; New Zealand, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 49; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sierra Leone; Slovakia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 140; Slovenia, *ibid.*, paras. 105–107; South Africa, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 7; Sweden (on behalf of the Nordic countries), *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 56; Switzerland, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 66; Sudan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 68; and Trinidad and Tobago (on behalf of CARICOM), *ibid.*, 25th meeting (A/C.6/72/SR.25), para. 35. See also Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

³¹² Greece, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 27.

³¹³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Argentina.

³¹⁴ *Ibid.*, Uruguay.

³¹⁵ *Ibid.*, chapter III.B.2, OHCHR. See also *ibid.*, chapter III.A: Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Working Group on Enforced or Involuntary Disappearances. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 2; Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 17–19; and H. A. Relva, “Three propositions for a future convention on crimes against humanity: the prohibition of amnesties, military courts, and reservations”, *Journal of International Criminal Justice*, vol. 16 (2018), pp. 857–875, at pp. 868–871.

³¹⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Argentina.

³¹⁷ *Ibid.*, chapter II.B.12, Sweden (on behalf of the Nordic countries).

for excluding responsibility, including mental incapacity and duress”,³¹⁸ perhaps drawing upon article 31 of the Rome Statute of the International Criminal Court. Doing so would “prevent [S]tates from establishing substantially different rules on the matter, which would certainly be a desirable outcome”.³¹⁹ The Special Rapporteur notes that the Commission’s approach has been to focus on the most salient issues for ensuring the crimes against humanity are criminalized under national law, rather than try to harmonize all ancillary rules of criminal law that operate within the national legal systems of States.

133. Cuba, El Salvador and Estonia agreed with the text of **paragraph 1**, finding that crimes against humanity should constitute offences at the national level.³²⁰ Greece suggested that “as defined in the present draft articles” be added at the end of this paragraph.³²¹ The Special Rapporteur notes that such a cross reference would appear unnecessary here and in all other places in the draft articles where reference is made to “crimes against humanity”, given the definition in draft article 3.

134. In contrast, China and Mexico commented on the ability of States to prosecute crimes against humanity, in essence, by means of other types of offences under national laws, with China suggesting that States should be given latitude to determine whether under national laws the listed crimes constituted crimes against humanity or another offence, and Mexico recommending that the commentary be expanded to reflect that the absence of classification of offences as “crimes against humanity” did not prevent them from being prosecuted under other categories of crime.³²² The Special Rapporteur notes that the Commission viewed it as important, when drafting this paragraph, that States adopt within their national laws “crimes against humanity” as such and not rely on existing provisions concerning murder or other underlying acts. Doing so advances the overall objective of stigmatizing crimes against humanity as especially heinous and may be relevant when determining issues such as indirect liability, command/superior responsibility and the appropriate sentence for the crime, as well as reinforcing the role of the draft articles in enhancing complementarity with international criminal tribunals. Further, it is noted that the Committee against Torture has stressed the importance of fulfilling the obligation set forth in article 4, paragraph 1, of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment,³²³ so as to avoid possible discrepancies between the crime as defined in that convention and the crime as it is addressed in national law. It noted: “Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State.”³²⁴

³¹⁸ *Ibid.*, chapter II.B.7, Chile.

³¹⁹ *Ibid.*

³²⁰ Cuba, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 65; El Salvador, *ibid.*, 25th meeting (A/C.6/71/SR.25), para. 51; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Estonia.

³²¹ *Ibid.*, Greece.

³²² China, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 88; and Mexico, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 17.

³²³ The Convention provides in article 4, paragraph 1, that: “Each State Party shall ensure that all acts of torture are offences under its criminal law.” See also A. Marchesi, “Implementing the UN Convention definition of torture in national criminal law (with reference to the special case of Italy)”, *Journal of International Criminal Justice*, vol. 6 (2008), pp. 195–214.

³²⁴ Committee against Torture, General Comment No. 2: Implementation of article 2 by States

135. Further, the Commission’s commentary indicates that, “[w]hile there might be some deviations from the exact language of draft article 3, paragraphs 1 to 3, so as to take account of terminological or other issues specific to any given State, such deviations should not result in qualifications or alterations that significantly depart from the meaning of crimes against humanity as defined in draft article 3”.³²⁵

136. Regarding **paragraph 2**, Switzerland welcomed the fact that it called upon States “to ensure that the different forms of participation in crimes against humanity, including an attempt to commit such a crime and various forms of incitement or assistance, are established as offences under their national law”.³²⁶ Croatia, Cuba and Turkey appeared to welcome the flexibility of the modes of liability as expressed in the paragraph.³²⁷ Spain, however, suggested that the wording could be more detailed and follow more closely that of the Rome Statute of the International Criminal Court.³²⁸ Belarus commented that its national law does not include all of the forms of liability identified in paragraph 2 (c).³²⁹

137. The Special Rapporteur notes that the Commission’s approach in this paragraph is to capture the overall forms of individual criminal responsibility identified in the Rome Statute of the International Criminal Court: committing the crime;³³⁰ attempting to commit the crime;³³¹ ordering, soliciting or inducing the commission of the crime;³³² aiding, abetting or otherwise assisting in its commission or attempted commission of the crime;³³³ and contributing to the commission or attempted commission of the crime.³³⁴ At the same time, the Commission’s approach does not seek to do this in an overly-prescriptive manner, by using all of the detailed wording found in the Rome Statute of the International Criminal Court, preferring instead to allow national criminal laws to operate according to their existing contours with respect to such types of liability.³³⁵ This approach has proved acceptable in many prior

parties (CAT/C/GC/2), para. 9; see also the Report of the Committee against Torture on its twenty-ninth and thirtieth sessions, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44 (A/58/44)*, paras. 115 (a) and 130.

³²⁵ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 6, para. (6).

³²⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Switzerland.

³²⁷ Croatia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 48; Cuba, *ibid.*, 24th meeting (A/C.6/71/SR.24), para. 65; Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 81.

³²⁸ Spain, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 5.

³²⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Belarus; Belarus, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 54.

³³⁰ Rome Statute of the International Criminal Court, art. 25, para. 3 (a).

³³¹ *Ibid.*, art. 25, para. 3 (f).

³³² *Ibid.*, art. 25, para. 3 (b).

³³³ *Ibid.*, art. 25, para. 3 (c).

³³⁴ *Ibid.*, art. 25, para. 3 (d).

³³⁵ See E. van Sliedregt, “Criminalization of crimes against humanity under national law”, *Journal of International Criminal Justice*, vol. 16 (2018), pp. 729–749, at p. 731:

The approach to individual criminal responsibility in draft Article 6 is praiseworthy, in that it uses neutral and generic terms to describe secondary liability. This is appropriate for a ‘suppression treaty’ like the convention which could result from the ILC articles, i.e. a treaty which would require enforcement via national justice systems. ... The modes of liability in Article 6(2) ... will often be captured in legal concepts and theories of liability that already exist in states’ domestic criminal law... . It is, therefore, highly likely that this section of Article 6 will not require much legislative change at the domestic level.

treaties addressing criminalization under national law, which also are not overly prescriptive,³³⁶ and has not proved an impediment to inter-State cooperation.³³⁷ Thus, while draft article 6, paragraph 2 (a), could be more detailed in saying that committing a crime against humanity can occur “whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”³³⁸ or more detailed in saying that aiding and abetting liability includes “providing the means for” the crime’s commission,³³⁹ the Commission has not viewed it as preferable to spell out such detail when addressing national jurisdictions (as opposed to when establishing an international court).

138. Iceland (on behalf of the Nordic countries) and Sierra Leone suggested that the forms of liability should not be interpreted narrowly and should include conspiracy and incitement.³⁴⁰ The Special Rapporteur notes that the Rome Statute of the International Criminal Court does not refer to either “conspiracy” or “incitement” with respect to crimes against humanity, and hence the Commission elected also not to use such terms.³⁴¹ The Commission has viewed paragraph 2 as not including

³³⁶ See, for example, Convention against torture and other cruel, inhuman or degrading treatment or punishment, art. 4, para. 1 (“Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture”); and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (“Each State Party shall take the necessary measures to hold criminally responsible at least: (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”).

³³⁷ See van Sliedregt (footnote 335 above), pp. 733–734 (“Harmonization of modes of liability is not necessary. Differentiation of standards or definitions of modes of liability will not pose an obstacle to mutual legal assistance. The test of ‘dual criminality’, central to mutual legal assistance, is generally limited to crime definitions”).

³³⁸ Rome Statute of the International Criminal Court, art. 25, para. 3 (a).

³³⁹ *Ibid.*, art. 25, para. 3 (c).

³⁴⁰ Iceland (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 59; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sierra Leone.

³⁴¹ See J. D. Ohlin, “Incitement and conspiracy to commit genocide”, in P. Gaeta (ed.), *The UN Genocide Convention: a Commentary*, Oxford University Press, 2009, pp. 207–227, at pp. 222–223 (finding that the decision not to include “conspiracy” in the Rome Statute of the International Criminal Court was a conscious effort to move away from its contentious history since Nürnberg).

The Rome Statute of the International Criminal Court expressly identifies individual criminal responsibility for “directly and publicly incit[ing] others” only with respect to the crime of genocide, not crimes against humanity or any other crime within the jurisdiction of the International Criminal Court (see the Rome Statute of the International Criminal Court, art. 25, para. 3 (e) (in conjunction with article 6)). For the negotiating history, see W. K. Timmermann, “Incitement in international criminal law”, *International Review of the Red Cross*, vol. 88, No. 864 (December 2016), pp. 823–852, at p. 843 (“During the Diplomatic Conference in Rome the drafters rejected the suggestion that the incitement provision be extended to apply also to crimes against humanity, war crimes and aggression”); and Report of the Preparatory Committee on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1), p. 50, cited in M. C. Bassiouni, *The Statute of the International Criminal Court: a Documentary History*, Transnational Publishers, 1998, p. 142. Similarly, the constituent instruments for the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, and the Panels with Exclusive Jurisdiction over Serious Criminal Offenses for East Timor provided for the crime of direct and public incitement to commit genocide, but only inducement or instigation of crimes against humanity (see, respectively, article 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (footnote 225 above), article 2 of the Statute of the International Tribunal for Rwanda (*ibid.*), and section 14 of the United Nations Transitional Administration in East Timor, Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (footnote 242 above)).

incitement as an inchoate or incomplete offence (an offence that can occur even if the crime is not consummated, such as “attempt” in subparagraph 2 (b)). At the same time, the Commission has viewed paragraph 2 (c) (“soliciting, inducing,” “contributing”) as encompassing incitement to a crime against humanity when the crime is consummated.³⁴² Moreover, “contributing to the commission or attempted commission of such a crime”, in the context of crimes against humanity (which entails the multiple commission of acts pursuant to or in furtherance of a State or organizational policy to commit such attack), encompasses the concept of contributing to the commission or attempted commission of the crime by a group of persons acting with a common purpose.³⁴³

139. Cuba proposed removing paragraph 2 (a), which it viewed as redundant given paragraph 1.³⁴⁴ The Special Rapporteur notes that paragraph 1 addresses the general obligation to make crimes against humanity *per se* an offence under national law, while paragraph 2 indicates the various types of criminal responsibility that must exist in relation to the crime, beginning with a person himself or herself committing the act.³⁴⁵

140. El Salvador expressed concern that paragraph 2 did not address the concept of “indirect perpetration”, which it suggested has been fully established in international law and in the case law of the International Criminal Court.³⁴⁶ According to El Salvador, “indirect perpetration is relevant to the draft articles because it would define and punish participation in criminal acts by those individuals who do not physically execute a crime but who direct it through a power structure, in which they give orders and assume a planning role”.³⁴⁷ The Special Rapporteur notes that such indirect involvement is addressed in paragraph 2, through terms such as “ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contribution to the commission or attempted commission of such a crime”, as well as in paragraph 3 on command/superior responsibility.

141. Regarding **paragraph 3**, a number of States welcomed the inclusion in this draft article of a provision on command/superior responsibility.³⁴⁸ Croatia specifically noted with approval that it interpreted the paragraph as implying that “a single act constituting a crime against humanity could simultaneously engage the responsibility

³⁴² Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 6, para. (13).

³⁴³ See van Sliedregt (footnote 335 above), p. 733 (finding that article 6’s lack of express reference to “joint enterprise liability and indirect perpetration” was “not necessarily a bad choice, since they are contested concepts”).

³⁴⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Cuba.

³⁴⁵ See Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, commentary to draft article, paras. (2)–(15).

³⁴⁶ El Salvador, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 51; see also, El Salvador, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, paras. 28–29; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, El Salvador.

³⁴⁷ *Ibid.*, chapter II.B.7, El Salvador.

³⁴⁸ Chile, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 98; Croatia, *ibid.*, para. 49; Cuba, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 33; Ireland, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 27th meeting (A/C.6/71/SR.27)*, para. 14; Mexico, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 17; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Switzerland.

of more than one superior at different levels”.³⁴⁹ Switzerland encouraged the Commission to indicate in its commentary that States are able to go beyond this provision in their national law, such as by extending it to other superiors, if they wish to do so.³⁵⁰

142. Nevertheless, some States expressed concern about the text used for this paragraph. Hungary queried whether the formulation “should have known”, though used in the Rome Statute of the International Criminal Court, “was of a customary nature and if not, whether States would consider that it represented progressive development instead”.³⁵¹ Turkey found the text of the paragraph ambiguous.³⁵² Spain suggested that use be made of the formulation found in article 6 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.³⁵³ Israel urged using the *mens rea* standard of “knew or had reason to know”, which appears in the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda.³⁵⁴ Uruguay recommended that the paragraph “be amended to ensure that the principles of civilian superior responsibility are stringent, as required by customary international law and international treaty law ([for example, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)], under which the same rules apply to civilian superiors as to military commanders)”.³⁵⁵ The Special Rapporteur notes that, while draft article 6, paragraph 3, is based verbatim on the text of the Rome Statute of the International Criminal Court, there would be advantages in using a more streamlined version, closer to Protocol I, that is responsive to some of the concerns raised by States and others.³⁵⁶

143. Chile, Switzerland and Uruguay³⁵⁷ supported **paragraph 4**, while Belarus indicated that under its law a superior orders defense is possible unless the person

³⁴⁹ Croatia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, paras. 48–49.

³⁵⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Switzerland.

³⁵¹ Hungary, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 80. See also K. Ambos, “Superior responsibility”, in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, vol. I, Oxford University Press, 2002, pp. 823–872, at p. 852 (finding that “should have known” establishes a negligence standard, thereby giving rise to “a stunning contradiction between the negligent conduct of the superior and the underlying *intent* crimes committed by the subordinates”); and van Sliedregt (footnote 335 above), p. 741.

³⁵² Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 78.

³⁵³ Spain, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 5.

³⁵⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Israel (referring to article 7, paragraph 3, of the Statute of the International Criminal Tribunal for the Former Yugoslavia and article 6, paragraph 3, of the Statute of the International Tribunal for Rwanda). See also Human Rights Watch, Submission to the International Law Commission (1 December 2018), pp. 1–2 (proposing replacing “the superior knew, or consciously disregarded information which clearly indicated” with “the superior either knew, or owing to the circumstances at the time, should have known”).

³⁵⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Uruguay (referring to the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, art. 87). See also Amnesty International, “17-point program ...” (footnote 143 above), p. 2 (recommending use of the standard set forth in Protocol I).

³⁵⁶ See paragraphs 158 to 161 below.

³⁵⁷ Chile, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th*

committed the act with knowledge that the order or instruction was of a criminal nature.³⁵⁸

144. Regarding **paragraph 5**, Peru, Sierra Leone, Switzerland, and Trinidad and Tobago (on behalf of CARICOM) expressed their support for the irrelevance of official capacity in regard to crimes against humanity.³⁵⁹ Estonia and Liechtenstein indicated that the wording of the paragraph could be stronger, more closely following article 27, paragraph 1, of the Rome Statute of the International Criminal Court which refers to “official capacity” not “official position”.³⁶⁰ The Czech Republic proposed that the phrase “nor a ground for reduction or mitigation of sentence” be added as the end of the paragraph, rather than the current approach of addressing that point in the commentary.³⁶¹ The Special Rapporteur notes that the issue of there not being any reduction or mitigation of sentence might be raised with respect to various paragraphs of draft article 6 (such as on command/superior responsibility or on superior orders), but the Commission viewed such matters as best not expressly addressed, relying instead on the general language regarding penalties found in paragraph 7. As such, the Special Rapporteur remains of the view that the current formulation is appropriate, especially when considered in relation to the approach taken with the other paragraphs of this draft article.

145. While paragraph 5 addresses the irrelevance of official capacity as a substantive defense, it does not address the immunity a person enjoys under international law from the exercise of national jurisdiction.³⁶² Japan, Liechtenstein, Sierra Leone and Uruguay³⁶³ expressed a desire that a provision on immunities be included based on article 27, paragraph 2, of the Rome Statute of the International Criminal Court, which would deny immunity to all State officials, including a head of state, head of government and foreign minister. Alternatively, Sierra Leone proposed using text analogous to article IV of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.³⁶⁴

meeting (A/C.6/71/SR.25), para. 98; Switzerland, *ibid.*, 24th meeting (A/C.6/71/SR.24), para. 66; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7: Switzerland and Uruguay.

³⁵⁸ *Ibid.*, chapter II.A, Belarus; see also Belarus, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 23rd meeting (A/C.6/71/SR.23)*, para. 6.

³⁵⁹ Peru, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 9; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sierra Leone and Switzerland; and Trinidad and Tobago (on behalf of CARICOM), *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 25th meeting*, para. 35.

³⁶⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7: Estonia and Liechtenstein (also proposing that the provision be relocated as paragraph 2 *bis* of the draft article).

³⁶¹ *Ibid.*, the Czech Republic.

³⁶² For consideration of the issue of immunity in relation to this topic, see the third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), paras. 278–284.

³⁶³ Japan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 70; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7: Liechtenstein (proposing that the provision appear as paragraph 2 *ter* of the draft article); Sierra Leone; and Uruguay. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 1; Human Rights Watch, Submission to the International Law Commission (1 December 2018), p. 2; Crimes against Humanity Initiative Steering Committee, *Comments and Observations ...* (footnote 90 above), pp. 6–7; and Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 37–38.

³⁶⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sierra Leone (proposing “Persons committing crimes against humanity or any of the other acts enumerated in draft article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”).

The Committee on Enforced Disappearances asserted that the draft articles introduce a “gap” on this issue,³⁶⁵ although the Special Rapporteur notes that the 2006 International Convention for the Protection of All Persons from Enforced Disappearance also contains no provision on immunity from foreign criminal jurisdiction. The OHCHR did not propose any change in the text but recommended that the draft articles “provide that such immunities do not constitute in practice a barrier to a general system of accountability and to the obligation to provide effective remedies to the victims of crimes against humanity, including criminal investigations and prosecutions”.³⁶⁶

146. In contrast, France reiterated its support for the decision taken by the Commission not to include a provision on immunity in the draft articles.³⁶⁷ Likewise, the United Kingdom viewed it as unhelpful to the goal of a widely-accepted convention to expand the draft articles so as to address immunity.³⁶⁸ Brazil read paragraph 5, together with the commentaries, as having “no effect on the procedural immunities that a foreign State official shall enjoy before a national criminal jurisdiction, in accordance with international customary law and in line with the case law of the International Court of Justice”.³⁶⁹ Switzerland also indicated that it was content with the commentary as adopted on first reading.³⁷⁰ Israel also supported the existing approach, but proposed that the commentary be adjusted to clarify that “paragraph 5 has no effect on any procedural immunity that a *current or former* foreign State official may enjoy”.³⁷¹ Singapore concurred in the overall approach, but would adjust paragraph 5 to “make clear that the obligation under draft article 6, paragraph 5 only addresses substantive criminal responsibility under national law, and does not preclude raising immunity of State officials as a procedural bar to the exercise of foreign criminal jurisdiction over State officials”.³⁷²

147. Algeria and the Republic of Korea each recommended that the Commission keep in mind the relationship between this paragraph and the topic “Immunity of State officials from foreign criminal jurisdiction”.³⁷³ Sudan recommended that the Commission wait for the completion of that topic before addressing the immunity issue regarding crimes against humanity.³⁷⁴ The Special Rapporteur notes that the Commission’s commentary indicates that paragraph 5 is without prejudice to the Commission’s work on that other topic.³⁷⁵

³⁶⁵ Committee on Enforced Disappearances, Statement ... (see footnote 175 above), para. 6.

³⁶⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.5, OHCHR.

³⁶⁷ *Ibid.*, chapter II.A, France.

³⁶⁸ *Ibid.*, the United Kingdom.

³⁶⁹ *Ibid.*, chapter II.B.7, Brazil.

³⁷⁰ *Ibid.*, Switzerland.

³⁷¹ *Ibid.*, Israel (referring to paragraph (31) of the Commission’s commentary to draft article 6).

³⁷² *Ibid.*, Singapore.

³⁷³ Algeria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 16; and the Republic of Korea, *ibid.*, para. 40.

³⁷⁴ Sudan, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 67.

³⁷⁵ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 6, para. (31).

