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Chapter IV
Crimes against humanity

Addendum

Revised version

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1. The text of the draft articles and commentaries thereto adopted by the Commission on first reading at its sixty-ninth session is reproduced below.

Crimes against humanity

Article 1
Scope

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

Commentary

(1) Draft article 1 establishes the scope of the present draft articles by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity is focused on precluding the commission of such offences, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed.

(2) The present draft articles focus solely on crimes against humanity, which are grave international crimes wherever they occur. The present draft articles do not address other grave international crimes, such as genocide, war crimes or the crime of aggression. Although a view was expressed that this topic might include those crimes as well, the Commission decided to focus on crimes against humanity.

(3) The present draft articles avoid any conflicts with the obligations of States arising under the constituent instruments of international or "hybrid" (containing a mixture of international law and national law elements) criminal courts or tribunals, including the International Criminal Court. Whereas the 1998 Rome Statute establishing the International Criminal Court regulates relations between the International Criminal Court and its States parties (a "vertical" relationship), the focus of the present draft articles is on the adoption of national laws and on inter-State cooperation (a "horizontal" relationship). Part IX of the 1998 Rome Statute on "International Cooperation and Judicial Assistance" assumes that inter-State cooperation on crimes within the jurisdiction of the International Criminal Court will continue to exist without prejudice to the 1998 Rome Statute, but does not direct itself to the regulation of that cooperation. The present draft articles address inter-State cooperation on the prevention of crimes against humanity, as well as on the investigation, apprehension, prosecution, extradition and punishment in national legal systems of persons who commit such crimes, an objective consistent with the 1998 Rome Statute. In doing so, the present draft articles contribute to the implementation of the principle of complementarity under the 1998 Rome Statute. Finally, constituent instruments of international or hybrid criminal courts or tribunals address the prosecution of persons for the crimes within their jurisdiction, not steps that should be taken by States to prevent such crimes before they are committed or while they are being committed.

Article 2
General obligation

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

Commentary

(1) Draft article 2 sets forth a general obligation of States to prevent and punish crimes against humanity. 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. Those specific obligations address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations and with, as appropriate, other organizations.

(2) In the course of stating this general obligation, draft article 2 recognizes crimes against humanity as "crimes under international law". The Charter of the International Military Tribunal established at Nürnberg [1] (hereinafter "Nürnberg Charter") included "crimes against humanity" as a component of the jurisdiction of the Tribunal. Among other things, the Tribunal noted that "individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". [2] Crimes against humanity were also within the jurisdiction of the International Military Tribunal for the Far East (hereinafter "Tokyo Tribunal").[3]

(3) The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1946 by the General Assembly. [4] The Assembly also directed the Commission to "formulate" the Nürnberg Charter principles and to prepare a draft code of offences. [5] The Commission in 1950 produced the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, which stated that crimes against humanity were "punishable as crimes under international law".[6] Further, the Commission completed in 1954 a draft Code of Offences against the Peace and Security of Mankind, which, in article 2, paragraph 11, included as an offence a series of inhuman acts that are today understood to be crimes against humanity, and which stated in article 1 that "[o]ffences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished".[7]

(4) The characterization of crimes against humanity as "crimes under international law" indicates that they exist as crimes whether or not the conduct has been criminalized under national law. The Nürnberg Charter defined crimes against humanity as the commission of certain acts "whether or not in violation of the domestic law of the country where perpetrated" (art. 6 (c)). In 1996, the Commission completed a draft code of crimes against the peace and security of mankind, which provided, *inter alia*, that crimes against humanity were "crimes under international law and punishable as such, whether or not they are punishable under national law".[8] The gravity of such crimes is clear; the Commission has

[1] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6 (c) (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, p. 279 (hereinafter "Nürnberg Charter").

[2] *Judgment of 30 September 1946, International Military Tribunal, in Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945-1 October 1946)*, vol. 22 (1948), p. 466.