148. Regarding **paragraph 6**, many States³⁷⁶ and the Council of Europe³⁷⁷ expressed their support for the non-applicability of any statute of limitations, and El Salvador even suggested that the provision was so important that it could merit its own draft article.³⁷⁸ Liechtenstein supported such a provision but proposed that it be drafted to be more “self-executing”.³⁷⁹ Belarus, however, indicated that its current law does allow for a statute of limitations with respect to some crimes against humanity.³⁸⁰ The United Kingdom indicated that “it may be helpful for the draft [a]rticles to state that this does not mean that States are obligated to prosecute crimes against humanity that took place before such crimes were [criminalized] in their law”.³⁸¹ The Special Rapporteur confirms that this is the case and notes that he addressed this temporal issue in his second report.³⁸² At the same time, he is of the view that such detail need not be addressed in the draft articles themselves, but could be explained in the commentary.

149. Uruguay³⁸³ and a Human Rights Council special rapporteur³⁸⁴ urged that there also be no statute of limitations with respect to civil proceedings concerning crimes against humanity, but the United Kingdom viewed it as unhelpful to the goal of a widely-accepted convention to expand the draft articles so as to encompass civil jurisdiction.³⁸⁵ The Special Rapporteur agrees with that view.

150. Regarding **paragraph 7**, Romania supported the inclusion of a provision drawing attention to the “gravity of the offences”,³⁸⁶ while the Czech Republic proposed that “appropriate” be changed to “appropriate and effective”, so as to “send a strong dissuasive message to possible perpetrators”.³⁸⁷ In that regard, it observed that the 2003 United Nations Convention against Corruption refers to “effective,

³⁷⁶ Chile, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 99; Cuba, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 33; Romania, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 74; Slovenia, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 105; Spain, *ibid.*, para. 4; Switzerland, *ibid.*, 24th meeting (A/C.6/71/SR.24), para. 66; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726): chapter II.B.7, Switzerland, and chapter II.A, Uruguay. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 1.

³⁷⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.5, Council of Europe.

³⁷⁸ El Salvador, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 54.

³⁷⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Liechtenstein (“The offences referred to in this draft article shall not be subject to any statute of limitations”).

³⁸⁰ *Ibid.*, chapter II.A, Belarus.

³⁸¹ *Ibid.*, chapter II.B.7, the United Kingdom.

³⁸² See the second report of the Special Rapporteur on crimes against humanity (A/CN.4/690), para. 73.

³⁸³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Uruguay.

³⁸⁴ *Ibid.*, chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. See also Human Rights Watch, Submission to the International Law Commission (1 December 2018), p. 2; Amnesty International, “17-point program ...” (footnote 143 above), p. 2; and Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), p. 19.

³⁸⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, the United Kingdom.

³⁸⁶ Romania, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 74.

³⁸⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, the Czech Republic.

proportionate and dissuasive ... penalties".³⁸⁸ Some States proposed that the death penalty be prohibited in the draft article,³⁸⁹ while Sierra Leone proposed indicating in the commentary that the death penalty would not be appropriate.³⁹⁰ Otherwise, France and Sierra Leone emphasized that States should be given discretion when it comes to determining penalties.³⁹¹ The Special Rapporteur is of the view that the current formulation, which is reflected in a large number of widely-adhered-to treaties relating to crimes,³⁹² is appropriate in this context as well.

151. Regarding **paragraph 8**, several States expressed their support for the liability of legal persons, especially given the flexibility provided for in the draft article.³⁹³ The OHCHR said that the paragraph is "welcomed and should be maintained".³⁹⁴ Austria, while supporting this flexible approach, noted that the paragraph must be understood as not affecting State immunity.³⁹⁵ The Special Rapporteur confirms that the draft articles have no effect on any procedural immunity that a foreign State or its officials may enjoy before a national criminal jurisdiction.

152. Many other States expressed concern or sought clarification regarding paragraph 8. Some States maintained that paragraph 8 should be interpreted as obligating States to approach criminal liability for legal persons only in accordance

³⁸⁸ United Nations Convention against Corruption, art. 12, para. 1.

³⁸⁹ Austria, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 81; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Chile; Iceland (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 61; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, France; France, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 20th meeting (A/C.6/71/SR.20)*, para. 74; Mexico, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 17; Slovenia, *ibid.*, para. 105; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sweden (on behalf of the Nordic countries); and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Switzerland. See also Commission nationale consultative des droits de l'homme, *Avis ...* (footnote 305 above), p. 18.

³⁹⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sierra Leone.

³⁹¹ France, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 20th meeting (A/C.6/71/SR.20)*, para. 74; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sierra Leone.

³⁹² See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 21–22.

³⁹³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, the Czech Republic; France, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 20th meeting (A/C.6/71/SR.20)*, para. 74; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7: France; Sierra Leone; Slovenia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 107; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Switzerland; Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 81. See also van Sliedregt (footnote 335 above), p. 747 ("Article 6(8) of the ILC draft is broad enough to provide for liability of legal persons even for those jurisdictions that traditionally have rejected liability for legal persons. Its wording is sufficiently broad to allow for attribution via individual liability").

³⁹⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.2, OHCHR.

³⁹⁵ Austria, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 81.

with their existing national laws.³⁹⁶ Slovakia noted that applying such a provision was challenging, since criminal liability of legal persons was unknown in many countries.³⁹⁷ Indeed, Belarus, Greece and Hungary indicated that their national legal systems did not recognize such liability,³⁹⁸ with Belarus commenting that its Code of Administrative Offences “provides for administrative liability, but only in the case of administrative offences, which means wrongful acts for which administrative liability is incurred, that is, acts that are not considered to be crimes”.³⁹⁹

153. The Special Rapporteur analysed in his second report the uneven practice in treaties and national laws with respect to the issue of criminal liability of legal persons.⁴⁰⁰ The Commission concluded that a provision addressing this issue was warranted in the context of crimes against humanity and crafted a text based on article 3, paragraph 4 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (“Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative”). As of January 2019, there were 175 States parties to the Optional Protocol, with no reservations to this provision.

154. Israel found that the provision “does not reflect existing customary international law” and that “most tribunals to date did not include a provision on criminal liability of legal persons”.⁴⁰¹ Chile indicated that criminal liability of legal persons is an emerging issue.⁴⁰² A number of States suggested that the issue required a more thorough analysis.⁴⁰³ For example, the Czech Republic said “that the commentary to this provision would benefit from further clarification on the relation between the liability of legal persons and the organizational policy element which forms part of the definition of crimes against humanity”.⁴⁰⁴ Mexico commented that the commentary should reflect in a more balanced manner the current academic debate

³⁹⁶ Greece, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 28; Peru, *ibid.*, 30th meeting (A/C.6/71/SR.30), para. 5; Romania, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 79; Russian Federation, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 65.

³⁹⁷ Slovakia, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 140.

³⁹⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Belarus; Greece, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 28; and Hungary, *ibid.*, 24th meeting (A/C.6/71/SR.24), para. 81.

³⁹⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Belarus.

⁴⁰⁰ See the second report of the Special Rapporteur on crimes against humanity (A/CN.4/690), paras. 41–44.

⁴⁰¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Israel.

⁴⁰² Chile, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 99.

⁴⁰³ Cuba, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 33; the Czech Republic, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 69; Ireland, *ibid.*, 27th meeting (A/C.6/71/SR.27), paras. 14–15; Mexico, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 18, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 111; Portugal, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 93; and Spain, *ibid.*, 26th meeting (A/C.6/71/SR.26), paras. 4 and 6.

⁴⁰⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, the Czech Republic.

on the requirements for organizations to be considered perpetrators of crimes against humanity.⁴⁰⁵

155. China and the Islamic Republic of Iran recommended that the Commission leave the issue of liability of legal persons to be decided by States.⁴⁰⁶ Similarly, Viet Nam recommended that the provision be deleted altogether.⁴⁰⁷ The United Kingdom said that the paragraph “risks creating controversy without having any substantive legal effects”, given that States that already have such liability will continue to do so, while States that do not have such liability are unlikely to change their position, given the flexibility contained in the text of paragraph 8.⁴⁰⁸

156. France suggested⁴⁰⁹ that the text of paragraph 8 might be improved by drawing upon article 5 of the 1999 International Convention for the Suppression of the Financing of Terrorism.⁴¹⁰ The Special Rapporteur notes that article 5 was crafted in the context of an act (financing of terrorism) that frequently involves legal persons (financial institutions), such that greater detail in that context may have been especially warranted. Nevertheless, the Special Rapporteur agrees that text based on article 5 is a possible alternative to the current formulation of paragraph 8 and might provide somewhat greater clarity for States as to the obligation at issue and to its relation to crimes against humanity committed by natural persons. Nevertheless, taking into account all considerations, the Special Rapporteur is of the view that the more streamlined version found in the current text of paragraph 8 is sufficiently clear for the purposes of these draft articles but that the commentary might be improved to address some of the concerns and suggestions expressed.

157. Finally, Uruguay proposed⁴¹¹ inclusion in this draft article or elsewhere of an exception to the *nullum crimen sine lege* principle (but not inclusion of the principle itself), based on article 15, paragraph 2, of the International Covenant on Civil and Political Rights.⁴¹² The Special Rapporteur notes that the “no crime without prior law”

⁴⁰⁵ Mexico, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 110.

⁴⁰⁶ China, *ibid.*, para. 120; and the Islamic Republic of Iran, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 41.

⁴⁰⁷ Viet Nam, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 99; see also Viet Nam, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 35.

⁴⁰⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, the United Kingdom.

⁴⁰⁹ *Ibid.*, France.

⁴¹⁰ Article 5 of the 1999 International Convention for the Suppression of the Financing of Terrorism, which has 188 States parties as of January 2019, provides:

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

⁴¹¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Uruguay. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 1.

⁴¹² See the International Covenant on Civil and Political Rights, art. 15, para. 2.

principle,⁴¹³ as well as the exception,⁴¹⁴ operate as a part of human rights law and that, under draft article 11, paragraph 1, any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings “full protection” of his or her rights under “human rights law”. The objective of the draft articles is not to repeat detailed provisions of human rights law nor to seek to prescribe detailed rules of national criminal law beyond what is necessary to ensure that crimes against humanity are incorporated into national law and that jurisdiction is established and exercised over them. As such, the Special Rapporteur remains of the view that inclusion of such text is not warranted.

2. Recommendation of the Special Rapporteur

158. The Special Rapporteur recommends one change to draft article 6. In response to the comments by States,⁴¹⁵ there would be advantages in using a more streamlined version of paragraph 3 on command/superior responsibility. A streamlined version would be in keeping with the other paragraphs of draft article 6, which do not seek to be overly prescriptive. Such a streamlined version was used in the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda, which *inter alia* applied to crimes against humanity. Thus, the Statute of the International Criminal Tribunal for the Former Yugoslavia provides:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁴¹⁶

159. Further, such a streamlined version may be seen in article 86, paragraph 2, of the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) which provides:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁴¹⁷

160. The Special Rapporteur notes that there were 174 States parties to Protocol I as of January 2019. As such, a streamlined standard based on article 86, paragraph 2,

⁴¹³ See, for example, the Universal Declaration of Human Rights, art. 11, para. 2 (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”); and the International Covenant on Civil and Political Rights, art. 15, para. 1 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”).

⁴¹⁴ International Covenant on Civil and Political Rights, art. 15, para. 2 (“Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”).

⁴¹⁵ See paragraphs 141 to 142 above.

⁴¹⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 3. See also the Statute of the International Tribunal for Rwanda, art. 6, para. 3.

⁴¹⁷ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 86, para. 2.

might reflect better the manner in which the command/superior responsibility standard already operates in the national laws, military manuals, and practice of many States in relation to war crimes,⁴¹⁸ thereby making it easier for States to adhere to and implement the obligation with respect to crimes against humanity. After analysing such laws, manuals and practice, as well as international and national jurisprudence, a 2005 study completed under the auspices of the ICRC on *Customary International Humanitarian Law* formulated the relevant rule (Rule 153) as follows:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.⁴¹⁹

161. As such, the Special Rapporteur recommends that the current text of paragraph 3 be replaced with a text that builds upon the approach taken in Protocol I, while bearing in mind the more recent formulation in the 2005 study of the ICRC. The new text might read as follows:

“Each State shall also take the necessary measures to ensure that commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.”

162. No other changes to draft article 6 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

I. Draft article 7 [6]: Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles 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 covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does

⁴¹⁸ In this regard, the ICRC study cites the legislation of Azerbaijan, Bangladesh, France, Italy, Luxembourg, the Netherlands, Spain, Sweden and the Philippines, the military manuals of the United Kingdom and the United States, and the practice of Italy (see J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules*, Cambridge University Press, 2005).

⁴¹⁹ *Ibid.*, pp. 558–563 (Rule 153).

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.

1. Comments and observations

163. States provided comments on draft article 7 both in writing and in statements before the Sixth Committee during the seventy-first and seventy-second sessions of the General Assembly.

164. A number of States expressed their general support for the draft article.⁴²⁰ Iceland (on behalf of the Nordic countries) and Slovakia both supported the relationship between draft article 7 and draft article 10 as they worked in tandem to prevent safe havens for perpetrators of crimes against humanity.⁴²¹

165. Some States, however, expressed concerns. On the one hand, Argentina regarded the text as potentially restricting a broader concept of “universal jurisdiction”.⁴²² France noted that States should be given a “degree of procedural freedom with regard to the establishment of national jurisdiction”.⁴²³ On the other hand, Turkey recommended that the provision be further analysed, since extraterritorial jurisdiction could be exploited for political reasons.⁴²⁴

166. The Special Rapporteur notes that the formula with respect to the establishment of jurisdiction that appears in this draft article essentially replicates the formula that exists in a large number of treaties addressing crimes.⁴²⁵ As such, States appear to be aware of and amenable to the basic contours of such an article. Rather than altering the text of this draft article, the Special Rapporteur proposes that the Commission

⁴²⁰ Chile, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 99; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Estonia; Mexico, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 18; the Netherlands, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 21; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Sierra Leone; Romania, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 80; Slovakia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 141; Spain, *ibid.*, para. 6; Sudan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 68; Switzerland, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 66; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Switzerland.

⁴²¹ Iceland (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 60; Slovakia, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 141.

⁴²² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Argentina (expressing a preference for the Madrid–Buenos Aires Principles of Universal Jurisdiction, adopted by a group of experts in 2015).

⁴²³ France, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 20th meeting (A/C.6/71/SR.20)*, para. 75.

⁴²⁴ Turkey, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 76.

⁴²⁵ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 23–29.

consider possible changes to the commentary to address some of the concerns expressed by States.⁴²⁶

167. Several States suggested addressing in draft article 7 the situation where multiple States have jurisdiction over the alleged offender.⁴²⁷ The Special Rapporteur notes that the jurisdictional formula expressed in this draft article requires States to *establish* jurisdiction within their national law but does not seek to address which States should *exercise* jurisdiction in a given situation, nor whether a State should extradite an alleged offender to another State. Rather, draft articles 9 and 10 address the exercise of jurisdiction and require only that the State where the alleged offender is present exercise jurisdiction. In the event that other States also wish to exercise jurisdiction, they may seek extradition of the alleged offender from the State in which the offender is present, and draft article 13 may help facilitate such an extradition. The formula in draft article 7 on the establishment of jurisdiction is a standard approach that characterizes a wide range of treaties addressing crimes and, in the view of the Special Rapporteur, remains suitable in the context of crimes against humanity. Nevertheless, the possibility of multiple States seeking to exercise jurisdiction simultaneously is an important issue, which at present is only addressed in the Commission's current commentary to draft article 13.⁴²⁸ In light of such considerations and of the concerns expressed by States, the Special Rapporteur proposes a change to draft article 13, as part of a new paragraph 1, that would call upon the requested State to give due consideration to a request for extradition from the State where the crime allegedly occurred.⁴²⁹

168. Portugal commented that it might be necessary to modify the draft article to cover cases where the offender was a legal person.⁴³⁰ The Special Rapporteur notes that the draft article as adopted on first reading requires a State to establish jurisdiction over "offences" in certain circumstances, not over "offenders", whether natural or legal persons. Draft article 6 indicates for natural persons (paras. 2–7) or legal persons (para. 8) the forms of responsibility or liability in relation to those offences.

169. Regarding, specifically, **paragraph 1 (a)**, Sierra Leone sought clarification as to whether territorial jurisdiction would extend to "acts amounting to crimes against humanity by organs of the [S]tate such as the armed forces of the [S]tate or by its members or those acting at their behest in foreign territory".⁴³¹ The Special Rapporteur notes that the formulation used in paragraph 1 (a) (and elsewhere in the draft articles) extends to territory that is either under the *de jure* or *de facto* jurisdiction of a State.⁴³² If acts of the armed forces of a State, for example, are occurring in territory that is not under the *de jure* or *de facto* jurisdiction of a State, then some other form of jurisdiction may be relevant, such as under paragraph 1 (b) (nationality of the alleged offender) or under paragraph 2 (presence of the alleged offender).

170. The United Kingdom questioned the assertion in the commentary that "territorial jurisdiction often encompasses jurisdiction over crimes committed on

⁴²⁶ See paragraph 186 below.

⁴²⁷ See, for example, Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Singapore.

⁴²⁸ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article, paras. (29)–(30).

⁴²⁹ See paragraphs 238 to 240 and 252 to 255 below.

⁴³⁰ Portugal, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 93.

⁴³¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Sierra Leone.

⁴³² See paragraph 111 above.

board a vessel or aircraft registered to the State”.⁴³³ In its view, jurisdiction over such crimes is a species of “nationality jurisdiction” not “territorial jurisdiction”, and further that such jurisdiction turns on the flag of the vessel, rather than the registration of the vessel. The Special Rapporteur proposes that appropriate adjustments be made in the commentary, but does not favour adjusting the text of paragraph 1 (*a*), which is based on the same language used in many other treaties that are widely adhered to by States.⁴³⁴

171. Regarding **paragraph 1 (b)**, Romania suggested that the active personality principle should be strengthened in the case of stateless persons,⁴³⁵ but Greece agreed that jurisdiction over stateless persons should remain optional.⁴³⁶ Iceland and Sweden (on behalf of the Nordic countries) explained that the Nordic countries generally had established active personality jurisdiction over stateless persons, as well as over resident foreign nationals.⁴³⁷ Sierra Leone suggested that the term “stateless person” be defined, using the definition in the 1954 Convention relating to the Status of Stateless Persons.⁴³⁸ The Special Rapporteur proposes that this could be indicated in the commentary.

172. Regarding **paragraph 1 (c)**, Australia indicated that “draft article 7 appropriately preserves for States’ discretion the ability to establish jurisdiction on the basis of passive personality”,⁴³⁹ while Greece questioned whether such jurisdiction should remain optional,⁴⁴⁰ and Romania recommended clarifying the conditions under which a State could exercise such jurisdiction.⁴⁴¹ The Special Rapporteur does not favour adjusting the text of paragraph 1 (*c*) which, as noted above, is based on the same language in many other treaties that are widely adhered to by States.

173. Regarding **paragraph 2**, several States expressed support for the provision, while recognizing that it would require changes to their national law.⁴⁴² Greece stressed that “a degree of ... discretion should be provided” in the exercise of jurisdiction based on the presence of the alleged offender, “given the complexity of the crimes against humanity, the difficulties that national jurisdictions may encounter in properly adjudicating cases of such crimes committed in other parts of the world,

⁴³³ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 7, para. (6).

⁴³⁴ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 23–29.

⁴³⁵ Romania, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 75.

⁴³⁶ Greece, *ibid.*, para. 30.

⁴³⁷ Iceland (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting* (A/C.6/71/SR.24), para. 60; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Sweden (on behalf of the Nordic countries).

⁴³⁸ *Ibid.*, Sierra Leone. The Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, *Treaty Series* vol. 360, No. 5158, p. 117, which has 91 States parties as of January 2019, provides in article 1 that “the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law”.

⁴³⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Australia.

⁴⁴⁰ Greece, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 30.

⁴⁴¹ Romania, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 80.

⁴⁴² See, for example, Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, the United Kingdom.

the conflicts of jurisdiction which may arise and the risks of forum shopping”.⁴⁴³ Again, the Special Rapporteur notes that this article is addressing the obligation of a State to establish jurisdiction, not to exercise jurisdiction. El Salvador recommended that the provision be clarified by including a reference to “the principle of universal jurisdiction”.⁴⁴⁴ The Special Rapporteur does not favour adjusting the text of paragraph 2, which is based on the same language used in many other treaties that are widely adhered to by States.

174. Singapore expressed its understanding that paragraph 2 “is intended to provide an additional treaty based jurisdiction in respect of an alleged offender on the basis of presence alone when none of the other connecting factors are present. Therefore, jurisdiction under that paragraph can only be exercised in respect of nationals of States parties”.⁴⁴⁵ The Special Rapporteur understands this paragraph in the same way, but does not see a need for this understanding to be expressly reflected in the text of this draft article, just as it is not done in other comparable treaties addressing crimes.

175. With respect to **paragraph 3**, Romania expressed support for ensuring that jurisdiction over crimes against humanity was as wide as possible.⁴⁴⁶ Poland and Belarus both suggested that paragraph 3 be widened so as not to exclude the exercise of any jurisdiction that is in accordance with applicable rules of international law.⁴⁴⁷ Some States called for an explicit reference to “universal jurisdiction” in paragraph 3,⁴⁴⁸ while Sudan expressed concern that the paragraph was vague and could be taken to provide for universal jurisdiction.⁴⁴⁹ The Special Rapporteur is of the view that the existing text is clear in stating that the obligations contained in the draft article should not be construed as excluding the exercise of other types of criminal jurisdiction as may exist in a State’s national law. Such jurisdiction, of course, remains subject to applicable rules of international law regarding the exercise of national jurisdiction.