[3] Charter of the International Military Tribunal for the Far East, art. 5 (c) (Tokyo, 19 January 1946) (as amended on 26 April 1946), *Treaties and Other International Agreements of the United States of America 1776-1949*, vol. 4, C. Bevans, ed. (Washington, D.C., Department of State, 1968), p. 20, at p. 23, art. 5 (c) (hereinafter "Tokyo Charter"). No persons, however, were convicted of this crime by that tribunal.

[4] *Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal*, General Assembly resolution 95 (I) of 11 December 1946.

[5] *Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal*, General Assembly resolution 177 (II) of 21 November 1947.

[6] *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 376 (Principle VI).

[7] *Yearbook ... 1954*, vol. II, p. 150.

[8] *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50 (art. 1). The 1996 draft Code contained five categories of crimes, one of which was crimes against humanity.

previously indicated that the prohibition of crimes against humanity is "clearly accepted and recognized" as a peremptory norm of international law.[9]

(5) Draft article 2 also identifies crimes against humanity as crimes under international law "whether or not committed in time of armed conflict". The reference to "armed conflict" should be read as including both international and non-international armed conflict. The Nürnberg Charter definition of crimes against humanity, as amended by the Berlin Protocol,[10] was linked to the existence of an international armed conflict; the acts only constituted crimes under international law if committed "in execution of or in connection with" any crime within the jurisdiction of the International Military Tribunal, meaning a crime against peace or a war crime. As such, the justification for dealing with matters that traditionally were within the national jurisdiction of a State was based on the crime's connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large-scale, perhaps as part of a pattern of conduct.[11] The International Military Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the war, although in some instances the connection of those crimes with other crimes within the jurisdiction of the International Military Tribunal was tenuous.[12]

(6) The Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, however, defined crimes against humanity in Principle VI (c) in a manner that required no connection to an armed conflict.[13] In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.[14] At the same time, the Commission maintained that "acts may be crimes against humanity even if they are committed by the perpetrator against his own population".[15] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity referred, in article I (b), to "[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8

[9] *Yearbook … 2001*, vol. II (Part Two), p. 85, para. (5) of the commentary on art. 26 of the draft articles on responsibility of States for internationally wrongful acts (maintaining that those "peremptory norms that are clearly accepted and recognized include the prohibitions of ... crimes against humanity"); see also Study Group of the International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, document A/CN.4/L.682 and Corr.1, para. 374 (identifying crimes against humanity as one of the "most frequently cited candidates for the status of *jus cogens*").

[10] Protocol Rectifying Discrepancy in Text of Charter (Berlin, 6 October 1945), in *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945-1 October 1946)*, vol. 1 (1947), pp. 17-18 (hereinafter "Berlin Protocol"). The Berlin Protocol replaced a semi-colon after "during the war" with a comma, so as to harmonize the English and French texts with the Russian text. *Ibid.*, p. 17. The effect of doing so was to link the first part of the provision 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.

[11] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office, 1948), p. 179 ("Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims".).

[12] See, for example, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 576 (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the jurisdiction of the International Military Tribunal), *Judicial Supplement No. 11*, January 2000.

[13] *Yearbook … 1950*, vol. II, document A/1316, Part III, p. 377, para. 119.

[14] *Ibid.*, para. 123.

[15] *Ibid.*, para. 124.

August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations".[16]

(7) The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia included "crimes against humanity". Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia provides that the Tribunal may prosecute persons responsible for a series of acts (such as murder, torture or rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".[17] Thus, the formulation used in article 5 retained a connection to armed conflict, but it is best understood contextually. The Statute of the International Criminal Tribunal for the Former Yugoslavia was developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia; the Security Council had already determined that the situation constituted a threat to international peace and security, leading to the exercise of the Security Council's enforcement powers under Chapter VII of the Charter of the United Nations. As such, the formulation used in article 5 ("armed conflict") was designed principally to dispel the notion that crimes against humanity had to be linked to an "international armed conflict". To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia later clarified that there was "no logical or legal basis" for retaining a connection to armed conflict, since "it has been abandoned" in State practice since Nürnberg.[18] The Appeals Chamber also noted that the "obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict".[19] Indeed, the Appeals Chamber later maintained that such a connection in the Statute of the International Criminal Tribunal for the Former Yugoslavia was simply circumscribing the subject-matter jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, not codifying customary international law.[20]

(8) In 1994, the Security Council established the International Criminal Tribunal for Rwanda and provided it with jurisdiction over "crimes against humanity". Although article 3 of the Statute of the International Criminal Tribunal for Rwanda retained the same series of acts as appeared in the Statute of the International Criminal Tribunal for the Former

[16] 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 July 2017, there were 55 States parties to this Convention. For a regional convention of a similar nature, see the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 25 January 1974), Council of Europe, *Treaty Series*, No. 82. As of July 2017, there were eight States parties to this Convention.

[17] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, approved by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary-General pursuant to para. 2 of Security Council resolution 808 (1993), S/25704 and Add.1, annex, art. 5 (hereinafter "Statute of the International Criminal Tribunal for the Former Yugoslavia").

[18] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994-1995*, vol. I, para. 140. See also *International Legal Materials* (ILM), vol. 35, No. 1 (January 1996), para. 140.

[19] *Ibid.*

[20] See, for example, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 33, *Judicial Supplement No. 24*, April/May 2001; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 249-251, *Judicial Supplement No. 6*, June/July 1999. See also ILM, vol. 38 (1999) ("[T]he armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law".).

Yugoslavia, the chapeau language did not retain the reference to armed conflict.[21] Likewise, article 7 of the 1998 Rome Statute did not retain any reference to armed conflict.

(9) As such, while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal courts and tribunals, including the 1998 Rome Statute. In its place, as discussed in relation to draft article 3 below, are the "chapeau" requirements that the crime be committed within the context of a widespread or systematic attack directed against a civilian population in furtherance of a State or organizational policy to commit such an attack.

Article 3
Definition of crimes against humanity

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

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

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

(i) enforced disappearance of persons;

(j) the crime of apartheid;

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

2. For the purpose of paragraph 1:

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

[21] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committee in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, Security Council resolution 955 (1994) of 8 November 1994, annex, art. 3 (hereinafter "Statute of the International Criminal Tribunal for Rwanda"); see *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005, Appeals Chamber, International Criminal Tribunal for Rwanda, para. 269 ("[C]ontrary to Article 5 of the [Statute of the International Criminal Tribunal for the Former Yugoslavia], Article 3 of the [Statute of the International Criminal Tribunal for Rwanda] does not require that the crimes be committed in the context of an armed conflict. This is an important distinction".).

(b) "extermination" includes the intentional infliction of conditions of life including, *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.

Commentary

(1) The first three paragraphs of draft article 3 establish, for the purpose of the present draft articles, a definition of "crime against humanity.". The text of these three paragraphs is verbatim the text of article 7 of the 1998 Rome Statute, except for three non-substantive changes (discussed below), which are necessary given the different context in which the definition is being used. Paragraph 4 of draft article 3 is a "without prejudice" clause which indicates that this definition does not affect any broader definitions provided for in international instruments or national laws.

Definitions in other instruments

(2) Various definitions of "crimes against humanity" have been used since 1945, both in international instruments and in national laws that have codified the crime. The Nürnberg Charter, in article 6 (c), defined "crimes against humanity" as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any

crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

(3) Principle VI (c) of the Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal defined crimes against humanity as: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime".[22]

(4) Furthermore, the Commission's 1954 draft Code of Offences against the Peace and Security of Mankind identified as one of those offences: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities".[23]

(5) Article 5 of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia stated that the Tribunal "shall have the power to prosecute persons responsible" for a series of acts (such as murder, torture, and rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population". Although the report of the Secretary-General of the United Nations proposing this article indicated that crimes against humanity "refer to inhumane acts of a very serious nature ... committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds",[24] that particular language was not included in the text of article 5.