⁴⁴³ *Ibid.*, Greece.

⁴⁴⁴ *Ibid.*, El Salvador; El Salvador, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 55. See also Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Sierra Leone. But see A. Coco, “The universal duty to establish jurisdiction over, and investigate, crimes against humanity: preliminary remarks on draft articles 7, 8, 9 and 11 by the International Law Commission”, *Journal of International Criminal Justice*, vol. 16 (2018), pp. 751–774, at p. 761 (“As a matter of fact, the ILC’s draft articles are an embryonic treaty and, as such, would only bind states parties. Thus, it may be argued that the obligation to establish jurisdiction in draft Article 7(2) would not be ‘truly universal’, but only applicable *inter partes*, i.e., between contracting parties”).

⁴⁴⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.5, Singapore.

⁴⁴⁶ Romania, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 75.

⁴⁴⁷ Poland, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 53; and Belarus, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 54.

⁴⁴⁸ Iceland (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 60; El Salvador, *ibid.*, 25th meeting (A/C.6/71/SR.25), para. 55; Slovenia, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 108; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8: Sierra Leone and Sweden (on behalf of the Nordic countries).

⁴⁴⁹ Sudan, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 71.

2. Recommendation of the Special Rapporteur

176. No changes to draft article 7 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

J. Draft article 8 [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.

1. Comments and observations

177. States provided comments on draft article 8 both in writing and in statements before the Sixth Committee during the seventy-first and seventy-second sessions of the General Assembly.

178. Several States expressed their general support for the draft article.⁴⁵⁰ Even so, some textual changes were proposed, such as with respect to the nature of the investigation. Thus, the Russian Federation wondered whether the reference to “impartial” was necessary,⁴⁵¹ while Spain recommended that the draft article specify that investigations should be “prompt and thorough”,⁴⁵² and Sierra Leone favoured “prompt, thorough and impartial”.⁴⁵³ Malaysia commented that it interpreted the draft article as leaving it to States to determine the parameters of “prompt and impartial”.⁴⁵⁴ Singapore considered “that the commentary on this draft article should clearly state that the reference to ‘impartiality’ does not require any special impartiality measures

⁴⁵⁰ Chile, *ibid.*, para. 99; the Netherlands, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 21; Romania, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 76; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.9, Sierra Leone; Slovakia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 141; and Sudan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 68. See also Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), p. 21; and Coco (footnote 444 above), pp. 765–766 (“While such duties to investigate may appear novel in international law, in fact they are not. On the premise that crimes against humanity constitute serious violations of fundamental human rights, the duty to investigate crimes against humanity can be considered as implicit in the duty to investigate human rights violations. ... The ILC’s draft articles on crimes against humanity hold the merit of making such a general duty explicit.”).

⁴⁵¹ The Russian Federation, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 66.

⁴⁵² Spain, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 7.

⁴⁵³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.9, Sierra Leone. See also Human Rights Committee, General Comment No. 31 (80) on article 2 of the Covenant: The nature of the legal obligation imposed on States parties to the Covenant, reproduced in the report of the Human Rights Committee on its seventy-ninth, eightieth and eighty-first sessions, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, annex III, at p. 178, para. 15 (finding a general obligation to investigate violations “promptly, thoroughly and effectively through independent and impartial bodies”).

⁴⁵⁴ Malaysia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 64.

above and beyond the general standards of investigations for criminal proceedings that are applicable under domestic law”.⁴⁵⁵

179. As the Commission noted in its commentary, the existing formula has been used in prior treaties that have been acceptable to States, notably the 165 States parties to the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment. Article 12 of that treaty provides: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” The Special Rapporteur remains of the view that the formula used in draft article 8 remains appropriate in this context.

180. Other comments addressed the circumstances that would trigger such an investigation. Thus, Chile proposed that the obligation also be “triggered whenever an allegation that crimes against humanity have been or are being committed is brought before the competent authorities of that [S]tate”.⁴⁵⁶ The Special Rapporteur views the current text as encompassing situations where allegations are brought to the attention of competent authorities, but also other situations where allegations have not been made yet information exists suggesting possible crimes against humanity. In either event, the competent authorities must decide whether, on the information available to it from whatever source, there is a reasonable ground to believe that acts constituting crimes against humanity have been or are occurring in any territory under its jurisdiction. If so, then the competent authorities must proceed with the investigation.

181. Some States suggested that more information be provided on this obligation in the commentary.⁴⁵⁷ For example, Sierra Leone sought explanation as to what is meant by “competent authorities”, what amount of knowledge is required before the obligation arises, and what consequences flow from failing to discharge the obligation, as well as confirmation that a complaint is not a predicate requirement.⁴⁵⁸ The Special Rapporteur proposes that the Commission can consider changes to the commentary to address such concerns. For example, a recent analysis of the Human Rights Committee (albeit in the context of the obligation to investigate potentially unlawful deprivations of life) provided:

Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), and must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations. Investigations should explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates. Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary

⁴⁵⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.9, Singapore.

⁴⁵⁶ *Ibid.*, Chile.

⁴⁵⁷ Austria, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 83; Iceland (on behalf of the Nordic countries), *ibid.*, 24th meeting (A/C.6/71/SR.24), para. 61; and Spain, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 7.

⁴⁵⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.9, Sierra Leone.

measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.⁴⁵⁹

2. Recommendation of the Special Rapporteur

182. No changes to draft article 8 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

K. Draft article 9 [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 covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State 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 7, 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.

1. Comments and observations

183. States provided comments on draft article 9 both in writing and in statements before the Sixth Committee during the seventy-first and seventy-second sessions of the General Assembly.

184. Chile and Slovakia expressed their general support for the draft article,⁴⁶⁰ and Greece and Sierra Leone welcomed the alignment of the draft article with article 6 of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment.⁴⁶¹ Belgium indicated that it should “be clear that this provision cannot impede the application of the rules of international law with regard to immunity”, and proposed that the commentary indicate that the draft article was without prejudice to the Commission’s topic on immunity of State officials from foreign criminal

⁴⁵⁹ Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to live (CCPR/C/GC/36), para. 27, citing the Office of the United Nations High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016); the Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions*, United Nations publication (Sales No.: E.17.XIV.3), 2017, available from www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf.

⁴⁶⁰ Chile, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 99; and Slovakia, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 141.

⁴⁶¹ Greece, *ibid.*, 25th meeting (A/C.6/71/SR.25), para. 31; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.10, Sierra Leone.

jurisdiction.⁴⁶² The Special Rapporteur confirms that the draft article does not seek to address customary or treaty-based immunities.

185. As this draft article (along with draft article 10) addresses the exercise of jurisdiction over an alleged offender who is present, it is pertinent to address in this context certain concerns raised by States. Brazil indicated that “the draft articles would benefit from the addition of safeguards to prevent the abuse of the universality principle, such as a provision giving jurisdictional priority to [S]tates with the closest links to the crimes”.⁴⁶³ Similarly, Israel believed that safeguards should be adopted “in order to prevent the initiation of inappropriate, unwarranted or ineffective legal proceedings; proceedings where proper standards of due process cannot be met, in particular in cases in which the forum State does not have sufficient access to witnesses and other evidence; and/or proceedings where the incident has already been examined by another State with close jurisdictional links”.⁴⁶⁴ To that end, it proposed several specific safeguards: “a requirement that any initiation of legal proceedings would be conducted only with the prior approval of high-level legal officials in the executive branch at the earliest stage; assertion of universal jurisdiction should be regarded as a measure of last resort in appropriate circumstances only; adherence to the principle of subsidiarity; and a requirement that prior to issuing requests for mutual legal assistance, provisional arrest, or extradition, States take appropriate measures to determine whether the party that filed the complaint has filed complaints about the alleged incident or suspect in other fora, and if so, whether an investigation has taken place or is ongoing there.”⁴⁶⁵

186. The Special Rapporteur notes that the text used in this draft article essentially replicates the formulas that exist in a large number of treaties addressing crimes.⁴⁶⁶ As such, States appear to be aware of and amenable to the basic contours of such an article. Rather than altering the text of this draft article, the Special Rapporteur proposes that the Commission consider possible changes to the commentary to address some of the concerns expressed by States. For example, the term “circumstances so warrant” in draft article 9, paragraph 1, is best understood as a reference not just to the factual circumstances relating to the alleged offender, but also to the legal circumstances (including any procedural safeguards) concerning exercise of jurisdiction over that offender. The commentary might be adjusted to reflect this.

187. Sierra Leone suggested that a cross reference to draft article 10 be considered and that the commentary explain in greater detail various phrases contained in the draft article.⁴⁶⁷ The Special Rapporteur does not see a need for a cross reference to draft article 10, viewing the sequence of the draft articles as sufficient for establishing the connection among them, but the Commission might consider revisions to the commentary as appropriate.

188. France suggested that, for consistency and accuracy, the term “State” could be replaced in all three paragraphs of draft article 9 with the term “competent authorities”, as is used in draft articles 8 and 10.⁴⁶⁸ The Special Rapporteur notes that the term “State” normally is used throughout these draft articles to express obligations imposed upon a State. Only in limited circumstances, typically where the obligation

⁴⁶² *Ibid.*, Belgium.

⁴⁶³ *Ibid.*, chapter II.B.7, Brazil.

⁴⁶⁴ *Ibid.*, chapter II.A, Israel.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 31–36.

⁴⁶⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.10, Sierra Leone.

⁴⁶⁸ *Ibid.*, France.

imposed upon the State requires it to ensure that its “competent authorities” (usually meaning civilian or military law enforcement officials) take particular action, in reference made to “competent authorities”.⁴⁶⁹ In the context of draft article 9, replacing “State” with “competent authorities” does not appear to be appropriate for the types of obligations being expressed, with the possible exception of paragraph 2, which might read: “Such State shall ensure that its competent authorities immediately make a preliminary inquiry into the facts.” Yet even in that context, use of the term “competent authorities”, if understood as only law enforcement officials, would appear to unnecessarily limit the range of State officials who might be expected to assist in such a preliminary inquiry, such as diplomatic, consular or intelligence officials. Further, the text of this paragraph (and of the other paragraphs of this draft article) has been found appropriate by States in many widely-adhered-to treaties.⁴⁷⁰

189. Germany proposed that the last word of **paragraph 1** be changed from “instituted” to “conducted”, to make clear that the measures should continue for the full duration of the proceedings.⁴⁷¹ The Special Rapporteur notes that this draft article only addresses the period of time when an alleged offender is first taken into custody, prior to the point of either submission of the case to the competent authorities for the purpose of prosecution in the State concerned, or extradition of the alleged offender to another State. As such, the term “instituted” is appropriate and, as previously noted, is used in other widely-adhered-to treaties.

190. Cuba proposed that, in **paragraph 2**, the phrase “in accordance with the law of that State” be added, so as to “take into consideration the fact that such measures may be applied in accordance with the specific features of the law of each country”.⁴⁷² The Special Rapporteur agrees that such preliminary inquiry may and should be conducted in accordance with the law of the State, but does not believe that the text needs to be amended, in light of the comparable clause already contained in paragraph 1. Further, as previously noted, several existing treaties contain the same formulation as appears in paragraph 2. Singapore noted that “States may face practical difficulties in investigating crimes where jurisdiction is exercised on the basis of the alleged offender’s presence in any territory under the State’s jurisdiction only and where other jurisdictional links provided in draft article 7, paragraph 1 are absent”, and therefore the “commentary on the draft article should make clear that the extent of the inquiry required would be dependent, among other things, on the jurisdictional basis for the State’s exercise of criminal jurisdiction”.⁴⁷³

191. France indicated that the term “preliminary inquiry” in **paragraphs 2 and 3** refers in French law (and perhaps in other national laws) to a specific phase of the proceedings and to the exclusion of others (expedited investigation procedures or investigation phase). A more neutral term, such as “investigations” or “inquiry”, would avoid this problem.⁴⁷⁴ The Special Rapporteur notes that the term “preliminary inquiry” or “preliminary enquiry” is used in other widely-adhered-to treaties⁴⁷⁵ without apparent difficulty.

⁴⁶⁹ See draft article 5, para. 2; draft article 6, para. 3 (a)(ii) and (b)(iii); draft article 8; draft article 10; draft article 12, para. 1 (a); draft article 14, para. 6; and draft annex, paras. 2 and 17 (b).

⁴⁷⁰ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 31–36.

⁴⁷¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.10, Germany.

⁴⁷² *Ibid.*, Cuba.

⁴⁷³ *Ibid.*, Singapore.

⁴⁷⁴ *Ibid.*, France.

⁴⁷⁵ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 31–36.

192. With respect to **paragraph 3**, France expressed concern over “the impact that the obligation of a State to report the findings of an inquiry to another State might have on the outcome of an ongoing investigation or inquiry”⁴⁷⁶ and, hence, proposed that the paragraph be qualified by commencing with: “If it considers that such information is not of such a nature as to endanger the ongoing investigations,”.⁴⁷⁷ Germany also expressed concern that this obligation “appears new under international public law” and “poses important questions with regard to the strategy of inquiry and foreign policy considerations”.⁴⁷⁸ It proposed changing the text to read: “When a State, pursuant to this draft article, has taken a person into custody, it shall [endeavour] to consult, as appropriate, with the States referred to in draft article 7, paragraph 1, in order to indicate whether it intends to exercise jurisdiction and whether to exchange its findings.”⁴⁷⁹ South Africa expressed concern about having to report “immediately” to other States, when those other States may not yet have been identified at the time of the arrest.⁴⁸⁰ Poland simply recommended replacing the word “immediately” with “without delay” to be more in line with international standards.⁴⁸¹ South Africa expressed concern that paragraph 3 placed too disproportionate a burden on States who had taken custody of an offender, since they might not know which States have established jurisdiction over the offence.⁴⁸²

193. Again, the Special Rapporteur notes that the formulation that appears in paragraph 3 is similar to the one that appears in other widely-adhered-to treaties.⁴⁸³ For example, article 6, paragraph 4, of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment provides:

When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

194. Nevertheless, there may be reasons, in the context of crimes against humanity, for somewhat greater caution with respect to an obligation of one State to report its findings to other States. For example, the State where the offender is located may be engaged in a wide-ranging investigation into the conduct of multiple persons, given the nature of crimes against humanity, and revealing all aspects of that investigation may comprise the State’s efforts. Likewise, the State where the offender is located may wish to protect the identities of victims or witnesses, such that revealing certain aspects of the investigation is problematic.

⁴⁷⁶ France, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 20th meeting (A/C.6/71/SR.20)*, para. 75.

⁴⁷⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.10, France. See also Coco (footnote 444 above), p. 771–772.

⁴⁷⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.10, Germany.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ South Africa, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 7.

⁴⁸¹ Poland, *ibid.*, 26th meeting (A/C.6/72/SR.26), para. 53.

⁴⁸² South Africa, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 7.

⁴⁸³ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 31–36.

2. Recommendation of the Special Rapporteur

195. To address concerns raised with respect to the obligation in paragraph 3 to report its findings to other States,⁴⁸⁴ the Special Rapporteur recommends, in the second sentence, adding “, as appropriate,” after “shall”. No other changes to draft article 9 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

L. Draft article 10 [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.

1. Comments and observations

196. States provided comments on draft article 10 both in writing and in statements before the Sixth Committee during the seventy-first and seventy-second sessions of the General Assembly.

197. Several States⁴⁸⁵ and the OHCHR⁴⁸⁶ expressed their general support for the draft article. The Czech Republic welcomed inclusion of the term “surrender” as “reflecting the different terminology used in various international instruments”.⁴⁸⁷ Austria indicated its understanding that the term “international criminal tribunal” as

⁴⁸⁴ See paragraphs 192 to 194 above.

⁴⁸⁵ Argentina, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 26th meeting (A/C.6/72/SR.26)*, para. 15; Chile, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 99; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11: Chile and the Czech Republic; Jordan, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 24; Mexico, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 18; the Netherlands, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 21; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11, Panama; Peru, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 9; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.6, Peru; Slovakia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 141; Switzerland, *ibid.*, 24th meeting (A/C.6/71/SR.24), para. 67; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11, Switzerland; and Thailand, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 62.

⁴⁸⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.9, OHCHR. See also *ibid.*, chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Amnesty International, “17-point program ...” (footnote 143 above), p. 2; and Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 23–24.

⁴⁸⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11, the Czech Republic.

used in the draft articles “includes ... hybrid courts”.⁴⁸⁸ The Special Rapporteur agrees that extradition or surrender to hybrid courts is covered by the “unless” clause in this draft article.

198. Sweden (on behalf of the Nordic countries) questioned the structure of the draft article, indicating that “it would be useful to assess whether it is always necessary for such cases to be submitted to the competent authorities for the purpose of prosecution, even without the requesting [S]tate calling for such submission”.⁴⁸⁹ Yet all other States viewed this “Hague formula” approach as appropriate in this context. Indeed, Belgium proposed that the title of the draft article be changed to “*judicare aut dedere*” or “*judicare vel dedere*”, so as to stress that the obligation is, in the first instance, to submit the matter to prosecution, whether or not there exists an extradition request.⁴⁹⁰ The Special Rapporteur notes that the Commission considered using a title for the draft article that was technically a more accurate Latin phrase but elected to use the existing title, deeming it the most familiar phrase in common use in this context.

199. Greece and Romania⁴⁹¹ each suggested that the wording of draft article 10 might be better aligned with the actual “Hague formula” used in various treaties.⁴⁹² Thus, Greece proposed that the first sentence read: “The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender him or her to another State or competent international criminal tribunal, submit the case to its competent authorities for the purpose of prosecution.”⁴⁹³ The Special Rapporteur views this as a non-substantive change that more closely follows the text of the standard “Hague formula” and therefore may be more familiar to the competent authorities of States.

200. Slovakia and Thailand both noted that it was unclear whether the principle of *aut dedere aut judicare* reflected customary international law, with the latter suggesting that State practice should be further examined.⁴⁹⁴ The Special Rapporteur notes that the Commission is not seeking to determine whether this provision reflects customary international law, a matter previously considered by the Commission.⁴⁹⁵ Rather, here the Commission is drafting a provision that is often used in treaties addressing crimes for the purpose of a possible future convention.

201. Panama proposed that a time element be introduced into the draft article, requiring a State to submit the matter to prosecution “within a reasonable period of time”.⁴⁹⁶ In that regard, it noted that the International Court of Justice has viewed

⁴⁸⁸ *Ibid.*, chapter II.A, Austria.

⁴⁸⁹ *Ibid.*, chapter II.B.8, Sweden (on behalf of the Nordic countries).

⁴⁹⁰ *Ibid.*, chapter II.B.11, Belgium.

⁴⁹¹ *Ibid.*, Greece; Greece, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 32; and Romania *ibid.*, para. 76.

⁴⁹² Article 7 of the Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105, reads:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

⁴⁹³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11, Greece.

⁴⁹⁴ Slovakia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 141; and Thailand, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 62.

⁴⁹⁵ See the report of the Commission on the work of its sixty-sixth session, *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10 (A/69/10)*, chapter VI.

⁴⁹⁶ Crimes against humanity: Comments and observations received from Governments, international

such an obligation as existing with respect to such a provision.⁴⁹⁷ The Special Rapporteur agrees that the case must be submitted to the competent authorities for the purpose of prosecution within a reasonable period of time, but views such an element as implicit in the obligation.

202. Switzerland recommended that the draft article also address the situation where “a person who is sentenced in one State for a crime against humanity but who has not served his or her sentence is currently present in another State”, in which case “the latter State should also extradite the person or enforce the sentence itself”.⁴⁹⁸ The Special Rapporteur notes that a State may pursue extradition for this purpose, as facilitated by draft article 13, with the issue of a refusal to extradite in that context expressly addressed in paragraph 8 of that draft article.

203. The Russian Federation recommended deleting the reference to “competent international criminal tribunal”, since such surrender was regulated by special agreements and thus outside the purpose of the draft articles.⁴⁹⁹ In contrast, the Czech Republic and Switzerland proposed retaining the reference.⁵⁰⁰ Further, the Czech Republic suggested clarifying in the text that surrender to an international criminal tribunal is possible only where such State has recognized the tribunal’s jurisdiction.⁵⁰¹ The Special Rapporteur notes that draft article 10 contains no requirement that a State surrender an alleged offender to an international criminal tribunal. Were a State to do so (rather than to submit the matter to prosecution within its own national law), such surrender would occur subject to whatever relevant international instruments may exist relating to that tribunal, whose jurisdiction might arise from a treaty to which the State has adhered or from a Security Council resolution.

204. Sierra Leone stressed that the phrase “submit the case to its competent authorities” leaves intact prosecutorial discretion as to whether the evidence exists to support a prosecution.⁵⁰² Australia indicated that “it would be useful to clarify that where the State in question is a common law jurisdiction, ‘submission to competent authorities for prosecution’ would entail provision of relevant information to police for their evaluation and then, if sufficient information is available, investigation, in accordance with relevant procedures and policies. If a police investigation reveals sufficient evidence of criminal conduct, a brief of evidence would be prepared for a prosecutorial authority. A decision on whether to commence a prosecution would be made independently in accordance with relevant policies.”⁵⁰³

organizations and others (A/CN.4/726), chapter II.B.11, Panama. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), pp. 10–11.