(6) By contrast, the 1994 Statute of the International Criminal Tribunal for Rwanda, in article 3, retained the same series of acts, but the chapeau language introduced the formulation from the 1993 Secretary-General's report of "crimes when committed as part of a widespread or systematic attack against any civilian population" and then continued with "on national, political, ethnic, racial or religious grounds". As such, the Statute of the International Criminal Tribunal for Rwanda expressly provided that a discriminatory intent was required in order to establish the crime. The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also defined "crimes against humanity" to be a series of specified acts "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group", but did not include the discriminatory intent language.[25] Crimes against humanity have also been defined in the jurisdiction of hybrid criminal courts or tribunals.[26]

(7) Article 5, paragraph 1 (b), of the 1998 Rome Statute lists crimes against humanity as being within the jurisdiction of the International Criminal Court. Article 7, paragraph 1, defines "crime against humanity" as any of a series of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7, paragraph 2, contains a series of definitions which, *inter alia*, clarify that an 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" (para. 2 (a)). Article 7, paragraph 3, provides: "[I]t is understood that the term 'gender'

[22] *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 377, para. 119.

[23] *Yearbook ... 1954*, vol. II, p. 150, para. 50 (art. 2 (11)).

[24] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), document S/25704 and Corr.1, p. 13, para. 48.

[25] *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

[26] See, for example, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, p. 145 (hereinafter "Statute of the Special Court for Sierra Leone"); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, art. 5 (hereinafter "Extraordinary Chambers of Cambodia Agreement").

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". Article 7, paragraph 1 (h), does not retain the nexus to an armed conflict that characterized the Statute of the International Criminal Tribunal for the Former Yugoslavia, nor (except with respect to acts of persecution) the discriminatory intent requirement that characterized the Statute of the International Criminal Tribunal for Rwanda.

(8) The definition of "crime against humanity" in article 7 of the 1998 Rome Statute has been accepted by the more than 120 States parties to the 1998 Rome Statute and is now being used by many States when adopting or amending their national laws. The Commission considered article 7 an appropriate basis for defining such crimes in paragraphs 1 to 3 of draft article 3. Indeed, the text of article 7 is used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used. First, the opening phrase of paragraph 1 reads "For the purpose of the present draft articles" rather than "For the purpose of this Statute". Second, the same change has been made in the opening phrase of paragraph 3. Third, article 7, paragraph 1 (h), of the 1998 Rome Statute criminalizes acts of persecution when undertaken "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". Again, to adapt to the different context, this phrase reads in draft article 3 as "in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes". In due course, the International Criminal Court may exercise its jurisdiction over the crime of aggression when the requirements established at the Review Conference of the 1998 Rome Statute of the International Criminal Court are met, in which case this paragraph may need to be revisited.

Paragraphs 1 to 3

(9) The definition of "crimes against humanity" set forth in paragraphs 1 to 3 of draft article 3 contains three overall requirements that merit some discussion. These requirements, all of which appear in paragraph 1, have been illuminated through the case law of the International Criminal Court and other international or hybrid courts and tribunals. The definition also lists the underlying prohibited acts for crimes against humanity and defines several of the terms used within the definition (thus providing definitions within the definition). No doubt the evolving jurisprudence of the International Criminal Court and other international or hybrid courts and tribunals will continue to help inform national authorities, including courts, as to the meaning of this definition, and thereby will promote harmonized approaches at the national level. The Commission notes that relevant case law continues to develop over time, such that the following discussion is meant simply to indicate some of the parameters of these terms as of July 2017.

"Widespread or systematic attack"

(10) The first overall requirement is that the acts must be committed as part of a "widespread or systematic" attack. This requirement first appeared in the Statute of the International Criminal Tribunal for Rwanda,[27] although some decisions of the International Criminal Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in the Statute of the International Criminal Tribunal for the Former Yugoslavia, given the inclusion of such language in the Secretary-General's report proposing that Statute.[28]

[27] Unlike the English version, the French version of article 3 of the Statute of the International Criminal Tribunal for Rwanda used a conjunctive formulation ("généralisée et systématique"). In the *Akayesu* case, the Trial Chamber indicated: "In the original French version of the Statute, these requirements were worded cumulatively ... thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation". *Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgment, 2 September 1998, Trial Chamber I, International Criminal Tribunal for Rwanda, para. 579, footnote 144.

[28] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, para. 202; *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997,

Jurisprudence of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda maintained that the conditions of "widespread" and "systematic" were disjunctive rather than conjunctive requirements; either condition could be met to establish the existence of the crime.[29] This reading of the widespread/systematic requirement is also reflected in the Commission's commentary to the 1996 draft Code, where it stated that "an act could constitute a crime against humanity if either of these conditions [of scale or systematicity] is met".[30]

(11) When this standard was considered for the 1998 Rome Statute, some States expressed the view that the conditions of "widespread" and "systematic" should be conjunctive requirements — that they both should be present to establish the existence of the crime — because otherwise the standard would be over-inclusive.[31] Indeed, if "widespread" commission of acts alone were sufficient, these States maintained that spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity. Owing to that concern, a compromise was developed that involved leaving these conditions in the disjunctive,[32] but adding to article 7, paragraph 2 (a), of the 1998 Rome Statute a definition of "attack" which, as discussed below, contains a policy element.

(12) According to the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac*, "[t]he adjective 'widespread' connotes the large-scale nature of the attack and the number of its victims".[33] As such, this requirement refers to a

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Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, para. 648.

[29] See, for example, *Prosecutor v. Mile Mrkšić, Miroslac Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Judgment, 27 September 2007, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, para. 437 ("[T]he attack must be widespread or systematic, the requirement being disjunctive rather than cumulative".); *Prosecutor v. Clémen Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, Trial Chamber, International Criminal Tribunal for Rwanda, para. 123 ("The attack must contain one of the alternative conditions of being widespread or systematic".); *Akayesu*, Judgment, 2 September 1998 (see footnote 27 above), para. 579; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 648 ("either a finding of widespreadness ... or systematicity ... fulfils this requirement").

[30] *Yearbook ... 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 18. See also the report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court, *Official Records of the General Assembly, Fiftieth Session*, Supplement No. 22 (A/50/22), para. 78 ("elements that should be reflected in the definition of crimes against humanity included ... [that] the crimes usually involved a widespread *or* systematic attack" (emphasis added)); *Yearbook ... 1995*, vol. II (Part Two), para. 90 ("the concepts of 'systematic' and 'massive' violations were complementary elements of the crimes concerned"); *Yearbook ... 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to art. 21 ("the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread *or* systematic violations" (emphasis added)); *Yearbook ... 1991*, vol. II (Part Two), p. 103, para. (3) of the commentary to art. 21 ("Either one of these aspects — systematic or mass-scale — in any of the acts enumerated ... is enough for the offence to have taken place".).

[31] See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -1 7 July 1998, Official Records, Volume II*, document A/CONF/183/13 (Vol. II), p. 148 (India); *ibid.*, p. 150 (United Kingdom of Great Britain and Northern Ireland, France); *ibid.*, p. 151 (Thailand, Egypt); *ibid.*, p. 152 (Islamic Republic of Iran); *ibid.*, p. 154 (Turkey); *ibid.*, p. 155 (Russian Federation); *ibid.*, p. 156 (Japan).