⁴⁹⁷ See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Judgment, I.C.J. Reports 2012*, p. 422, p. 460, para. 114 (“While Article 7, paragraph 1, of the Convention [against torture and other cruel, inhuman or degrading treatment or punishment] does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention”).

⁴⁹⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11, Switzerland.

⁴⁹⁹ Russian Federation, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 66.

⁵⁰⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11: the Czech Republic and Switzerland.

⁵⁰¹ *Ibid.*, chapter II.B.11, the Czech Republic. To that end, it proposed using language from article 9, paragraph 2, of the International Convention for the Protection of All Persons from Enforced Disappearance (“... unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized”).

⁵⁰² *Ibid.*, Sierra Leone.

⁵⁰³ *Ibid.*, Australia.

205. The Special Rapporteur suggests that clarifications could be included in the Commission's commentary to address such points. Indeed, the requirement that the State "submit the case to its competent authorities for the purpose of prosecution" and that those "authorities shall take their decision in the same manner" as any offence of a grave nature, means that prosecutorial discretion operates in the usual way, whereby the prosecutor will consider whether sufficient evidence exists against the alleged offender, whether the legal standards for a crime against humanity have been met, and whether there are any other relevant factors, such as determining whether the interests of justice are served in prosecuting the alleged offender. Such factors typically operate within national criminal justice systems⁵⁰⁴ and are also considered when deciding whether to proceed with an investigation and prosecution at the International Criminal Court.⁵⁰⁵

206. Finally, Chile proposed further provisions in this draft article regarding the principle of *ne bis in idem*, whereby the obligation to submit the matter to prosecution does not exist if the alleged offender has already been convicted or acquitted of the same offence. To that end, Chile suggested using text drawn from article 20 of the Rome Statute of the International Criminal Court.⁵⁰⁶ The Special Rapporteur notes that the application of such a principle would need to be considered in relation to at least three different contexts: prosecution for the same offence twice in the same State; prosecution for the same offence in one State after conviction or acquittal in another State; and prosecution for the same offence by a State and by an international criminal tribunal. The Commission's approach to such matters has been to leave them to be regulated by existing treaties⁵⁰⁷ and customary international law on human rights, which must be applied for any alleged offender pursuant to draft article 11. The Commission has not sought to replicate such human rights law in these draft articles; were it to try to do so, many principles beyond *ne bis in idem* would need to be considered as well.

2. Recommendation of the Special Rapporteur

207. Based on the comments received,⁵⁰⁸ the Special Rapporteur recommends a non-substantive adjustment of draft article 10, so as to be more closely aligned with the text of the standard "Hague formula."⁵⁰⁹ The draft article might read:

"The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or

⁵⁰⁴ See, for example, J. H. Langbein, "Controlling prosecutorial discretion in Germany", *University of Chicago Law Review*, vol. 41, No. 3 (Spring 1974), pp. 439–467; D. J. Galligan, *Discretionary Powers: a Legal Study of Official Discretion*, Oxford, Clarendon Press, 1990; and D. D. Ntanda Nsereko, "Prosecutorial discretion before national courts and international tribunals", *Journal of International Criminal Justice*, vol. 3, No. 1 (March 2005), pp. 124–144.

⁵⁰⁵ See the Rome Statute of the International Criminal Court, art. 53. See also S. SáCouto and K. Cleary, "The gravity threshold of the International Criminal Court", *American University International Law Review*, vol. 23, No. 5 (2008), pp. 807–854; K. A. Rodman, "Is peace in the interests of justice? The case for broad prosecutorial discretion at the International Criminal Court", *Leiden Journal International Law*, vol. 22, No. 1 (March 2009), pp. 99–126; and K. Vaid, "Discretion operationalized through paw: *proprio motu* decision-making at the International Criminal Court", *Florida Journal International Law*, vol. 25, No. 3 (December 2013), pp. 359–416.

⁵⁰⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11, Chile.

⁵⁰⁷ See, for example, International Covenant on Civil and Political Rights, art. 14, para. 7; and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Strasbourg, 22 November 1984), United Nations, *Treaty Series*, vol. 1525, No. 2889, p. 195, art. 4, para. 1.

⁵⁰⁸ See paragraph 199 above.

⁵⁰⁹ See footnote 492 above.

competent international criminal tribunal, submit the case to its competent authorities for the purpose of prosecution. 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.”

208. No other changes to draft article 10 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

M. Draft article 11 [10]: Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

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.

1. Comments and observations

209. States provided comments on draft article 11 both in writing and in statements before the Sixth Committee during the seventy-first and seventy-second sessions of the General Assembly.

210. Several States expressed general support for the draft article,⁵¹⁰ as did the

⁵¹⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, the Czech Republic, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 69; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Estonia; Iceland (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 24th meeting (A/C.6/71/SR.24)*, para. 61; Mexico, *ibid.*, 26th meeting (A/C.6/71/SR.26), para. 18; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Peru; Romania, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 76; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Sierra Leone; Slovakia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 141; Slovenia, *ibid.*, para. 108; and Crimes against humanity: Comments and observations received from Governments, international

Council of Europe.⁵¹¹ Sierra Leone proposed changing the title to “Fair treatment of persons” or “Fair treatment of suspects and alleged offenders”, given that such treatment is to be accorded even prior to a person being accused.⁵¹² The Special Rapporteur notes that the term “person” is overbroad and the term “suspect” is not used in the draft article, and therefore views the current title as appropriate for indicating the general focus of the draft article.

211. Some States favoured either a much longer article or no article at all. Thus, Brazil, Liechtenstein and Uruguay favoured a longer article addressing a much wider array of rights of the accused, based on articles 55 and 67 of the Rome Statute of the International Criminal Court.⁵¹³ In contrast, the Russian Federation questioned whether the draft article was necessary at all, since it might create the impression that persons who had allegedly committed crimes against humanity enjoyed special rights.⁵¹⁴ Sierra Leone proposed that the commentary do more “to separate out and explain the duties on the part of [S]tates to ensure fair treatment of natural persons”, such as duties with respect to suspects versus duties with respect to accused persons.⁵¹⁵

212. The Special Rapporteur notes that the Commission viewed it as important to have a draft article indicating that persons who are alleged to have committed offences of crimes against humanity are entitled to the same rights as any person alleged to have committed a crime, as is done in many treaties addressing crimes.⁵¹⁶ At the same time, the Commission did not view it as necessary to replicate in the draft article the wide array of rights to which a suspect or defendant before a national court is entitled under international law. Detailed provisions to that effect in the Rome Statute of the International Criminal Court should be viewed in that particular context, in which there was a desire to identify clearly the rights to which an accused was entitled under the Statute of a newly-created international court (rather than before the courts of a State that is already bound by customary and treaty-based human rights law).

213. Regarding **paragraph 1**, Belarus doubted whether the phrase “including human rights law” was necessary, since this would be included under applicable national and international law.⁵¹⁷ The Special Rapporteur agrees with that point.⁵¹⁸ Italy recommended that paragraph 1 be further qualified by “stating that national law was applicable only to the extent that it was fully consistent with internationally recognized human rights”.⁵¹⁹ The Special Rapporteur notes that the text calls for full protection of rights as they may exist under both international law and national law. If national law does not provide certain protections that exist in international law, the

organizations and others (A/CN.4/726), chapter II.B.12: Sweden (on behalf of the Nordic countries) and Switzerland.

⁵¹¹ *Ibid.*, chapter III.B.10, Council of Europe. See also *ibid.*, chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

⁵¹² *Ibid.*, chapter II.B.12, Sierra Leone.

⁵¹³ *Ibid.*: Brazil; Liechtenstein; and Uruguay. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 2; and Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 24–25.

⁵¹⁴ Russian Federation, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 66.

⁵¹⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Sierra Leone.

⁵¹⁶ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 41–45.

⁵¹⁷ Belarus, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 23rd meeting (A/C.6/71/SR.23)*, para. 6.

⁵¹⁸ See paragraph 218 below.

⁵¹⁹ Italy, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 139.

latter protections must nevertheless be accorded to the person concerned. Malaysia suggested that the gravity of the offence should be taken into account when considering fair treatment.⁵²⁰ The Special Rapporteur is of the view that the gravity of an alleged offence is not relevant to the basic obligation to provide such rights to the person concerned.

214. With respect to the commentary to this paragraph, Singapore agreed that the obligation to accord an alleged offender a “fair and public hearing”, as provided in article 10 of the Universal Declaration of Human Rights, is part of customary international law. However, Singapore did not agree that all of the provisions of article 14 of the 1966 International Covenant on Civil and Political Rights reflected customary international law, and proposed that the commentary be amended accordingly.⁵²¹

215. Regarding **paragraph 2**, Greece agreed with the Commission’s decision to address consular issues, without replicating in full article 36 of the 1963 Vienna Convention on Consular Relations.⁵²² Uruguay proposed that such rights should be accorded to “all foreigners or stateless persons deprived of liberty, regardless of their immigration status, in accordance with General Assembly resolution 65/212 of 21 December 2010”.⁵²³ In contrast, Israel maintained that allowing stateless persons to communicate with a State willing to protect that person’s rights is not consistent with article 36 of the Vienna Convention on Consular Relations or with customary international law, and therefore should not be included.⁵²⁴ The Special Rapporteur agrees that the current text goes beyond that Convention in that respect, but the Commission viewed it as desirable to enable stateless persons some measure of protection, in the event that there exists a State willing to assist in that regard.

216. Poland recommended that the phrase “representative of the State” be replaced with “consular post”.⁵²⁵ Cuba suggested that a further subparagraph be added reading: “to receive legal assistance for his or her defence in any of the situations mentioned”.⁵²⁶ The Special Rapporteur believes it best to retain the existing language, with which States are familiar under the Vienna Convention on Consular Relations.⁵²⁷

217. Austria expressed concern regarding the relationship between the rights of detainees and restrictions based on national law, suggesting that **paragraph 3** should

⁵²⁰ Malaysia, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 65.

⁵²¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Singapore.

⁵²² Greece, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 32.

⁵²³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Uruguay (referencing General Assembly resolution 65/212 of 21 December 2010, para. 4 (g), which “[r]eaffirms emphatically the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their immigration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention”). See also Amnesty International, “17-point program ...” (footnote 143 above), p. 2.

⁵²⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Israel.

⁵²⁵ Poland, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 53.

⁵²⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Cuba. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 2.

⁵²⁷ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 42–45.

be deleted or should express “a clear rule protecting the rights of the detainees against restrictions based on national law, such as, for instance, that national laws and regulations ‘must enable the full exercise of the rights accorded under paragraph 2’”.⁵²⁸ Again, the Special Rapporteur believes it best to retain the existing language, with which States are familiar under article 36, paragraph 2 of the Vienna Convention on Consular Relations and many treaties addressing crimes.

2. Recommendation of the Special Rapporteur

218. Based on the comments received,⁵²⁹ the Special Rapporteur recommends deleting at the end of paragraph 1 of draft article 11 the phrase “, including human rights law”. First, the phrase is superfluous, in that the preceding phrase “international law” clearly includes human rights law. Second, the inclusion of this final phrase might be interpreted as displacing or downgrading another highly important area of international law in this context, which is international humanitarian law. Important protections for both combatants and non-combatants exist under international humanitarian law in relation to criminal law proceedings against them. Third, in the twelve other places in the draft articles where “international law” is mentioned, there is no further “including” phrase directed at any particular area of international law. In contrast, in the sole other place in the draft articles where “human rights” law is referenced, it is paired with a reference to “international humanitarian law”.⁵³⁰ As such, the Special Rapporteur recommends deleting the phrase “including human rights law” as unnecessary and to avoid any adverse implication.

219. No other changes to draft 11 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

N. Draft article 12: Victims, witnesses and others

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

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

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

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

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation

⁵²⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Austria; and Austria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting* (A/C.6/72/SR.18), para. 67.

⁵²⁹ See paragraph 213 above.

⁵³⁰ See draft article 5, paragraph 2.

for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

1. Comments and observations

220. States provided comments on draft article 12 both in writing and in statements before the Sixth Committee during the seventy-second session of the General Assembly.

221. A number of States expressed their general support for the draft article,⁵³¹ as did the Council of Europe⁵³² and the European Union. The latter noted “that this draft article reflects similar provisions contained in recent international treaties regarding serious crimes”.⁵³³ In contrast, the Committee on Enforced Disappearances regretted that “the draft is still so weak on the rights and guarantees already enshrined in [a]rticle 24” of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance,⁵³⁴ which as of January 2019 had 59 States parties. France said that it might be preferable for a single article to address issues concerning victims, rather than include in paragraph 1 persons other than victims.⁵³⁵ The Special Rapporteur notes that, while such an approach is technically possible, it would not be optimal, as it would result in an unnecessary duplication of the text of draft article 12, paragraph 1; first, as a paragraph focused on victims in draft article 12, and then as a separate article focused on persons other than victims.

⁵³¹ Chile, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 90; Cuba, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 33; Estonia, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 73; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Estonia; the Republic of Korea, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 41; Mexico, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 106; New Zealand, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 49; Poland, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 92; Slovakia, *ibid.*, para. 56; Sweden (on behalf of the Nordic countries), *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 57; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Switzerland; and Trinidad and Tobago (on behalf of CARICOM), *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 25th meeting*, para. 35.

⁵³² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.11, Council of Europe.

⁵³³ *Ibid.*, European Union.

⁵³⁴ Committee on Enforced Disappearances, Statement ... (see footnote 175 above), para. 5.

⁵³⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, France.

222. Several States⁵³⁶ and certain United Nations experts⁵³⁷ urged that a definition of “victims” be provided, such as “[v]ictims’ means natural persons who have suffered harm as a result of the commission of any offence covered by the present draft articles”.⁵³⁸ Liechtenstein proposed that the definition of victims also include “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.⁵³⁹ Argentina proposed that “associations of victims and/or members of their families” should be mentioned.⁵⁴⁰ In contrast, the United Kingdom supported not having such a definition, “given the need to reflect the differing approaches at [the] national level”.⁵⁴¹

223. The Special Rapporteur is of a view that a simple definition of “victim” (“natural persons who have suffered harm ...”) has the potential for limiting broader definitions that exist in national laws of certain States, while a more complex definition (such as inclusion of NGOs, including corporations) would require certain States to change their national laws so as to conform with that definition, either with respect just to crimes against humanity or (to avoid potential confusion) with respect to all criminal offences. Given that widely-adhered-to treaties relating to crimes typically do not define “victim”,⁵⁴² the Commission opted not to include such a definition in these draft articles, and the Special Rapporteur remains of the view that such an approach is appropriate.

⁵³⁶ Algeria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 16; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Argentina; Estonia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 73; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13: Estonia and Liechtenstein; Poland, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 92; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Sierra Leone; Sweden (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 57; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.12, Uruguay.

⁵³⁷ *Ibid.*: chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and chapter III.B.11, Working Group on Enforced or Involuntary Disappearances. See also Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 25–26 (proposing that the definition *be toute personne physique ayant subi un préjudice direct du fait d’un crime contre l’humanité* (“any natural person having suffered a direct prejudice as a result of a crime against humanity”)); Amnesty International, “17-point program ...” (footnote 143 above), p. 3; and IBA War Crimes Committee, *Comments ...* (footnote 60 above), pp. 11–12.

⁵³⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Liechtenstein (drawing upon the Rules of Procedure and Evidence of the International Criminal Court). See the International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 1 (“For the purposes of this Convention, ‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”).

⁵³⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Liechtenstein (drawing upon the Rules of Procedure and Evidence of the International Criminal Court).

⁵⁴⁰ *Ibid.*, Argentina.

⁵⁴¹ *Ibid.*, the United Kingdom.

⁵⁴² See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 46–49.

224. With respect to **paragraph 1**, Bulgaria and the Czech Republic welcomed the focus on protecting victims, witnesses and other persons.⁵⁴³ Estonia did as well, but urged that greater attention be paid “to the procedural safeguards and other substantive rights of the victims”, including “of particularly vulnerable victims or groups of victims”, such as children.⁵⁴⁴ The Council of Europe similarly suggested the draft article should adopt a holistic approach to address the various needs of victims.⁵⁴⁵ France and Uruguay suggested that **subparagraph (a)** include an obligation for a State to examine impartially and promptly the complaint made to the competent authorities.⁵⁴⁶ The Special Rapporteur notes that such an obligation already exists in draft article 8, albeit one that is imposed solely on the State where the crimes have been or are being committed. In **subparagraph (b)**, the United Kingdom supported the decision not to define “protective measures”, given “the need to ensure the necessary flexibility”.⁵⁴⁷ Chile suggested, however, that after the word “witnesses” there be added “judges, prosecutors” so that State officials also benefit from the protection.⁵⁴⁸ The Special Rapporteur notes that the phrase “other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles” is broad enough to encompass such persons. Chile also proposed changing “victim” to “alleged victim” in paragraph 1 (b) and “victims” to “alleged victims” in paragraph 2, so as to preserve a presumption of innocence regarding whether a crime has been committed.⁵⁴⁹ The Special Rapporteur does not believe that such changes are necessary to preserve a presumption of innocence.

225. With respect to **paragraph 2**, a national consultative commission on human rights proposed indicating that views of victims must be allowed where the personal interests of the victims are affected, so as to guide national courts, and further proposed an explicit acknowledgment that such views could be presented by the victim’s legal representative.⁵⁵⁰ The Special Rapporteur is of the view that both propositions are implicitly encompassed within the existing language, which has been used by States in this context in several widely-adhered-to treaties relating to the participation of victims in national proceedings.⁵⁵¹

226. Australia indicated that it would be useful to clarify in paragraph 2 that “where the State in question is a common law jurisdiction, longstanding criminal trial procedures such as the opportunity to deliver victim impact statements at the point of sentencing would fulfil the intention of the provision, and that there is no intention that draft article 12 would require a common law jurisdiction to import into its criminal law trial procedures opportunities for non-witness ‘participation’ in a manner

⁵⁴³ Bulgaria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 7; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, the Czech Republic.

⁵⁴⁴ *Ibid.*, chapter II.B.13, Estonia.

⁵⁴⁵ Council of Europe, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 22nd meeting (A/C.6/72/SR.22)*, para. 31.

⁵⁴⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13: France and Uruguay.

⁵⁴⁷ *Ibid.*, the United Kingdom.

⁵⁴⁸ *Ibid.*, Chile.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 26–28.

⁵⁵¹ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), p. 48.

more readily understood in the civil law tradition”.⁵⁵² The Special Rapporteur proposes that the Commission consider such a clarification in its commentary.

227. Regarding **paragraph 3**, several States⁵⁵³ and the European Union expressed their support for such a provision on reparation, with Turkey welcoming its flexibility.⁵⁵⁴ According to the European Union: “As regards the victims’ rights to obtain reparation, the European Union notes that draft [a]rticle 12, paragraph 3, provides in a comprehensive manner several forms of reparation which appear to be tailored to the specific needs of victims of crime[s] against humanity, including restitution, which goes beyond mere compensation. Moreover, in terms of the scope of reparation, the European Union notes that draft [a]rticle 12, paragraph 3, covers both material and moral damages.”⁵⁵⁵

228. Portugal suggested that the question of compensation should be addressed in a separate draft article, so as to give more emphasis to victims’ rights.⁵⁵⁶ The Special Rapporteur notes that all three paragraphs of draft article 12 contain important provisions that are protective of victims, and that there is some value in keeping them together. The United Kingdom viewed the existing text on compensation as appropriate, noting in part paragraph (20) of the commentary to this draft article,⁵⁵⁷ which indicates that the obligation could be satisfied by the availability in the State’s national law of civil claims processes. At the same time, the United Kingdom indicated that it “may be helpful to make this position more explicit to ensure that there is no presumption that States must establish compensation schemes, although they can do so if they wish”.⁵⁵⁸

229. Other States requested that the exact scope of a State’s obligation in paragraph 3 be further clarified.⁵⁵⁹ Singapore considered that “an explicit reference to moral damages is not necessary”, noting that the Rome Statute of the International Criminal Court contains no such reference, “but rather permits the court to ‘determine the scope and extent of any damage, loss and injury to, or in respect of, victims’”.⁵⁶⁰ Sierra Leone viewed paragraph 3 as imposing “too stringent an obligation”. It noted that “conflict-torn societies” may face “thousands if not hundreds of thousands of victims of crimes against humanity” such that, despite the qualifications contained therein,

⁵⁵² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Australia.

⁵⁵³ Chile, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para 90; New Zealand, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 49; Peru, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 9; and Slovakia, *ibid.*, para. 56.

⁵⁵⁴ Turkey, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 81.

⁵⁵⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.11, European Union.

⁵⁵⁶ Portugal, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting* (A/C.6/72/SR.18), para. 94.

⁵⁵⁷ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 12, para. (20).

⁵⁵⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, the United Kingdom. No State called for the deletion from paragraph 3 of “cessation and guarantees of non-repetition” and the United Kingdom saw “no issue with including them within the list” (*ibid.*).

⁵⁵⁹ Algeria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting* (A/C.6/72/SR.21), para. 16; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Estonia; Malawi, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 26th meeting* (A/C.6/72/SR.26), para. 135; Poland, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 92; and Turkey, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 81.