[32] Case law of the International Criminal Court has affirmed that the conditions of "widespread" and "systematic" in article 7 of the 1998 Rome Statute are disjunctive. See *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the *Situation in the Republic of Kenya*, 31 March 2010, Pre-Trial Chamber II, International Criminal Court, para. 94; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges, 15 June 2009, Pre-Trial Chamber II, International Criminal Court, para. 82; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, Trial Chamber III, International Criminal Court, para. 162.

[33] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 428, *Judicial Supplement No. 23*, February/March 2001; see also *Bemba*,

"multiplicity of victims"[34] and excludes isolated acts of violence,[35] such as murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative. Such an attack may be "massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[36] At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign.[37] There is no specific numerical threshold of victims that must be met for an attack to be "widespread".

(13) "Widespread" can also have a geographical dimension, with the attack occurring in different locations.[38] Thus, in the *Bemba* case, the International Criminal Court Pre-Trial Chamber found that there was sufficient evidence to establish that an attack was "widespread" based on reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass grave sites and a large number of victims.[39] Yet a large geographic area is not required; the International Criminal Tribunal for the Former Yugoslavia has found that the attack can be in a small geographic area against a large number of civilians.[40]

(14) In its *Situation in the Republic of Kenya* decision, the International Criminal Court Pre-Trial Chamber indicated that "[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts".[41] An attack may

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Judgment, 21 March 2016 (see footnote 32 above), para. 163; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, 7 March 2014, Trial Chamber II, International Criminal Court, para. 1123; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, Pre-Trial Chamber I, International Criminal Court, para. 394; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, paras. 545-546; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment [and corrigendum], 17 December 2004, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 94.

[34] *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 83; *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 27 above), para. 580; *Yearbook … 1996*, vol. II (Part Two), p. 47, art. 18 (using the phrase "on a large scale" instead of widespread); see also *Mrkšić*, Judgment, 27 September 2007 (see footnote 29 above), para. 437 ("'widespread' refers to the large scale nature of the attack and the number of victims"). In *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, Pre-Trial Chamber II, International Criminal Court, para. 24, the Chamber found that the attack against the civilian population was widespread "as it resulted in a large number of civilian victims".

[35] See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor's application under Article 58, 13 July 2012, Pre-Trial Chamber II, International Criminal Court, para. 19; *Prosecutor v. Ahmad Harun and Ali Muhammad al abd-al-Rahman*, Case No. ICC-02/05-01/07, Decision on the prosecution application under Article 58(7) of the Statute, 27 April 2007, Pre-Trial Chamber I, International Criminal Court, para. 62; see also *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment, 6 December 1999, Trial Chamber I, International Criminal Tribunal for Rwanda, paras. 67-69; *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), paras. 122-123; *Yearbook … 1996*, vol. II (Part Two), p. 47; *Yearbook … 1991*, vol. II (Part Two), p. 103.

[36] *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), para. 163 (citing to *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 83).

[37] *Kupreškić*, Judgment, 14 January 2000 (see footnote 12 above), para. 550; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 649.

[38] See, for example, *Ntaganda*, Decision, 13 July 2012 (see footnote 35 above), para. 30; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, para. 177.

[39] *Bemba*, Decision, 15 June 2009 (see footnote 32 above), paras. 117-124; see *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), paras. 688-689.

[40] *Kordić*, Judgment, 17 December 2004 (see footnote 33 above), para. 94; *Blaškić*, Judgment, 3 March 2000 (see footnote 28 above), para. 206.

[41] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 96, also para. 95; see also *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), para. 163.

be widespread due to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.[42]

(15) Like "widespread", the term "systematic" excludes isolated or unconnected acts of violence,[43] and jurisprudence from the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court reflects a similar understanding of what is meant by the term. The International Criminal Tribunal for the Former Yugoslavia defined "systematic" as "the organised nature of the acts of violence and the improbability of their random occurrence"[44] and found that evidence of a pattern or methodical plan establishes that an attack was systematic.[45] Thus, the Appeals Chamber in *Kunarac* confirmed that "patterns of crimes — that is the non-accidental repetition of similar criminal conduct on a regular basis — are a common expression of such systematic occurrence".[46] The International Criminal Tribunal for Rwanda has taken a similar approach.[47]

(16) Consistent with jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda, an International Criminal Court Pre-Trial Chamber in *Harun* found that "systematic" refers to "the organised nature of the acts of violence and improbability of their random occurrence".[48] An International Criminal Court Pre-Trial Chamber in *Katanga* found that the term "has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis'".[49] In applying the standard, an International Criminal Court Pre-Trial Chamber in *Ntaganda* found an attack to be systematic since "the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting".[50] Additionally, in the *Ntaganda* confirmation of charges decision, a Pre-Trial Chamber held that the attack was systematic as it followed a "regular pattern" with a "recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines, and coordinated the commission of the unlawful acts ... in order to attack the non-Hema civilian population".[51] In *Gbagbo*, an International Criminal Court Pre-Trial Chamber found an

[42] *Yearbook ... 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind; see also *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 83 (finding that widespread "entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians").

[43] See *Yearbook ... 1996*, vol. II (Part Two), p. 47; *Yearbook ... 1991*, vol. II (Part Two), p. 103.

[44] *Mrkšić*, Judgment, 27 September 2007 (see footnote 29 above), para. 437; *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 429.

[45] See, for example, *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 648.

[46] *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 94, *Judicial Supplement No. 34*, June 2002.

[47] *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 27 above), para. 580.

[48] *Harun*, Decision, 27 April 2007 (see footnote 35 above), para. 62 (citing to *Kordić*, Judgment, 17 December 2004 (see footnote 33 above), para. 94, which in turn cites to *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 429); see also *Ruto*, Decision, 23 January 2012 (see footnote 38 above), para. 179; *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 96; *Katanga*, Decision, 30 September 2008 (see footnote 33 above), para. 394.

[49] *Katanga*, Decision, 30 September 2008 (see footnote 33), para. 397.

[50] *Ntaganda*, Decision, 13 July 2012 (see footnote 35 above), para. 31; see also *Ruto*, Decision, 23 January 2012 (see footnote 38 above), para. 179.

[51] *Ntaganda*, Decision, 9 June 2014 (see footnote 34 above), para. 24.

attack to be systematic when "preparations for the attack were undertaken in advance" and the attack was planned and coordinated with acts of violence revealing a "clear pattern".[52]

"Directed against any civilian population"

(17) The second overall requirement is that the act must be committed as part of an attack "directed against any civilian population". Draft article 3, paragraph 2 (a), defines "attack directed against any civilian population" for the purpose of paragraph 1 as "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".[53] As discussed below, jurisprudence from the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court has construed the meaning of each of these terms: "directed against", "any", "civilian", "population", "a course of conduct involving the multiple commission of acts" and "State or organizational policy".

(18) The International Criminal Tribunal for the Former Yugoslavia has found that the phrase "directed against" requires that civilians be the intended primary target of the attack, rather than incidental victims.[54] The International Criminal Court Pre-Trial Chambers subsequently adopted this interpretation in the *Bemba* case and the *Situation in the Republic of Kenya* decision,[55] as did the International Criminal Court Trial Chambers in the *Katanga* and *Bemba* trial judgments.[56] In the *Bemba* case, the International Criminal Court Pre-Trial Chamber found that there was sufficient evidence showing the attack was "directed against" civilians of the Central African Republic.[57] The Chamber concluded that Mouvement de libération du Congo (MLC) soldiers were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.[58] The Chamber further found that MLC soldiers targeted *primarily* civilians, demonstrated by an attack at one locality where the MLC soldiers did not find any rebel troops that they claimed to be chasing.[59] The term "directed" places its emphasis on the intention of the attack rather than the physical result of the attack.[60] It is the attack, not the acts of the individual perpetrator, which must be "directed against" the target population.[61] The Trial Chamber in *Bemba* later confirmed "that the civilian population was the primary, as opposed to incidental, target of the attack, and in turn, that the attack was directed against the civilian population in the [Central African Republic]".[62] In doing so, it explained that "[w]here an attack is carried out in an area containing both civilians and non-civilians, factors relevant to determining whether an attack was directed against a civilian population include the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the form of resistance to the assailants at the time of the attack, and the extent to

[52] *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent *Gbagbo*, 12 June 2014, Pre-Trial Chamber II, International Criminal Court, para. 225.