⁵⁶⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Singapore (citing the Rome Statute of the International Criminal Court, art. 75, para. 1).

paragraph 3 “could still be problematic”.⁵⁶¹ If retained, Sierra Leone suggested that a fourth paragraph might be added to the draft article allowing a State to derogate from the obligation in certain circumstances.⁵⁶² The Special Rapporteur notes that the Commission’s commentary indicates an understanding that there may be limited capacity of a State to accord reparation⁵⁶³ and a belief that paragraph 3 (which provides “as appropriate” and “one or more”) is flexible enough to account for such circumstances.

230. Australia stated that “it would be helpful to clarify that a State would not be under an obligation to provide compensation for victims of crimes against humanity perpetrated by a foreign [G]overnment outside of the said State’s territory or jurisdiction”.⁵⁶⁴ The Special Rapporteur believes that this last comment raises an important point, in that paragraph 3 is silent as to which State, for any given situation of crimes against humanity, is expected to have in its legal system a right of reparation for the victims of those crimes. As such, it would be best to clarify that each State must have in place measures allowing reparation for victims of crimes against humanity when such crimes are committed through acts attributable to the State under international law or committed in any territory under the State’s jurisdiction.

231. Argentina, Liechtenstein, Uruguay⁵⁶⁵ and certain United Nations experts⁵⁶⁶ proposed inclusion of a new provision on the victim’s “right to know the truth” about the circumstances in which the crimes occurred or to have other access to information, *inter alia* to combat the spreading of misinformation that seeks to justify discrimination against and the targeting of victims, or that conceals the crimes. To that end, Uruguay proposed drawing upon provisions of certain instruments.⁵⁶⁷ Further, Uruguay proposed that States be obligated to “inform victims of the progress and results of the examination of the complaint and any subsequent investigations”, and “that victims shall receive legal counsel where appropriate”.⁵⁶⁸ The Special Rapporteur notes that the inclusion of such a right is not typical of treaties addressing crimes and that some States may be uncertain as to what exactly such a right implies in the context of a widespread or systematic attack against a civilian population. Consequently, the Special Rapporteur remains of a view that a “right to know the

⁵⁶¹ *Ibid.*, Sierra Leone.

⁵⁶² *Ibid.* (suggesting text based on article 4 of the International Covenant on Civil and Political Rights on derogation in time of public emergency).

⁵⁶³ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 12, paras. (19)–(20).

⁵⁶⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Australia.

⁵⁶⁵ *Ibid.*: Argentina; Liechtenstein; and Uruguay.

⁵⁶⁶ *Ibid.*, chapter III.A: Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; and Working Group on Enforced or Involuntary Disappearances. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 3; and Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), p. 30.

⁵⁶⁷ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 2 (“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard”); and Commission on Human Rights, Promotion and protection of human rights: Impunity: Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), principle 4: The victims’ right to know (“Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate”).

⁵⁶⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.13, Uruguay. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 3.

truth” provision should not be included in the draft article, but that the Commission’s commentary might reflect the importance of States in providing information to victims whenever possible as part of the reparative process.

2. Recommendation of the Special Rapporteur

232. Based on the comments received,⁵⁶⁹ the Special Rapporteur recommends, in paragraph 3 of draft article 12, that after the phrase “crime against humanity” there be inserted the following clause: “, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction,”. No other changes to draft article 12 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

O. Draft article 13: Extradition

1. Each of the offences covered by the present draft articles 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 covered by the present draft articles 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 covered by the present draft articles.

4. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; 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 in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles 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 the grounds upon which the requested State may refuse extradition.

7. If necessary, the offences covered by the present draft articles 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 7, paragraph 1.

⁵⁶⁹ See paragraph 229 above.

8. 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.

9. 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 gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

10. 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.

1. Comments and observations

233. States provided comments on draft article 13 both in writing and in statements before the Sixth Committee during the seventy-second session of the General Assembly.

234. Several States expressed their general support for the draft article, including its detailed provisions.⁵⁷⁰ The United Kingdom noted that it was important to consider the relationship between this draft article and national law regarding extradition.⁵⁷¹ Australia, after analysing its national law, indicated that an "international convention containing provisions such as those contained in the draft articles could facilitate cooperation between Australia and States not currently designated [under Australian law] as 'extradition countries' with respect to cases involving crimes against humanity, if ratified by Australia".⁵⁷²

235. Some States sought either a shorter or longer draft article. Thus, Greece expressed concern that the "long-form" draft article decided on by the Commission risked overshadowing the main topic of the draft articles.⁵⁷³ The United Kingdom indicated its support for the draft article, though "should the International Law Commission take the view" that the draft article needs "to be simplified to ensure

⁵⁷⁰ See Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Australia; Hungary, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 71; Indonesia, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 9; Italy, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 140; the Republic of Korea, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 38; Mexico, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 107; Mozambique, *ibid.*, 22nd meeting (A/C.6/72/SR.22), para. 5; Romania, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 82; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Sierra Leone; Slovakia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 57; South Africa, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 8; and Thailand, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 63.

⁵⁷¹ The United Kingdom, *ibid.*, para. 3.

⁵⁷² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Australia.

⁵⁷³ *Ibid.*, Greece; and Greece, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 50.

greater support from other States, the United Kingdom would not oppose such a decision”.⁵⁷⁴

236. In contrast, some States supported the existing length, while proposing yet further provisions. Thus, the Czech Republic favoured inclusion of a provision on the “rule of speciality”, which provides that a person may only be tried in the requesting State for the offence for which he or she was extradited.⁵⁷⁵ At the same time, Germany favoured adding a paragraph that would address situations where extradition is sought not only for crimes against humanity, but for other offences as well, fearing that extraditions under the draft articles might end up being limited only to crimes against humanity.⁵⁷⁶ The Special Rapporteur notes that there is no obligation to extradite under the present draft articles; extradition is merely an option that a State may exercise, when an alleged offender is present and when extradition is available, rather than submit a case to prosecution in its own national legal system. If a State exercises this option, it may condition the extradition on whatever basis it sees fit, provided that the case against the alleged offender for crimes against humanity is submitted to prosecution in the requesting State.

237. The Islamic Republic of Iran favoured the inclusion of a provision that required dual criminality, as exists in numerous international instruments.⁵⁷⁷ In contrast, the Republic of Korea expressed support for the current approach of not including a requirement of dual criminality,⁵⁷⁸ given that the draft articles require the requesting and requested States both to have national laws on crimes against humanity. The Special Rapporteur agrees that the current approach is appropriate, for the reasons explained in the Commission’s commentary.⁵⁷⁹

238. Switzerland requested the addition of a provision addressing competing extradition requests,⁵⁸⁰ a request that might be linked with concerns expressed in relation to draft article 7.⁵⁸¹ Israel maintained that “States have the primary sovereign prerogative to exercise jurisdiction in their national courts over crimes against humanity that have been committed either in their territory or by their nationals. ... Only when such States are unable or unwilling to exercise jurisdiction, [should] alternative mechanisms ... be considered.”⁵⁸² Similarly, the Russian Federation suggested that States with a greater interest should be given priority to establish

⁵⁷⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, the United Kingdom.

⁵⁷⁵ *Ibid.*, the Czech Republic (referring in this context to article 14 of the 1957 European Convention on Extradition ((Paris, 13 December 1957), United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273)).

⁵⁷⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Germany. Germany suggested a paragraph aligned with article 2, paragraph 4, of the United Nations Model Treaty on Extradition, which reads: “If a request for extradition includes several separate offences each of which is punishable under the laws of both States, but some of which do not fulfil the conditions as an extraditable offence covered by the present draft articles, the requested State may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence” (see General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997)).

⁵⁷⁷ The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 38.

⁵⁷⁸ The Republic of Korea, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 38.

⁵⁷⁹ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 13, paras. (31)–(33).

⁵⁸⁰ Switzerland, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, paras. 102–103.

⁵⁸¹ See paragraph 167167 above.

⁵⁸² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Israel.

jurisdiction, noting in particular States acting on the basis of territoriality or nationality.⁵⁸³ Singapore concluded that: “Where such conflicts of jurisdiction exist, the draft articles should accord primacy to the State which can exercise jurisdiction on the basis of at least one of the limbs in [a]rticle 7, paragraph 1, rather than a custodial State that can only exercise jurisdiction on the basis of [a]rticle 7, paragraph 2, alone. This is because the former would be the State with a greater interest in prosecuting the offence in question.”⁵⁸⁴

239. The Czech Republic did not propose that a primacy be accorded to any particular State, but instead suggested that a provision be included “according to which States shall strive to coordinate their action appropriately, should such situation occur”.⁵⁸⁵

240. While the Commission in its commentary has indicated certain factors that might be relevant in such a situation,⁵⁸⁶ the Commission might consider adding to draft article 13, perhaps as a part of a new paragraph 1, a provision indicating that a requested State shall give due consideration to the request of the State in whose territory the alleged offence has occurred. Such a provision would not dictate a particular outcome in a situation of competing requests, but would encourage States to take into account the interests of the State where the crime occurred, given that most of the victims, witnesses and evidence relating to the crime may be located there, and that it may be the State of the nationality of the alleged offender.

241. Switzerland also indicated a desire that the draft article include an “obligation of promptness” in extradition proceedings, such as appears in the 2003 United Nations Convention against Corruption, finding that such “promptness is important in this type of proceeding” since it involves the detention of a person.⁵⁸⁷ Further, Switzerland noted that such a provision is a part of the Commission’s annex on mutual legal assistance (para. 7 of the draft annex).⁵⁸⁸ Likewise, Sierra Leone favoured adding an additional clause to the draft article, providing: “States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence referred to in draft article [6]”.⁵⁸⁹ The Special Rapporteur notes that he proposed such a provision in his third report,⁵⁹⁰ but the Commission viewed such a provision as unnecessary.⁵⁹¹ In light of the comments received, the Special Rapporteur suggests that the issue be revisited

⁵⁸³ Russian Federation, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 65.

⁵⁸⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.8, Singapore.

⁵⁸⁵ *Ibid.*, the Czech Republic. In this regard, the Czech Republic noted article 7, paragraph 5, of the 1999 International Convention for the Suppression of Financing of Terrorism, which reads: “When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.”

⁵⁸⁶ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 13, paras. (29)–(30).

⁵⁸⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Switzerland.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*, Sierra Leone.

⁵⁹⁰ See the third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), paras. 63 and 93 (proposed draft article 11(7)).

⁵⁹¹ Crimes against humanity, Statement of the Chair of the Drafting Committee, Mr. Aniruddha Rajput (1 June 2017), p. 9 (“Regarding the originally proposed paragraph 7 on the need to expedite and simplify extradition procedures, there was agreement among the members of the Drafting Committee that this paragraph was not necessary for the purposes of the draft articles. Accordingly, this paragraph was deleted”).

during the second reading, possibly as part of a new first paragraph to this draft article.

242. Switzerland made further suggestions for additions. It observed that the draft article does not address detention of the person to be extradited.⁵⁹² The Special Rapporteur notes that draft article 9, paragraph 1, addresses detention of an alleged offender, as “necessary to enable any criminal, extradition or surrender proceedings to be instituted”. Switzerland also observed that the draft article does not address the particular situation of extradition of children (such as child soldiers), and that “codification of differential treatment could provide added value”.⁵⁹³ The Special Rapporteur notes that States are, of course, bound to human rights standards in their treatment of various categories of vulnerable persons, and that draft article 11 requires that an alleged offender be accorded those rights throughout all stages of the proceedings against them.

243. With respect to **paragraph 1**, Sierra Leone suggested that the commentary make clear that the “offences” at issue concern only crimes against humanity, and not the underlying acts (for instance, a single incident of murder).⁵⁹⁴ The Special Rapporteur confirms that this is the case.

244. Argentina, Sierra Leone, Switzerland, Thailand⁵⁹⁵ and the Council of Europe⁵⁹⁶ each expressed support for **paragraph 2**, which precludes the political offence exception. In contrast, Israel asserted that the paragraph is in conflict with extradition practices, such that States should instead be able to make a determination on a case-by-case basis.⁵⁹⁷ The Nordic countries indicated that the definition of crimes against humanity “is open to interpretations and value judgments in many respects, which may prove problematic in respect to the application” of paragraph 2.⁵⁹⁸ Chile proposed deletion of the final word “alone”, viewing its inclusion as serving no apparent purpose.⁵⁹⁹ The Special Rapporteur notes that such a provision has been used in treaties for other complex crimes, such as genocide,⁶⁰⁰ and that the final word in this subparagraph makes clear that a refusal to extradite can be based on reasons other than an assertion that the offence is political in nature.

245. Thailand further supported the flexibility found in **paragraphs 3 and 4**,⁶⁰¹ while Jordan recommended the addition in paragraph 4 of “wording that required States to

⁵⁹² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Switzerland.

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid.*, Sierra Leone.

⁵⁹⁵ Argentina, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 26th meeting (A/C.6/72/SR.26)*, para. 15; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Sierra Leone; Switzerland, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 102; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Switzerland; and Thailand, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 63.

⁵⁹⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.12, Council of Europe.

⁵⁹⁷ Israel, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 3.

⁵⁹⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Sweden (on behalf of the Nordic countries).

⁵⁹⁹ *Ibid.*, Chile.

⁶⁰⁰ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 51–52.

⁶⁰¹ Thailand, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 63.

conclude agreements for the extradition of criminals, since such an obligation was lacking in the text”.⁶⁰² The Special Rapporteur notes that many States in their practice do not, as a matter of policy, wish to conclude extradition agreements with certain other States under certain circumstances. The objective of the draft article is not to require the conclusion of such extradition agreements but, rather, to help facilitate extradition between two States when they wish to pursue such a path for proceedings concerning a person alleged to have committed crimes against humanity. For a State that does not wish to extradite an alleged offender to another State, the first State is obligated, pursuant to draft article 10, to submit the case to its competent authorities for the purpose of prosecution in its own national legal system.

246. The Czech Republic saw no compelling reason for the inclusion of paragraph 4 (a); if that text remains, the Czech Republic suggested including time limits for the notification to occur,⁶⁰³ as exist in the 2000 United Nations Convention against Transnational Organized Crime⁶⁰⁴ and the 2003 United Nations Convention against Corruption.⁶⁰⁵ The Special Rapporteur agrees that such a time limit would be desirable, but notes that, in accordance with the Commission’s practice,⁶⁰⁶ and in advance of a decision by States as to whether to use these draft articles as the basis for a convention, the Commission has not included technical language characteristic of treaties, such as requiring a notification at the time of “ratification, acceptance or approval of or accession”.

247. Sierra Leone proposed that paragraph 4 (a) contain a default rule that if a State has not made any notification to the United Nations Secretary-General, then it has accepted use of the draft articles as a basis for extradition.⁶⁰⁷ The Commission contemplated such a default rule based on a proposal of the Special Rapporteur prior to the first reading, but concluded that it would not be appropriate. Among other things, “the generally-accepted approach used in the [United Nations] Convention against Transnational Organized Crime and the [United Nations] Convention against Corruption” was regarded as necessary “in view of the logical sequence flowing from paragraph 3 and the importance of having a clear text for judges when interpreting and applying the relevant instrument”.⁶⁰⁸ The Special Rapporteur remains of the view that the current approach, which is found in various widely-adhered-to conventions,⁶⁰⁹ should be retained.

248. France, Poland and Thailand expressed support for **paragraph 6** of the draft article,⁶¹⁰ which indicates that the extradition will proceed subject to the law of the

⁶⁰² Jordan, *ibid.*, 22nd meeting (A/C.6/72/SR.22), para. 26.

⁶⁰³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Czech Republic. See also *ibid.*, Sierra Leone, and IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 12.

⁶⁰⁴ United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209, art. 16, para. 5 (a).

⁶⁰⁵ For example, the United Nations Convention against Corruption provides, in its article 44, paragraph 6 (a): “At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, 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”.

⁶⁰⁶ See Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, general commentary, para. (3).

⁶⁰⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Sierra Leone.

⁶⁰⁸ Crimes against humanity, Statement of the Chair of the Drafting Committee, Mr. Aniruddha Rajput (1 June 2017), p. 8.

⁶⁰⁹ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 52–54.

⁶¹⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, France; Poland, *Official Records of the*

requested State and applicable extradition treaties. Switzerland queried whether the language of the paragraph (“conditions provided for by the national law of the requested State or by applicable extradition treaties”) encompassed diplomatic assurances given by the requesting State to the requested State.⁶¹¹ The Special Rapporteur is of the view that paragraph 6 is broad enough to encompass such assurances.

249. Switzerland also favoured in paragraph 6 an explicit indication that extradition can be refused to a country that applies the death penalty,⁶¹² while Austria and Brazil noted that additional examples of grounds for refusal might be included in the commentary, such as refusal to extradite a State’s own nationals.⁶¹³ Further, Austria expressed an interest in further explanation by the Commission of circumstances when refusal to extradite would not be permissible, as the Commission’s commentary only provides the example of refusal based on invocation of a statute of limitations.⁶¹⁴ The Special Rapporteur again notes that there is no obligation in the draft articles for a State to extradite a person; a State may refuse to do so on any ground its law or applicable treaties permit, other than on the ground that the crime is a political offence (per paragraph 2). If no extradition occurs, however, the State is obligated to submit the case to its competent authorities for the purpose of prosecution, pursuant to draft article 10.

250. With respect to **paragraph 8**, Argentina indicated that a State should not be able to refuse extradition based on the nationality of the alleged offender. According to Argentina, “States should not use the concept of nationality to enable possible perpetrators to remain outside the reach of the jurisdiction of the State in which the crimes were committed simply on the grounds that the person is a national of the State receiving the extradition request”.⁶¹⁵ The Special Rapporteur notes that the national law of certain States, including constitutional law, precludes the extradition of nationals. Further, as previously noted, nothing in the draft articles requires a State to extradite a person, so long as they submit the case to prosecution in their own national legal system.

251. The Council of Europe welcomed **paragraph 9**,⁶¹⁶ noting that the 1957 European Convention on Extradition incorporates a similar exception.⁶¹⁷ A few States, however, queried the formulation used, with Greece noting that the inclusion of the term “culture” required further explanation.⁶¹⁸ The Islamic Republic of Iran suggested that the phrase “membership of a particular social group” be deleted, since it was open to a wide interpretation that would make cooperation difficult.⁶¹⁹ The Czech Republic called for more explanation of what is meant by “other grounds that are not universally recognized as impermissible under international law”, finding it

General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19), para. 92; and Thailand, ibid., para. 63.

⁶¹¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Switzerland.

⁶¹² *Ibid.*

⁶¹³ Austria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 69; Brazil, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 11.

⁶¹⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Austria.

⁶¹⁵ *Ibid.*, Argentina.

⁶¹⁶ *Ibid.*, chapter III.B.12, Council of Europe.

⁶¹⁷ See the European Convention on Extradition, art. 3, para. 2. As of January 2019, this Convention had 50 States parties.

⁶¹⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Greece.

⁶¹⁹ The Islamic Republic of Iran, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 38.

“rather vague” and “a new concept which is not contained in previous conventions and is not explained in the commentary”, and thus not contributing to legal certainty.⁶²⁰ Austria wondered whether in the Commission’s commentary,⁶²¹ it “assumed that a multilateral agreement would always prevail over future bilateral treaties” and requested further clarification.⁶²² When explaining paragraph 9 in the commentary, the Commission stated: “Given that the present draft articles contain no obligation to extradite any individual, this provision, strictly speaking, is not necessary. Under the present draft articles, a State may decline to extradite, so long as it submits the case to its own competent authorities for the purpose of prosecution. Nevertheless, paragraph 9 serves three purposes. First, it helps ensure that individuals will not be extradited when there is a danger that their rights, in particular their basic rights, will be violated. Second, States that already insert a similar provision into their extradition treaties or national laws are assured that substantial grounds for believing that a person will be subjected to persecution will remain a basis of refusal for extradition. Third, States that do not have such a provision explicitly in their bilateral arrangements will have a textual basis for refusal if such a case arises. As such, the Commission considered it appropriate to include such a provision in the present draft articles.”⁶²³

2. Recommendation of the Special Rapporteur

252. Based on the comments received,⁶²⁴ there are three issues that might be addressed by means of a new paragraph 1 to draft article 13.

253. First, a new paragraph 1 could provide a better opening as to the overall purpose of the draft article, which is to apply to the offences covered by the present draft articles whenever a requesting State seeks the extradition of a person who is present in a requested State. In that regard, it is noted that the extradition article of the 2003 United Nations Convention against Corruption begins with the language: “This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party”.⁶²⁵ Comparable language might be used for a new paragraph 1 to this draft article.

254. Second, a new paragraph 1 could indicate that States should endeavour to expedite their extradition procedures. In that regard, it is noted that the 2003 United Nations Convention against Corruption also contains a provision that reads: “States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.”⁶²⁶ Again, comparable language might be used for a new paragraph 1 to this draft article.

255. Finally, a new paragraph 1 could address, in a general way, the concerns raised by some States that due consideration be given to an extradition request from the State

⁶²⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, the Czech Republic.

⁶²¹ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 13, para. (26).

⁶²² Austria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 70; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Austria.

⁶²³ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 13, para. (26).

⁶²⁴ See paragraphs 238 to 241 above.

⁶²⁵ United Nations Convention against Corruption, art. 44, para. 1.

⁶²⁶ *Ibid.*, art. 44, para. 9.

where the alleged offences occurred.⁶²⁷ In that regard, it has been observed that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is focused on prosecution of alleged offenders “by a competent tribunal of the State *in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction” (emphasis added).⁶²⁸ Moreover, the complementarity system of the Rome Statute of the International Criminal Court,⁶²⁹ in practice, often accords deference to the State where the crime occurred (or the State of nationality of the alleged offender, which is often the same) if that State is able and willing to exercise jurisdiction. If the Commission wished to capture a degree of deference to the State where the crime against humanity has occurred, it is noted that the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) contains a provision reading: “Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.”⁶³⁰ Such language also might be drawn upon for a new paragraph 1 to this draft article.

256. In light of such considerations, a new paragraph 1 to draft article 13 could read:

“This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto. A requested State shall give due consideration to the request of the State in whose territory the alleged offence has occurred.”

257. No other changes to draft article 13 are recommended (other than the renumbering of subsequent paragraphs if a new paragraph 1 is included), but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

P. Draft article 14: Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles 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, judicial and other proceedings

⁶²⁷ See paragraphs 167 and 238 to 240 above.

⁶²⁸ Convention on the Prevention and Punishment of the Crime of Genocide, art. VI.

⁶²⁹ Rome Statute of the International Criminal Court, art. 17, para. 1 (a) (“the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”).

⁶³⁰ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 88, para. 2.

in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, 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) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;

(b) taking evidence or statements from persons, including by video conference;

(c) effecting service of judicial documents;

(d) executing searches and seizures;

(e) examining objects and sites, including obtaining forensic evidence;

(f) providing information, evidentiary items and expert evaluations;

(g) providing originals or certified copies of relevant documents and records;

(h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;

(i) facilitating the voluntary appearance of persons in the requesting State; or

(j) 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.

6. Without prejudice to its 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 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, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft 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 corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

1. Comments and observations

258. States provided comments on draft article 14 both in writing and in statements before the Sixth Committee during the seventy-second session of the General Assembly.

259. Many States expressed their support for the draft article.⁶³¹ Spain specifically welcomed the inclusion of the distinction between obligations that would always apply (identified in the draft article) and obligations that would apply in the absence of a mutual legal assistance treaty between the States concerned (identified in the draft annex).⁶³² Thailand requested that further explanation be provided regarding the choice of model provisions on which the draft article was based.⁶³³ The Special Rapporteur notes that the Commission's commentary provides such explanation, drawing heavily on the relevant provisions contained in widely-adhered-to treaties.⁶³⁴

260. As with draft article 13, Greece cautioned that the "long-form" draft article risked overshadowing the main topic.⁶³⁵ The United Kingdom indicated its support for the draft article though, as was the case with draft article 13, "should the International Law Commission take the view" that the draft article needs "to be simplified to ensure greater support from other States, the United Kingdom would not oppose such a decision".⁶³⁶ In contrast, the Council of Europe concurred with the Commission "that in the field of mutual legal assistance detailed provisions are essential to provide States with extensive guidance. In our view, [d]raft [a]rticle 14 combined with the applicability of the [d]raft [a]nnex pursuant to [d]raft article 14 paragraph 8 in cases where the States in question are not bound by a treaty of mutual legal assistance lives up to this standard of specificity. Such a detailed approach is also followed in the 1959 European Convention on Mutual Assistance in Criminal Matters and its two Additional Protocols. Having been ratified/acceded to by all forty-seven member States of the Council of Europe and three non-member States this Convention has proven to be a useful tool to facilitate cooperation between States with regard to requests of mutual legal assistance."⁶³⁷

⁶³¹ Chile, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 90; Cuba, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 33; Hungary, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 71; Italy, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 140; Mexico, *ibid.*, para. 107; Mozambique, *ibid.*, 22nd meeting (A/C.6/72/SR.22), para. 5; the Netherlands, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 21; the Republic of Korea, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 38; Romania, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 82; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.15, Sierra Leone; Slovakia, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 57; Thailand, *ibid.*, para. 63; Timor-Leste, *ibid.*, 22nd meeting (A/C.6/72/SR.22), para. 29; and the United Kingdom, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 4. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 12.

⁶³² Spain, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 14.

⁶³³ Thailand, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 63.

⁶³⁴ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 61–65.

⁶³⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, Greece; and Greece, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 50.

⁶³⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.14, the United Kingdom.

⁶³⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.13, Council of Europe (citing the European Convention on Mutual Legal Assistance in Criminal Matters (Strasbourg, 20 April 1959), United

261. In **paragraph 1**, Cuba suggested deleting “the widest measure of”, since it “does not provide a specific or quantitative description of legal assistance”.⁶³⁸ Similarly, Cuba suggested deleting the phrase “to the fullest extent possible” from **paragraph 2**.⁶³⁹ The Special Rapporteur notes that paragraph 1 is setting a broad standard of cooperation on mutual legal assistance with respect to proceedings against *natural* persons, while paragraph 2 sets a narrower standard of cooperation with respect to proceedings against *legal* persons, in recognition of the different ways that States approach liability of legal persons for criminal offences.⁶⁴⁰ Further, the existing language has proven acceptable to virtually all States in the context of the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption.⁶⁴¹ So as to sharpen the distinction between the two paragraphs, however, the Commission may wish to make a non-substantive change to paragraph 2 in the form of moving its final clause of paragraph 2 (“in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State”) to the beginning of the paragraph.

262. Sierra Leone viewed it advisable in the *chapeau* of **paragraph 3** to replace “any” with “one or more”.⁶⁴² France urged that the *chapeau* provide that the request for mutual legal assistance must be in one of the six official languages of the United Nations.⁶⁴³ The Special Rapporteur notes that the existing *chapeau* language has proven acceptable to virtually all States in the context of the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption.⁶⁴⁴

263. With respect to the subparagraphs in paragraph 3, the Council of Europe found that **subparagraph (a)**, by inclusion of “as appropriate”, took account of privacy concerns and therefore was commendable.⁶⁴⁵

264. France suggested that it be specified that such requests may include requests for financial documents.⁶⁴⁶ The Special Rapporteur notes that **subparagraph (h)** on “identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes”, and **subparagraph (j)** on “any other type of assistance that is not contrary to the national law of the requested State”, are broad enough to include financial documents.

265. Further, France viewed it as appropriate to expand the range of objectives for which mutual legal assistance might be pursued, to include: (a) the protection of witnesses under national law; (b) the enforcement of security measures of the requesting State under its national law; and (c) the provision of assistance for the interception of communications and special investigation techniques.⁶⁴⁷ The Special

Nations, *Treaty Series*, vol. 472, No. 6841, p. 185)).

⁶³⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.15, Cuba.

⁶³⁹ *Ibid.*

⁶⁴⁰ See draft article 6, paragraph 8; see also the Commission’s commentary to that paragraph, Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, commentary to draft article 6, paras. (41)–(51).

⁶⁴¹ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 64–65.

⁶⁴² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.15, Sierra Leone.

⁶⁴³ *Ibid.*, France.

⁶⁴⁴ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 64–65.

⁶⁴⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.13, Council of Europe.

⁶⁴⁶ *Ibid.*, chapter II.B.15, France.

⁶⁴⁷ *Ibid.*

Rapporteur notes that such objectives are not expressly included in existing treaties on mutual legal assistance between States, and might pose difficulties for some requested States, depending on the scope of what is intended by such language. Further, the Special Rapporteur reiterates that the final subparagraph (“any other type of assistance that is not contrary to the national law of the requested State”) provides a legal basis for a broad range of requests to be advanced by a requesting State with respect to crimes against humanity.

266. At the end of **paragraph 4**, Cuba proposed adding the phrase “in conformity with the provisions of their domestic law”.⁶⁴⁸ Austria supported **paragraph 6**, which allows for the spontaneous transmission of information between States, and welcomed that this must be done in accordance with the national law of the transmitting State. In particular, Austria noted that this required due respect for national laws and regulations on protection of personal data.⁶⁴⁹ Switzerland, however, regretted that the draft article did not require that such information only be used for investigation and not for purposes of prosecution (Swiss law requires that a formal mutual legal assistance request be made before using information for prosecution).⁶⁵⁰ The Special Rapporteur notes that the existing language of paragraphs 4 and 6 has proven acceptable to virtually all States in the context of the 2000 United Nations Convention against Transnational Organized Crime and 2003 United Nations Convention against Corruption.⁶⁵¹

267. Spain expressed a view that **paragraph 5** was repetitive of paragraph 7, and was not necessary.⁶⁵² The Special Rapporteur notes that paragraph 5 and paragraph 7 serve different purposes: the former encourages States to conclude new agreements or arrangements that help operationalize the provisions of the draft article, while the latter addresses the relationship of the draft article to existing agreements on mutual legal assistance. Moreover, the text of these two paragraphs, operating in tandem, also has proven acceptable to virtually all States in the context of the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption.⁶⁵³

268. Germany proposes the deletion in **paragraph 7** of the phrase “except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance”. According to Germany, such language “should be rejected because it causes legal uncertainty. It is practically significant that specific bilateral or (regional) multilateral agreements, where they exist, take priority in [cooperation] on crimes against humanity”.⁶⁵⁴

269. The Special Rapporteur notes that the existing text of paragraph 7 is *not* based on the 2000 United Nations Convention against Transnational Organized Crime and 2003 United Nations Convention against Corruption; the analogous provision in those treaties reads: “The provisions of this article shall not affect the obligations under any

⁶⁴⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.15, Cuba.

⁶⁴⁹ Austria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting* (A/C.6/72/SR.18), para. 71.

⁶⁵⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.15, Switzerland.

⁶⁵¹ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 64–65.

⁶⁵² Spain, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting* (A/C.6/72/SR.20), para. 14.

⁶⁵³ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 64–65.

⁶⁵⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.15, Germany.

other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.”⁶⁵⁵ As such, the proposal by Germany is consistent with widely-adhered-to treaties acceptable to virtually all States. The Commission at first reading regarded the current text as desirable so that, if prior treaties were less robust in addressing mutual legal assistance, they would be supplemented by the provisions set forth in this draft article. On reflection, however, the Special Rapporteur agrees that the existing approach introduces greater legal complexity and uncertainty, which would require law enforcement and judicial authorities in the States in question to read two, potentially-conflicting instruments in tandem, so as to understand fully the legal relationship between them concerning mutual legal assistance. As such, the Special Rapporteur agrees that the text could be improved along the lines proposed by Germany. The Special Rapporteur further notes that draft article 13 on extradition does not seek to supplement existing extradition treaties that exist between the States in question based on whether the draft article provides for “greater” rights or obligations relating to extradition.

270. The United Kingdom expressed its support for **paragraph 8**,⁶⁵⁶ which contains two sentences that relate to the application of the draft annex on mutual legal assistance. The first sentence essentially provides that if a request for legal assistance is made, but there exists no mutual legal assistance treaty between the States in question, then the draft annex shall apply. New Zealand indicated that it does not require a treaty in order to request or provide mutual legal assistance, and therefore would “prefer a formulation in which the draft annex applies to requests pursuant to [d]raft [a]rticle 14 if the States in question are not bound by such a treaty, *or which do not otherwise have a legal basis to provide such assistance*” (emphasis added).⁶⁵⁷ The Special Rapporteur notes that the objective in paragraph 8 is not solely to establish a legal basis for a requested State to respond to a request. Rather, the objective in paragraph 8 is to ensure that there is a legal relationship between the two States concerned by which a mutual legal assistance request will be addressed, either in the form of a separate mutual legal assistance treaty in force between those States or in the form of the draft annex.

271. The second sentence of paragraph 8 essentially provides that if a mutual legal assistance treaty exists between the States in question, then it should be applied and not the draft annex, unless the States otherwise agree. France indicated that it would be preferable for the text to provide that, where there exists a mutual legal assistance treaty between the States concerned, the draft annex should apply to the extent that it is “more effective in the matter”.⁶⁵⁸ The Special Rapporteur notes, however, that the existing approach of this sentence avoids the legal complexity and uncertainty that would be introduced by requiring the competent authorities of the States in question to read two, potentially-conflicting instruments in tandem, so as to determine which is more effective.⁶⁵⁹ As such, the Special Rapporteur favours retaining the existing language.

272. The United Nations Office on Genocide Prevention and the Responsibility to Protect proposed that language be added to draft article 14 to facilitate the cooperation of States “with international mechanisms established by the intergovernmental bodies of the United Nations, with a mandate to conduct criminal investigations on crimes

⁶⁵⁵ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 64–65.

⁶⁵⁶ The United Kingdom, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting* (A/C.6/72/SR.19), para. 4.

⁶⁵⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.15, New Zealand.

⁶⁵⁸ *Ibid.*, France.

⁶⁵⁹ See paragraph 269 above.

against humanity”, since including such language “could encourage States to make standing provisions for such cooperation at the national level”.⁶⁶⁰ Among other things, the Office noted that, in December 2016, the General Assembly established the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011.⁶⁶¹ The mandate of the International, Impartial and Independent Mechanism is

to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.⁶⁶²

Such a mandate encompasses evidence of crimes against humanity. Separately, the United Nations Office on Genocide Prevention and the Responsibility to Protect noted that, in September 2018, the Human Rights Council established a similar mechanism with respect to Myanmar.⁶⁶³ The Council requested that this mechanism “prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes”.⁶⁶⁴ Finally, the Office observed that in “its latest progress report to the General Assembly (A/73/295) the Mechanism noted that some States require legislative changes or formal frameworks in order to cooperate with the mechanism on investigations and prosecutions. Including language in the [Commission’s] draft [articles] to facilitate this type of mutual legal assistance could encourage States to make standing provisions for such cooperation at the national level for existing or future similar mechanisms.”⁶⁶⁵

273. The Special Rapporteur notes that draft article 4 addresses cooperation between States and international organizations in the context of *prevention* of crimes against humanity, but that there is no provision in the present draft articles concerning such cooperation in the context of collecting and preserving evidence for the *punishment* of crimes against humanity. While a provision addressing such cooperation is not in the nature of the “horizontal” mutual legal assistance between States that is the primary focus of draft article 14, such cooperation is important, and would complement the cooperation on prevention addressed in draft article 4. Further, there is precedent for addressing cooperation between States and the United Nations in situations where serious crimes are being committed.⁶⁶⁶ As such, there is merit in

⁶⁶⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.13, United Nations Office on Genocide Prevention and the Responsibility to Protect.

⁶⁶¹ See General Assembly resolution 71/248 of 21 December 2016.

⁶⁶² *Ibid.*, para. 4. For further information on the International, Impartial and Independent Mechanism, see <https://iiim.un.org>.

⁶⁶³ Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar (A/HRC/39/L.22).

⁶⁶⁴ *Ibid.*, para. 22.

⁶⁶⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.13, United Nations Office on Genocide Prevention and the Responsibility to Protect.

⁶⁶⁶ See the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 89 (“In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the [Charter of the United Nations]”).

considering a new final paragraph to draft article 14 addressing cooperation with international mechanisms that are established by intergovernmental bodies of the United Nations and that have a mandate to gather evidence with respect to crimes against humanity. Such a provision would not be directed at the cooperation of States with international criminal tribunals, which have a mandate to prosecute alleged offenders; such cooperation would remain governed by the constituent instruments of, and the legal relationship of any given State to, those tribunals.

274. INTERPOL suggested “introducing a broader reference to the use of INTERPOL policing capabilities”, such as “for the purpose of information exchange beyond the circulation of requests for mutual legal assistance” or for the purpose of transmitting a request for provisional arrest.⁶⁶⁷ The Special Rapporteur notes that the Commission has kept the present draft articles focused on bilateral cooperation relating to extradition and mutual legal assistance, and has not sought to include obligations that encompass a broader array of information-sharing with respect to crimes against humanity. Nevertheless, the Commission may wish to include references within its commentary as to the availability of INTERPOL as a channel for broader inter-State cooperation.

2. Recommendation of the Special Rapporteur

275. The Special Rapporteur recommends three changes to draft article 14.

276. First, in light of the comments received,⁶⁶⁸ the Special Rapporteur recommends moving the final clause of paragraph 2 (“in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State”) to the beginning of the paragraph.

277. Second, in light of the comments received,⁶⁶⁹ the Special Rapporteur recommends, in paragraph 7, replacing the phrase “except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance” with “between the States in question”.

278. Third, in light of the comments received,⁶⁷⁰ the Special Rapporteur recommends adding a new paragraph 9 to the draft article, which would read: “States may consider entering into agreements or arrangements with international mechanisms that are established by intergovernmental bodies of the United Nations and that have a mandate to collect evidence with respect to crimes against humanity.”

279. No other changes to draft article 14 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

Q. Draft article 15: Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.
2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation

⁶⁶⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.14, INTERPOL.

⁶⁶⁸ See paragraph 261 above.

⁶⁶⁹ See paragraphs 268 to 269 above.

⁶⁷⁰ See paragraphs 272 to 273 above.

shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may 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 draft 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.

1. Comments and observations

280. States provided comments on draft article 15 both in writing and in statements before the Sixth Committee during the seventy-second session of the General Assembly.

281. Several States⁶⁷¹ expressed their general support for the draft article. In contrast, Sierra Leone concluded that the draft article “may be unworkable”, and proposed instead a text based on the dispute settlement provision in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁶⁷² The Special Rapporteur does not view the draft article as unworkable and notes that similar provisions exist and successfully function in numerous other widely-adhered-to conventions.⁶⁷³ Further, the Commission discussed using the provision contained in the 1948 Convention at first reading, but opted for a more modern version of a dispute settlement clause.⁶⁷⁴

282. With respect to **paragraph 1**, Sierra Leone asserted that States are unlikely to bring such disputes against other States and, in any event, a State responsible for crimes against humanity is unlikely to be willing to negotiate such a dispute.⁶⁷⁵ The Special Rapporteur notes that disagreements may arise among States regarding the interpretation or application of these draft articles unrelated to whether a particular State itself is responsible for crimes against humanity (for example, on a matter such as extradition or mutual legal assistance). As such, there does not appear to be any basis for assuming that States will not bring disputes against other States, nor that negotiation of the dispute would inevitably fail to resolve the matter.

283. With respect to **paragraph 2**, Austria recommended the addition of a time limit for the negotiation of a dispute, after which the dispute may be submitted to the International Court of Justice, so as to avoid unduly protracting the settlement of the dispute.⁶⁷⁶ The Special Rapporteur notes that a specific formula for the duration of

⁶⁷¹ Chile, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 90; Israel, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 3; Mexico, *ibid.*, 18th meeting (A/C.6/72/SR.18), para. 109; and Slovakia, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 57. See also Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), p. 42.

⁶⁷² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.16, Sierra Leone. See also Crimes against Humanity Initiative Steering Committee, *Comments and Observations ...* (footnote 90 above), pp. 13–14; and A. Zimmermann and F. Boos, “Bringing States to justice for crimes against humanity: the compromissory clause in the International Law Commission draft convention on crimes against humanity”, *Journal of International Criminal Justice*, vol. 16 (2018), pp. 835–855, at pp. 850–852.

⁶⁷³ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 66–68.

⁶⁷⁴ See Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (footnote 9 above), para. 46, commentary to draft article 15, paras. (1)–(6).

⁶⁷⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.16, Sierra Leone.

⁶⁷⁶ Austria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee*,

negotiations (albeit in the context of submission thereafter to conciliation) may be found in the 2001 Stockholm Convention on Persistent Organic Pollutants (“if they have not been able to settle their dispute within twelve months following notification by one party to another that a dispute exists between them, the dispute shall be submitted ...”).⁶⁷⁷ However, most recent treaties providing for compulsory jurisdiction of the International Court of Justice simply include a reference to “a reasonable time” of negotiation prior to the submission of a dispute to compulsory dispute settlement, such as: the 2000 United Nations Convention against Transnational Organized Crime (“that cannot be settled through negotiation within a reasonable time”);⁶⁷⁸ the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime (“that cannot be settled through negotiation within a reasonable time”);⁶⁷⁹ the 2003 United Nations Convention against Corruption (“that cannot be settled through negotiation within a reasonable time”);⁶⁸⁰ and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (“which cannot be settled through negotiation within a reasonable time”).⁶⁸¹

284. While the Special Rapporteur’s original proposal for this draft article contained a “within a reasonable time” reference,⁶⁸² it was dropped by the Commission in the course of drafting changes made during the first reading. According to some members of the Commission, having such a requirement might prevent effective dispute settlement, as a respondent State could insist that a reasonable time had not yet elapsed. Rather, it was preferable for the International Court of Justice to be immediately available to address the dispute if it has not been settled by negotiation.

285. Greece expressed the view that this draft article was in the nature of a “final clause”, which should be left to States to draft. If this topic was to be addressed, Greece preferred the initial proposal by the Special Rapporteur for paragraphs 1 and 2 of this draft article, which reflected “the tried and tested three-tier process of negotiation, arbitration and judicial settlement”.⁶⁸³ The Special Rapporteur notes that it was the Commission’s view that, after negotiations, requiring States first to pursue arbitration may not be appropriate with respect to disputes relating to crimes against humanity, given their potential gravity. Rather, it should be possible to revert immediately to the International Court of Justice. As explained by the Chair of the Drafting Committee in reference to paragraph 2: “The sequence in the sentence

18th meeting (A/C.6/72/SR.18), para. 72.

⁶⁷⁷ Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119, art. 18, para. 6. As of January 2019, this Convention had 182 States parties.

⁶⁷⁸ United Nations Convention against Transnational Organized Crime, art. 35, para. 2. As of January 2019, this Convention had 189 States parties. The two Protocols to this Convention contain the same formulation.

⁶⁷⁹ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime (New York, 31 May 2001), United Nations, *Treaty Series*, vol. 2326, No. 39574, p. 211, art. 16, para. 2. As of January 2019, this Protocol had 116 States parties.

⁶⁸⁰ United Nations Convention against Corruption, art. 66, para. 2. As of January 2019, this convention has 186 States parties.

⁶⁸¹ International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005), United Nations, *Treaty Series*, vol. 2445, No. 44004, p. 89, art. 23, para. 1. As of January 2019, this Convention had 114 States parties.

⁶⁸² See the third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), para. 263.

⁶⁸³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.16, Greece.

indicates that the International Court of Justice should be considered as immediately available to settle disputes regarding the interpretation or application of the [draft articles]. It is not, however, the sole possibility for adjudication. Since the draft articles encompass a very broad range of obligations that could give rise to very different types of disputes, recourse to arbitration is also left open to the parties to the dispute; but only if they mutually agree ... upon such recourse.”⁶⁸⁴

286. With respect to **paragraph 3**, Austria and the Czech Republic proposed that it be specified that the declaration may be made no later than at the time of the expression by the State of consent to be bound by the convention.⁶⁸⁵ The Special Rapporteur agrees that such a time limit is desirable, but notes that, in accordance with the Commission’s practice, and in advance of a decision by States as to whether to use these draft articles as the basis for a convention, the Commission has not included language characteristic of treaties (for example, that such a declaration shall be made by a State Party no later than at the time of the State’s ratification, acceptance, approval, or accession to the convention).

2. Recommendation of the Special Rapporteur

287. No changes to draft article 15 are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

R. Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. 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 by each State of the central authority designated for this purpose. 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

3. 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

⁶⁸⁴ Crimes against humanity, Statement of the Chair of the Drafting Committee, Mr. Aniruddha Rajput (1 June 2017), p. 17.

⁶⁸⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.16: Austria and the Czech Republic.

State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. 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.

5. 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

6. 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.

7. 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.

8. Mutual legal assistance may be refused:

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

(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.

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

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

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, 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.

12. 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

13. 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.

14. 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

15. Without prejudice to the application of paragraph 19 of this draft annex, 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.

16. 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 the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction 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 covered by the present draft articles, 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.

18. For the purposes of paragraph 17 of this draft annex:

(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.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex 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

20. 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.

1. Comments and observations

288. States provided comments on the draft annex both in writing and in statements before the Sixth Committee during the seventy-second session of the General Assembly.

289. Several States expressed support for the draft annex, indicating that it provides useful guidance for mutual legal assistance requests in the absence of an otherwise applicable treaty between the requesting and requested States.⁶⁸⁶ At the same time, Greece expressed concern that the depth to which mutual legal assistance was being addressed risked overshadowing the main topic of the draft articles.⁶⁸⁷

290. Regarding **paragraph 2**, Germany indicated support for the designation of the “central authority” to send and receive requests for mutual legal assistance.⁶⁸⁸ The Czech Republic expressed the view that such central authority should have the responsibility and “competence” (rather than “power”) to receive requests.⁶⁸⁹ Further, given that “requests are usually executed by the judiciary which is independent”, the Czech Republic proposed that text be added to ensure that the central authorities ensure transmission of the request without delay to the relevant national organ and encourage rapid action by such organ on the request.⁶⁹⁰ While such modifications to the existing text are possible, the Special Rapporteur notes that a key objective in crafting provisions on mutual legal assistance is to harness the means by which States are already engaged in mutual legal assistance on a global scale in criminal matters. In that regard, it is salient that the existing language has proven acceptable to and is understood by virtually all States in the context of the 2000 United Nations Convention against Transnational Organized Crime and 2003 United Nations Convention against Corruption.⁶⁹¹ Moreover, one benefit of using such language is that it has been analysed and explained through detailed guides and other resources developed by the UNODC.⁶⁹²

291. Regarding **paragraph 8**, Austria expressed the view that mutual legal assistance could also be refused if it was “not in conformity with the draft articles

⁶⁸⁶ See, for example, Chile, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 90; Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.17, the Czech Republic; Hungary, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 71; the Netherlands, *ibid.*, 20th meeting (A/C.6/72/SR.20), para. 21; and the Republic of Korea, *ibid.*, 21st meeting (A/C.6/72/SR.21), para. 38.

⁶⁸⁷ Greece, *ibid.*, 19th meeting (A/C.6/72/SR.19), para. 50.

⁶⁸⁸ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.17, Germany.

⁶⁸⁹ *Ibid.*, the Czech Republic.

⁶⁹⁰ *Ibid.*

⁶⁹¹ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 70–72.

⁶⁹² See, for example, UNODC: *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd rev. ed., 2012, available from www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html; *Technical Guide to the United Nations Convention against Corruption*, 2009, available from www.unodc.org/unodc/en/treaties/CAC/technical-guide.html; *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, 2010, available from www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html; *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto*, 2004, available from www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html; and Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).

themselves”.⁶⁹³ El Salvador urged that the commentary provide greater clarity, including through examples, as to what is meant by *ordre public* and “fundamental interests”, as it viewed them as indeterminate legal concepts.⁶⁹⁴ A national consultative commission on human rights proposed replacing subparagraph (b) with *si l’Etat requis estime que l’exécution de la demande est susceptible de porter atteinte à la protection des droits fondamentaux* (“if the requested State considers execution of the request is likely to prejudice the protection of fundamental rights”).⁶⁹⁵ Here, too, the Special Rapporteur notes that changes of this kind might be considered, but the existing language has the benefit of already being acceptable to and used by virtually all States in the context of other treaties relating to crimes, notably the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption.⁶⁹⁶

292. The Council of Europe found that **paragraph 14** took account of privacy concerns and therefore was commendable.⁶⁹⁷ It found that “the importance of issues involving data protection could, however, equally warrant the adoption of a separate regulation on this matter – at least in the [d]raft [a]nnex – as is done by [a]rticle 26 of the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters”.⁶⁹⁸ The Special Rapporteur agrees that paragraph 14 allows for maintaining the confidentiality of a request for mutual legal assistance, and that a requesting State and requested State may be guided in the regard by reference to relevant international instruments, including the 2001 Second Additional Protocol.

293. The Czech Republic proposed that the draft annex address the issue of persons being transferred for mutual legal assistance purposes, but who must transit through third States, given that “often there are no direct flights and the transferred person has to transit through other States than the requested or requesting States”.⁶⁹⁹ The Special Rapporteur notes that it was not deemed necessary by States to expressly address this issue in treaties such as the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption. At the same time, to the extent that the requesting State and the third State are bound by a treaty on mutual legal assistance that addresses this issue, then that treaty would apply pursuant to draft article 14, paragraph 8, rather than the draft annex. If no such treaty exists, draft article 14, paragraph 5, contemplates that the requesting State and the third State might conclude either an agreement or arrangement that would give practice effect to mutual legal assistance, such as with respect to the transiting of a person for mutual legal assistance purposes.

⁶⁹³ Austria, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 18th meeting (A/C.6/72/SR.18)*, para. 73.

⁶⁹⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.17, El Salvador.

⁶⁹⁵ Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), p. 34. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 12.

⁶⁹⁶ See the addendum to the fourth report of the Special Rapporteur on crimes against humanity: annex II: table of relevant treaty provisions (A/CN.4/725/Add.1), pp. 74–76.

⁶⁹⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.B.13, Council of Europe.

⁶⁹⁸ *Ibid.*, Council of Europe (citing the Second Additional Protocol to the 2001 European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 8 November 2001), United Nations, *Treaty Series*, vol. 2297, No. 6841, p. 22, art. 26. As of January 2019, this Protocol had 37 States parties).

⁶⁹⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.17, the Czech Republic.

2. Recommendation of the Special Rapporteur

294. No changes to the draft annex are recommended, but the Commission may wish to consider changes to the commentary that take into account some of the comments received. The Special Rapporteur will make proposals to this effect in due course.

Chapter II Possible additional draft articles

1. Transfer of sentenced persons

295. Switzerland observed that the draft articles do not address the transfer of a sentenced person from one State to another State (the latter State usually being the State of the person's nationality).⁷⁰⁰ In making this observation, Switzerland noted that an article devoted to this issue appears in both the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption.⁷⁰¹

296. The UNODC, which monitors the two conventions indicated above, has observed:

The nature of transnational organized crime means that it is increasingly common for criminals involved to be convicted and sentenced in foreign countries. International transfer of sentenced prisoners not only facilitates the fair treatment and social rehabilitation of prisoners, but is also a tool of international cooperation. UNODC plays an active role in facilitating the transfer of sentenced persons.

Generally, it is preferable that prisoners are imprisoned or otherwise deprived of liberty in their own countries, where they have access to visits from their families and where their rehabilitation, re-socialization and reintegration is aided by familiarity with the local community and culture.⁷⁰²

297. The UNODC has published a *Handbook on the International Transfer of Sentenced Persons*, which explains how transferring sentenced persons to serve their sentences in their home countries can contribute both to their fair treatment and effective rehabilitation.⁷⁰³ Such factors would seem pertinent in the context of persons sentenced for crimes against humanity as well.

298. Transfers of sentenced persons at present take place based on a network of either multilateral or bilateral treaties. One important instrument for developing such treaties is the 1985 United Nations Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners.⁷⁰⁴ Another is

⁷⁰⁰ *Ibid.*, chapter II.B.14, Switzerland.

⁷⁰¹ See, for example, the United Nations Convention against Corruption, art. 45 (“*Transfer of sentenced persons*: States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there”).

⁷⁰² UNODC, International Transfer of Sentenced Persons, available from www.unodc.org/unodc/en/organized-crime/transfer-of-sentenced-persons.html.

⁷⁰³ UNODC, *Handbook on the International Transfer of Sentenced Persons*, 2012, available from www.unodc.org/documents/organized-crime/Publications/Transfer_of_Sentenced_Persons_Ebook_E.pdf.

⁷⁰⁴ United Nations Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolution 40/32 of 29 November 1985.

the 1983 Convention on the transfer of sentenced persons,⁷⁰⁵ which as of January 2019 had 67 States parties. The Special Rapporteur notes as well that a separate initiative by States that addresses cooperation with respect, *inter alia*, to crimes against humanity contains provisions on such transfer of sentenced persons.⁷⁰⁶

299. The Special Rapporteur recommends that a new draft article 13 *bis* be included in the draft articles entitled “Transfer of sentenced persons”, which would read as follows:

“States may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by the present draft articles in order that they may complete their sentences there.”

2. Relationship to international criminal tribunals

300. France proposed that the Commission revisit its decision not to include a draft article on the relationship between the draft articles and the international obligations of States with respect to international criminal tribunals.⁷⁰⁷ As France notes, the Special Rapporteur in his third report proposed such a draft article, which would read: “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.”⁷⁰⁸ In the view of France, “[s]uch a provision is absolutely necessary to avoid uncertainties and jurisdictional conflicts”.⁷⁰⁹ Brazil noted a particular instance where the International Criminal Court should have primacy over the exercise of national jurisdiction, concluding that “where there might be a conflict between the exercise of universal jurisdiction and the International Criminal Court jurisdiction, the latter should prevail”.⁷¹⁰

301. The Commission concluded at first reading that a draft article on the relationship of the present draft articles to international criminal tribunals was not necessary. First, there is no identified conflict between the rights and obligations under the present draft articles and those arising with respect to a competent international criminal tribunal. In particular, if such a tribunal – pursuant to its constituent instrument and its relationship to a given State – has the authority to seek surrender of an alleged offender from that State, there is nothing in the draft articles that precludes the tribunal from doing so. Further, a State is fully able to surrender an alleged offender to a competent international criminal tribunal as one means of fulfilling the *aut dedere aut judicare* obligation set forth in draft article 10. Second, there is a concern about subsuming the obligations existing under the present draft articles to all possible international criminal tribunals that might be established, whether at a regional, subregional or even bilateral level. Third, it may be confusing for the principle of complementarity, which provides some deference to national proceedings, to operate in tandem with a rule that gives priority to international proceedings. Fourth, standard conflict rules in international law can be applied in the unlikely event that a conflict

⁷⁰⁵ Convention on the transfer of sentenced persons (Strasbourg, 21 March 1983), United Nations, *Treaty Series*, vol. 1496, No. 25703, p. 91.

⁷⁰⁶ See paragraph 324 below.

⁷⁰⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, France.

⁷⁰⁸ Third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), para. 207.

⁷⁰⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, France.

⁷¹⁰ *Ibid.*, chapter II.B.8, Brazil.

arises.⁷¹¹ In light of such considerations, the Special Rapporteur is of the view that the conclusion reached at first reading by the Commission was correct.

3. Amnesties

302. Argentina, Peru, Uruguay⁷¹² and the OHCHR,⁷¹³ called for the inclusion of a provision prohibiting amnesties. Chile did not call for a prohibition on amnesties in the draft articles, but did suggest that the commentary to draft article 10, at paragraph (8), be modified so as to read: “The obligation upon a State to submit the case to the competent authorities precludes the possibility of implementing an amnesty in relation to crimes against humanity.”⁷¹⁴ Underscoring that “these are complex issues”, Sierra Leone suggested that a distinction might be drawn whereby blanket and unconditional amnesties are prohibited, as opposed to narrow and conditional amnesties.⁷¹⁵

303. In contrast, France reiterated its support for the decision taken by the Commission not to include a provision on amnesty in the draft articles.⁷¹⁶ Likewise, the United Kingdom viewed it as unhelpful to the goal of a widely-accepted convention to expand the draft articles so as to prohibit amnesties.⁷¹⁷

304. The Special Rapporteur notes that his third report analysed the issue of amnesties⁷¹⁸ and that the Commission’s commentary to draft article 10 addressed the issue as well.⁷¹⁹ Among other things, that commentary indicated “that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence”, and that within “the State that has adopted the amnesty,

⁷¹¹ See Crimes against humanity, Statement of the Chair of the Drafting Committee, Mr. Aniruddha Rajput (1 June 2017), p. 16.

⁷¹² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726): chapter II.B.7, Argentina; chapter II.A, Peru; and chapter II.B.7, Uruguay.

⁷¹³ *Ibid.*, chapter III.A, OHCHR. See also *ibid.*: Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Working Group on Enforced or Involuntary Disappearances; Human Rights Watch, Submission to the International Law Commission (1 December 2018), p. 2; Amnesty International, “17-point program ...” (footnote 143 above), p. 2; Crimes against Humanity Initiative Steering Committee, *Comments and Observations ...* (footnote 90 above), pp. 7–10; and Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 37–38. See also Relva (footnote 315 above), at pp. 860–868.

⁷¹⁴ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.11, Chile.

⁷¹⁵ *Ibid.*, chapter II.B.10, Sierra Leone.

⁷¹⁶ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, France. See also S. M. H. Nouwen, “Is there something missing in the proposed convention on crimes against humanity? A political question for States and a doctrinal one for the International Law Commission”, *Journal of International Criminal Justice*, vol. 16 (2018), pp. 877–908, at p. 880 (arguing that what is missing is not a prohibition on amnesties but, rather, “an explicit qualification of the duty to submit matters for prosecution in cases of negotiated settlements, given that there are good reasons to qualify this duty, including, in some circumstances, respect for amnesties”).

⁷¹⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, the United Kingdom. See also IBA War Crimes Committee, *Comments ...* (footnote 60 above), p. 11 (“While some members urged that a blanket prohibition on amnesties for crimes of this gravity be made explicit in the text, others considered that controversy exists around the desirability of non-judicial mechanisms, particularly in relation to negotiated settlements ending armed conflict. Ultimately, the Committee supports the approach taken by the Commission”).

⁷¹⁸ See the third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), paras. 285–297.

⁷¹⁹ Report of the Commission on the work of its sixty-ninth session ... (A/72/10) (see footnote 9 above), para. 46, commentary to draft article 10, paras. (8)–(11).

its permissibility would need to be evaluated, *inter alia*, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others".⁷²⁰

305. The Special Rapporteur remains of the view that a prohibition on amnesties need not be reflected in the draft articles, just as it does not exist in treaties addressing other crimes, but that the Commission may wish to consider changes to the commentary to take into account some of the comments received.

4. Institutional mechanism

306. Germany welcomed the fact that the Commission did not propose any institutionalized mechanism in the draft articles.⁷²¹ Likewise, France, Israel and Mexico agreed that establishing a monitoring mechanism in the draft articles was undesirable.⁷²²

307. Sierra Leone, however, called for the Commission to "propose a carefully tailored monitoring body for crimes against humanity".⁷²³ Likewise, the OHCHR stated that "it is important to have an international body monitoring a State Party's compliance".⁷²⁴ Neither, however, indicated the exact type and objective of such a body.

308. The United Nations Office on Genocide Prevention and the Responsibility to Protect urged that special attention be paid to early prevention, rather than *post hoc* monitoring of compliance with a convention. It observed that "even though there are already several monitoring mechanisms capable of scrutinizing situations of crimes against humanity, such mechanisms are mostly focused on the occurrence of such crimes and their punishment, rather than on their early prevention. A monitoring mechanism that would regularly request States to report on initiatives taken to build the resilience of their societies to the risk of these crimes, would crucially contribute to the prevention of" crimes against humanity.⁷²⁵

309. The Special Rapporteur notes that, if such an approach were pursued, it might allow for the United Nations Office on Genocide Prevention and the Responsibility to Protect to fulfil various functions: receiving reports by States on their implementation of their obligations with respect to crimes against humanity; maintaining a repository of such reports and other information, with access for States, international organizations and NGOs; developing best practices for use by States with respect to implementation of their obligations; and assisting States, as

⁷²⁰ *Ibid.*, para. (11).

⁷²¹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Germany. See also Germany, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 36, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 19th meeting (A/C.6/72/SR.19)*, para. 18.

⁷²² France, *Official Records of the General Assembly, Seventieth Session, Sixth Committee, 20th meeting (A/C.6/70/SR.20)*, para. 21; Israel, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 25th meeting (A/C.6/71/SR.25)*, para. 43, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 20th meeting (A/C.6/72/SR.20)*, para. 2; and Mexico, *Official Records of the General Assembly, Seventy-first Session, Sixth Committee, 26th meeting (A/C.6/71/SR.26)*, para. 15.

⁷²³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Sierra Leone.

⁷²⁴ *Ibid.*, chapter III.A, OHCHR. See also Crimes against Humanity Initiative Steering Committee, *Comments and Observations ...* (footnote 90 above), pp. 11–12.

⁷²⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter III.A, United Nations Office on Genocide Prevention and the Responsibility to Protect. See also Commission nationale consultative des droits de l'homme, *AVIS ...* (footnote 305 above), pp. 43–44.

appropriate, in building up their capacity for fulfilling their obligations. Indeed, to a certain degree, the Office is already performing such functions with respect to atrocities generally.⁷²⁶

310. In his third report, the Special Rapporteur briefly surveyed the numerous mechanisms that *currently* monitor potential situations of crimes against humanity, including: the United Nations Security Council, the United Nations General Assembly and the United Nations Secretariat; other United Nations entities, including the Human Rights Council and the Office of the Special Adviser on the Prevention of Genocide and the Responsibility to Protect; treaty bodies established by human rights instruments; and international tribunals and regional tribunals.⁷²⁷ Further, the third report surveyed the various options for creating a *new* monitoring mechanism associated with a new convention, by considering the mechanisms that exist in the context of treaties addressing other crimes or human rights.⁷²⁸ That analysis was aided considerably by an excellent study completed by the Secretariat in 2016 on existing treaty-based monitoring mechanisms.⁷²⁹

311. Ultimately, the third report concluded on this issue as follows: “In the event that the present draft articles are transformed into a convention on the prevention and punishment of crimes against humanity, there exists a possibility for the selection of one or more of the above mechanisms to supplement existing mechanisms. Such mechanisms might help ensure that States parties fulfil their commitments under the convention, such as with respect to adoption of national laws, pursuing appropriate preventive measures, engaging in prompt and impartial investigations of alleged offenders and complying with their *aut dedere aut judicare* obligation. Selection of a particular mechanism or mechanisms, however, turns less on legal reasoning and more on policy factors, the availability of resources and the relationship of any new mechanism with those that already exist. Further, choices would need to be made with respect to structure: a new monitoring mechanism might be incorporated immediately in a new convention or might be developed at a later stage, such as occurred with the creation of a committee for the 1966 International Covenant on Economic, Social and Cultural Rights.⁷³⁰ Finally, such a monitoring mechanism might be developed in tandem with a monitoring mechanism for the Convention on the Prevention and Punishment of the Crime of Genocide, for which there have been periodic calls.”⁷³¹

312. As such, the third report made no proposal with respect to the selection of one or more new mechanisms for incorporation into the draft articles.⁷³² The Commission

⁷²⁶ The United Nations Office on Genocide Prevention and the Responsibility to Protect describes its mandate, in part, as working to advance national and international efforts to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity (atrocities crimes), as well as their incitement. ... [T]he Office collects information, conducts assessments of situations worldwide and alerts the Secretary-General and relevant actors to the risk of atrocity crimes, as well as their incitement. The Office also undertakes training and technical assistance to promote greater understanding of the causes and dynamics of atrocity crimes and of the measures that could be taken to prevent them; to raise awareness among States and other actors about their responsibility to protect; and to enhance the capacity of the United Nations, Member States, regional and sub-regional organisations and civil society to prevent atrocity crimes and to develop more effective means of response when they occur (see www.un.org/en/genocideprevention/office-mandate.shtml).

⁷²⁷ Third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), paras. 212–221.

⁷²⁸ *Ibid.*, paras. 222–237.

⁷²⁹ Memorandum by the Secretariat on crimes against humanity: information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission (A/CN.4/698).

⁷³⁰ See the Economic and Social Council resolution 1985/17 of 28 May 1985.

⁷³¹ See the third report of the Special Rapporteur on crimes against humanity, para. 238.

⁷³² *Ibid.*, para. 262.

at first reading debated and accepted this approach. In light of the comments received, the Special Rapporteur sees no reason to change this approach at second reading.

5. Application of draft articles to all parts of territory

313. Liechtenstein proposed inclusion of a draft article that would provide: “Unless a different intention is established, this Convention is binding upon each party in respect of its entire territory.”⁷³³ The Special Rapporteur notes that the draft articles are designed to address not just a State’s obligations in respect of its own territory, but also within territory under its jurisdiction, such as occupied territory.⁷³⁴ Further, it is noted that the Special Rapporteur’s third report proposed a “federal-State clause”, which would have read: “The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions.”⁷³⁵ While the Commission referred the proposed draft article to the Drafting Committee, the Chair of that Committee explained: “The provision originally proposed in the third report under draft article 16 dealing with federal State obligations also has not been retained by the Drafting Committee. Although such a provision exists in a number of treaties, it was noted that this matter was covered by article 29 of the 1969 Vienna Convention on the Law of Treaties, which indicates that ‘[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.’ Further, this issue is related to the issue of reservations to treaties, which the plenary decided formed part of the final clauses of a treaty that should be left to the discretion of States in the course of negotiating and adopting a new convention.”⁷³⁶

314. The Commission then adopted the draft articles on first reading without the proposed draft article. The Special Rapporteur sees no reason at second reading to alter this approach.

6. Reservations

315. Liechtenstein, Peru, Uruguay⁷³⁷ and a special rapporteur⁷³⁸ proposed the inclusion of a provision that no reservations may be made to the present draft articles, since they may be used for the adoption of an international convention. In contrast, Viet Nam expressed support for the possibility of reservations.⁷³⁹ France indicated that it would even be useful for the Commission to include a provision that allows a State to file reservations.⁷⁴⁰

316. The Special Rapporteur notes that, in accordance with the Commission’s practice, and in advance of a decision by States as to whether to use these draft articles

⁷³³ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A, Liechtenstein.

⁷³⁴ See paragraph 111 above.

⁷³⁵ Third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), para. 211.

⁷³⁶ Crimes against humanity, Statement of the Chair of the Drafting Committee, Mr. Aniruddha Rajput (1 June 2017), p. 16.

⁷³⁷ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.A: Liechtenstein; Peru; and Uruguay.

⁷³⁸ *Ibid.*, chapter III.A, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. See also Amnesty International, “17-point program ...” (footnote 143 above), p. 2; Human Rights Watch, Submission to the International Law Commission (1 December 2018), p. 2; Crimes against Humanity Initiative Steering Committee, *Comments and Observations ...* (footnote 90 above), p. 11; and Commission nationale consultative des droits de l’homme, *Avis ...* (footnote 305 above), pp. 41–42. See also Relva (footnote 315 above), at pp. 872–874.

⁷³⁹ Viet Nam, *Official Records of the General Assembly, Seventy-second Session, Sixth Committee, 21st meeting (A/C.6/72/SR.21)*, para. 35.

⁷⁴⁰ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.16, France.

as the basis for a convention, the Commission has not drafted clauses that assume matters such as ratification, reservations, entry into force or amendment.

317. Even so, the Special Rapporteur analysed in his third report the different options available with respect to reservations in the event that States transform the draft articles into a convention.⁷⁴¹ Consistent with the preference of Liechtenstein, Peru and Uruguay, those options also include a provision prohibiting reservations. Consistent with the preference of France, those options include that the convention could expressly permit reservations to all or some of the draft articles (a further option is for a convention to be silent on the issue of reservations, in which case reservations would be possible within the constraints of the rules set forth in the 1969 Vienna Convention). To the extent that the concern of France relates in part to the draft article on dispute settlement,⁷⁴² the Special Rapporteur notes that, even if reservations were prohibited, such a draft article would allow a State to opt out of compulsory dispute settlement, by filing the declaration contemplated in draft article 15, paragraph 3.

Chapter III

Separate initiative for a convention addressing crimes against humanity, genocide and war crimes

1. Explanation of the initiative

318. In their written or oral statements on the draft articles, several States noted the existence of a separate initiative for a new convention that would address not just crimes against humanity, but also genocide and war crimes.⁷⁴³

319. In November 2011, an expert meeting was held in the Netherlands organized by the Belgian, Netherlands and Slovenian ministries of justice, together with The Hague Institute for Innovation of Law. The purpose of the meeting was to answer the questions: “Is there a legal gap in the international legal framework concerning mutual legal assistance between States for the national adjudication of international crimes? And, if such a legal gap exists, how might it best be filled?”⁷⁴⁴ According to the report of the meeting, there were 38 participants from 19 States. Among other things, the group concluded that there existed a gap relating to mutual legal assistance for serious crimes of concern to the international community, “which needs to be explored further in the interest of making the international criminal justice system more effective and efficient”, and “that enhancing mutual legal assistance is not only essential for the investigation and prosecution of international crimes but is also an effective way to exchange best practices, know-how and expertise”.⁷⁴⁵

320. Since 2011, the “core group of States” supporting this separate initiative has expanded to six States: Argentina, Belgium, Mongolia, the Netherlands, Slovenia and

⁷⁴¹ See the third report of the Special Rapporteur on crimes against humanity (A/CN.4/704), paras. 306–326.

⁷⁴² Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.16, France.

⁷⁴³ See, for example, Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C: Argentina; Austria; Belgium; the Netherlands, written comments, paras. 8–11; and Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.2, Sierra Leone.

⁷⁴⁴ Hague Institute for the Internationalisation of Law, *A Legal Gap? Getting the Evidence Where It Can Be Found: Investigating and Prosecuting International Crimes, Report Expert Meeting, The Hague, 22 November 2011*, p. 2, available from www.pgaction.org/pdf/Expert_Meeting_22nov2011.pdf.

⁷⁴⁵ *Ibid.*, p. 6.

Senegal; further, it is understood that other States have expressed support for the initiative.⁷⁴⁶ According to the Netherlands, this mutual legal assistance initiative “seeks to rapidly set up a new and operational framework for an efficient inter-state cooperation regarding all three core crimes”.⁷⁴⁷

321. In April 2013, this separate initiative was raised in Vienna at the twenty-second meeting of the Commission on Crime Prevention and Criminal Justice (CCPCJ) of the UNODC. While a resolution was proposed whereby CCPCJ States would express their “willingness to strengthen the legal framework for international cooperation, especially in matter of the crime of genocide, crimes against humanity and war crimes”,⁷⁴⁸ consensus could not be reached and the resolution was not adopted. Some States expressed a view that this initiative exceeded the mandate of the CCPCJ. This separate initiative has also been discussed during side events at annual meetings of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

322. This separate initiative has been referred to as a “mutual legal assistance initiative” or “MLA initiative”,⁷⁴⁹ which has led some States to conclude that, while addressing three different crimes, it would focus solely on mutual legal assistance. At other times, it has been referred to as an initiative “dealing exclusively with issues of extradition and mutual legal assistance in relation not only to crimes against humanity but also to other core crimes under international law”.⁷⁵⁰ For example, Greece, in commenting on the present draft articles, argued in favour of this separate initiative in part because it would avoid “a lengthy process of negotiation of a future convention where all relevant critical issues could be reopened with an uncertain outcome”, including the definition of crimes against humanity.⁷⁵¹

323. Nevertheless, over time, the separate initiative seems to have evolved so as to encompass many issues that extend well beyond what are typically contained in mutual legal assistance or extradition treaties, and that apparently would include definitions not just of crimes against humanity, but of genocide and war crimes as well.

324. Indeed, in late 2018, the core group of States finalized a draft of a convention, entitled “Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes”. The draft convention was transmitted to the Special Rapporteur by the Chairperson of the core group of States in December 2018⁷⁵² and was annexed to the comments submitted by the Netherlands regarding the Commission’s draft articles on crimes against humanity.⁷⁵³ This draft convention consists of a preamble and 66 articles. Among other things, the draft convention addresses: definitions of genocide, crimes against humanity and war crimes (article 2); protection of sovereignty (article 3);

⁷⁴⁶ See Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C: Argentina and Belgium; and the Netherlands, written comments, para. 9.

⁷⁴⁷ The Netherlands, written comments, para. 9.

⁷⁴⁸ CCPCJ, International cooperation in the fight against the crime of genocide, crimes against humanity and war crimes (E/CN.15/2013/L.5), para. 1.

⁷⁴⁹ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C, Argentina.

⁷⁵⁰ *Ibid.*, chapter II.B.14, Greece.

⁷⁵¹ *Ibid.*, chapter II.C, Greece.

⁷⁵² Letter to Sean D. Murphy, International Law Commission Special Rapporteur for Crimes against Humanity, from Arie IJzerman, Special Adviser, International Affairs, Netherlands Ministry of Justice and Security (4 December 2018), attachment. Mr. IJzerman is the Chairperson of the “Core Group of States.”

⁷⁵³ The Netherlands, written comments, annex II.

enactment of the crimes into national law (article 4); preliminary inquiry (article 6); *aut dedere aut judicare* (article 7); liability of legal persons (article 8); mutual legal assistance (articles 12–30); extradition (articles 31–41); transfer of sentenced persons (articles 42–55); witnesses and experts (articles 56–57); and final provisions (articles 58–66).

325. The Special Rapporteur is informed that in November 2018 the Government of the Netherlands hosted a meeting of States and others to discuss the initiative, and that a further meeting is planned for March 2019.⁷⁵⁴

2. Relationship of the initiative to the draft articles

326. Since 2014, the Special Rapporteur has met informally on occasion with representatives of this separate initiative in Geneva, New York and The Hague so as to inform them of the work of the Commission on this topic and, in turn, to learn about the progress of the separate initiative. As a general matter, there is a common desire that neither initiative adversely affect the other and an understanding that both seek to improve upon existing international legal structures for addressing international criminal justice. The most recent meeting was on 1 February in The Hague.

327. Argentina indicated that the separate initiative and the Commission's draft articles "have different scopes, purposes and negotiation processes, and both deserve to be considered separately by the international community, taking into account their specificities and the different forums in which they were developed".⁷⁵⁵ Likewise, Belgium maintained that "the MLA Initiative and the Commission's draft have different scopes, objectives and dynamics of negotiation. The international community should examine each of them in a differentiated manner, taking into account their specificities and the different forums in which they have developed."⁷⁵⁶ The Netherlands expressed "the view that the MLA initiative and the [d]raft [a]rticles pursue the same goal and are mutually supportive while proceeding along different trajectories", such that they "not only could co-exist but mutually reinforce each other and could be further developed side by side".⁷⁵⁷

328. In December 2017, the core group of States distributed a paper explaining various aspects of the initiative, one paragraph of which was devoted to "How does this initiative relate to the ILC's work on the topic 'Crimes against humanity?'" That paragraph read as follows:

The ongoing study by the International Law Commission of the topic "Crimes against humanity" focuses on this crime only and may deal not only with mutual legal assistance but also with the definition of the crime and other rules and concepts (role of victims, reparation, etc.). In contrast, the Joint Initiative seeks to rapidly set up a new and operational framework for an efficient interstate cooperation regarding crimes against humanity, as well as war crimes and crimes of genocide. The Joint Initiative would keep the existing definition of the three categories of targeted crimes and embark all modern mutual legal assistance and extradition provisions in order to have a uniform international

⁷⁵⁴ See the Netherlands, written comments, para. 9.

⁷⁵⁵ Crimes against humanity: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.C, Argentina.

⁷⁵⁶ *Ibid.*, Belgium.

⁷⁵⁷ The Netherlands, written comments, para. 11.

regulation applicable to these crimes. The Joint Initiative is therefore distinct and independent from the study on “Crimes against humanity.”⁷⁵⁸

329. While that comparison of the projects may have been correct at one time, it appears less so in light of the core group of States’ 2018 draft convention. A comparison of that draft convention and the Commission’s draft articles indicates considerable overlap in the topics being addressed:

<i>Topic</i>	<i>Draft articles on crimes against humanity of the Commission (2017)</i>	<i>Draft convention of the core group of States (2018)</i>
Preamble	Preamble	Preamble
Scope	Draft article 1	Draft article 1
General obligation	Draft article 2	Not addressed
Definition of covered crimes	Draft article 3	Draft article 2
Protection of sovereignty	Not addressed	Draft article 3
Obligation of prevention	Draft article 4	Not addressed
<i>Non-refoulement</i>	Draft article 5	Not addressed
Criminalization under national law	Draft article 6	Draft article 4
Establishment of national jurisdiction	Draft article 7	Draft article 5
Investigation by State of acts in its territory	Draft article 8	Not addressed
Preliminary measures when an alleged offender is present	Draft article 9	Draft article 6
<i>Aut dedere aut judicare</i>	Draft article 10	Draft article 7
Liability of legal persons	Draft article 6, para. 8	Draft article 8
Fair treatment of the alleged offender	Draft article 11	Draft article 6, para. 3, and draft article 7, para. 3
Confidentiality	Draft annex, para. 14	Draft article 9

⁷⁵⁸ Ministry of Foreign Affairs of the Republic of Slovenia, “Towards a multilateral treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes”, p. 4, available from www.mzz.gov.si/fileadmin/pageuploads/Mednarodno_pravo/Explanatory_Note_EN_-_20-12-2017.pdf. For commentary comparing the two initiatives, see D. Tladi, “A horizontal treaty on cooperation in international criminal matters: the next step for the evolution of a comprehensive international criminal justice system?” *Southern African Public Law*, vol. 29, No. 2 (2014), p. 368; P. Caban, “Gaps in the legal regime of interstate cooperation in prosecuting crimes under international law”, *Czech Yearbook of International Law*, vol. 6 (2015), pp. 289–311; and the Netherlands Advisory Committee on Issues of Public International Law (CAVV), *Advisory Report on the ILC Draft Articles on Crimes Against Humanity*, CAVV Letter No. 32, August 2018, pp. 3–5. The CAVV *Advisory Report* was attached as annex I to the comments submitted by the Netherlands regarding the Commission’s draft articles, and is also available from [https://cms.webbeat.net/ContentSuite/upload/cav/doc/The_ILC_Draft_Articles_on_Crimes_Against_Humanity_ENG\(1\).pdf](https://cms.webbeat.net/ContentSuite/upload/cav/doc/The_ILC_Draft_Articles_on_Crimes_Against_Humanity_ENG(1).pdf).

Data protection	Not addressed	Draft article 10
Costs	Draft annex, para. 20	Draft article 11
Victims, witnesses and others	Draft article 12	Draft articles 56–57
Extradition	Draft article 13	Draft articles 31–41
Mutual legal assistance	Draft article 14 and draft annex	Draft articles 12–30
Transfer of sentenced person to serve sentence in another State	Not addressed (but see proposed draft article 13 <i>bis</i>)	Draft articles 42–55
Settlement of disputes	Draft article 15	Draft article 60
Final provisions	Not addressed	Draft articles 58–59, 61–66

330. As indicated by the table, there are certainly differences between the Commission's draft articles and the draft convention of the core group of States; some issues contained in one are not currently addressed in the other. Further, while both address mutual legal assistance and extradition, there are more detailed obligations in that regard in the draft convention of the core group of States. Nevertheless, most of the topics being addressed by one initiative are also being addressed by the other initiative. The most significant difference between the two initiatives appears not to be the range of topics addressed but, rather, that the Commission's draft articles only address crimes against humanity, while the draft convention of the core group of States additionally covers genocide and war crimes.

331. Given the significant amount of overlap, it is the view of the Special Rapporteur that pursuit by States of both initiatives simultaneously might be inefficient and confusing, and risks the possibility that neither initiative succeeds.⁷⁵⁹ Further, if both initiatives were adopted as conventions, it could lead to two groups of States being parties to two different conventions covering much of the same ground, yet not mutually bound *inter se*. However, it is for States, not the Commission, to decide how best to proceed.

Chapter IV

Final form of the draft articles and recommendation to the General Assembly

332. At the outset of this topic, the Commission was of the view that it was best developed by means of "draft articles", and no comments received since the first reading has indicated a preference by States (or others) that an alternative approach (such as "conclusions" or "guidelines") be used at the second reading. Rather, the comments have assumed that the draft articles ultimately might be pursued as the basis for a convention on the prevention and punishment of crimes against humanity. As such, the Special Rapporteur is of the view that "draft articles" is the appropriate final form for this topic.

333. If the Commission completes the second reading of this topic at the seventy-first session, it will need to consider its recommendation to the General Assembly. Article 23, paragraph 1, of the Statute of the International Law Commission provides

⁷⁵⁹ See Commission nationale consultative des droits de l'homme, *AVIS ...* (footnote 305 above), pp. 10–11.

that when the Commission has completed a final draft of a report, it “may recommend to the General Assembly:

“(a) To take no action, the report having already been published;

“(b) To take note of or adopt the report by resolution;

“(c) To recommend the draft to Members with a view to the conclusion of a convention;

“(d) To convoke a conference to conclude a convention.”

334. As suggested in the Special Rapporteur’s first report,⁷⁶⁰ and supported by the comments and observations of many States, the Special Rapporteur proposes that the Commission recommend that these draft articles serve as a basis of an international convention on the prevention and punishment of crimes against humanity. If that is the preference of the Commission, a review of the past practice of the Commission indicates that such a recommendation has been made in one of four ways: (1) a recommendation that the Assembly convoke a conference to conclude a convention; (2) a recommendation that the Assembly itself take action to conclude a convention; (3) a recommendation that the Assembly recommend the draft articles to Members with a view to the conclusion of a convention; and (4) a recommendation that the Assembly consider at a later stage the elaboration of a convention.

335. The Special Rapporteur would welcome consultations among members of the Commission during the course of the seventy-first session on the most appropriate recommendation of the Commission to the General Assembly.

⁷⁶⁰ See the first report of the Special Rapporteur on crimes against humanity (A/CN.4/680 and Corr.1), para. 2.

Annex

Draft articles adopted by the Commission on first reading in 2017, with the Special Rapporteur's recommended changes

Crimes against humanity

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

Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

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

Recalling the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling also that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance,

Considering as well the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

...

Article 1 [1]⁷⁶¹

Scope

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

Article 2 [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.

⁷⁶¹ The numbers of the draft articles, as previously provisionally adopted by the Commission at the first reading, are indicated in square brackets.

**Article 3 [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.~~

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

Article 4 [4]

Obligation of prevention

12. Each State undertakes not to engage in acts that constitute crimes against humanity. 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.

~~12.~~ Each State **also** undertakes to prevent crimes against humanity, in conformity with international law, ~~including~~ through:

(a) effective legislative, administrative, judicial or other preventive measures, **such as education and training programmes**, in any territory under its jurisdiction; and

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

Article 5

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.

Article 6 [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 commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.** ~~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 fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. 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.

7. 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.

8. 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 7 [6]

Establishment of national jurisdiction

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

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 8 [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 9 [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 covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State 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 7, 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, **as appropriate**, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 10 [9]

Aut dedere aut iudicare

The State in the territory under whose jurisdiction the alleged offender is present shall, **if it does not extradite or surrender the person to another State or competent international criminal tribunal**, 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 11 [10]

Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, ~~including human rights law~~.

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.

Article 12

Victims, witnesses and others

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

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

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

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at

appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

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

Article 13 **Extradition**

1. This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto. A requested State shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

24. Each of the offences covered by the present draft articles 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.

32. For the purposes of extradition between States, an offence covered by the present draft articles 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.

43. 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 covered by the present draft articles.

54. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; 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 in order to implement this draft article.

65. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

76. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

87. If necessary, the offences covered by the present draft articles 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 7, paragraph 1.

98. 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.

109. 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 gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

1140. 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.

Article 13*bis*

Transfer of sentenced persons

States may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by the present draft articles in order that they may complete their sentences there.

Article 14

Mutual legal assistance

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

2. **In relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State, M**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, judicial and other proceedings ~~in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, 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) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
- (b) taking evidence or statements from persons, including by video conference;
- (c) effecting service of judicial documents;
- (d) executing searches and seizures;
- (e) examining objects and sites, including obtaining forensic evidence;
- (f) providing information, evidentiary items and expert evaluations;

- (g) providing originals or certified copies of relevant documents and records;
- (h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;
- (i) facilitating the voluntary appearance of persons in the requesting State; or
- (j) 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.

6. Without prejudice to its 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 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 **between the States in question**, ~~except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.~~

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft 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 corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

9. States may consider entering into agreements or arrangements with international mechanisms that are established by intergovernmental bodies of the United Nations and that have a mandate to collect evidence with respect to crimes against humanity.

Article 15

Settlement of disputes

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

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may 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 draft 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.

Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. 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 by each State of the central authority designated for this purpose. 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

3. 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 by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. 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.

5. 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

6. 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.

7. 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.

8. Mutual legal assistance may be refused:

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

(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.

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

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

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, 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.

12. 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

13. 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.

14. 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

15. Without prejudice to the application of paragraph 19 of this draft annex, 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.

16. 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 the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction 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 covered by the present draft articles, 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.

18. For the purposes of paragraph 17 of this draft annex:

(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.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex 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

20. 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.