[53] See Rome Statute; see also International Criminal Court, *Elements of Crimes*, document PCNICC/2000/1/Add.2, p. 5.

[54] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 421 ("The expression 'directed against' specifies that in the context of a crime against humanity the civilian population is the primary object of the attack".).

[55] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 82; *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 76.

[56] *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1104; *Bemba*, Judgment, 21 March 2016, (see footnote 32 above), para. 154.

[57] *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 94; see also *Ntaganda*, Decision, 13 July 2012 (see footnote 35 above), paras. 20-21.

[58] *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 94.

[59] *Ibid.*, paras. 95-98.

[60] See, for example, *Blaškić*, Judgment, 3 March 2000 (see footnote 28 above), para. 208, footnote 401.

[61] *Kunarac*, Judgment, 12 June 2002 (see footnote 46 above), para. 103.

[62] *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), para. 674.

which the attacking force complied with the precautionary requirements of the laws of war".[63]

(19) The word "any" indicates that "civilian population" is to have a wide definition and should be interpreted broadly.[64] An attack can be committed against any civilians, "regardless of their nationality, ethnicity or other distinguishing feature",[65] and can be committed against either nationals or foreigners.[66] Those targeted may "include a group defined by its (perceived) political affiliation".[67] In order to qualify as a "civilian population" during a time of armed conflict, those targeted must be "predominantly" civilian in nature; the presence of certain combatants within the population does not change its character.[68] This approach is in accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the 1949 Geneva Conventions states: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".[69] The Trial Chamber of the International Criminal Tribunal for Rwanda in *Kayishema* found that during a time of peace, "civilian" shall include all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.[70] The status of any given victim must be assessed at the time the offence is committed;[71] a person should be considered a civilian if there is any doubt as to his or her status.[72]

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[63] *Ibid.*, para. 153 (citing to the jurisprudence of various international courts and tribunals).

[64] See, for example, *Mrkšić*, Judgment, 27 September 2007 (see footnote 29 above), para. 442; *Prosecutor v. Kupreškić*, Judgment, 14 January 2000 (see footnote 12 above), para. 547 ("[A] wide definition of 'civilian' and 'population' is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity".); *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 127; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 643.

[65] *Katanga*, Decision, 30 September 2008 (see footnote 33 above), para. 399 (quoting *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 635); see also *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1103; *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), para. 155.

[66] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 423.

[67] *Ruto*, Decision, 23 January 2012 (see footnote 38 above), para. 164.

[68] See, for example, *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1105 (holding that the population targeted "must be primarily composed of civilians" and that the "presence of non-civilians in its midst has therefore no effect on its status of civilian population"); *Mrkšić*, Judgment, 27 September 2007 (see footnote 29 above), para. 442; *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 425 ("the presence of certain non-civilians in its midst does not change the character of the population"); *Kordić*, Judgment, 26 February 2001 (see footnote 20 above), para. 180; *Blaškić*, Judgment, 3 March 2000, (see footnote 28 above), para. 214 ("the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population"); *Prosecutor v. Kupreškić*, Judgment, 14 January 2000 (see footnote 12 above), para. 549 ("the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian"); *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 128; *Akayesu*, Judgment, 2 September 1998 (see footnote 27 above), para. 582 ("Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character".); *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 638.

[69] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50 (3).

[70] *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 127 (referring to "all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the [Forces armées rwandaises], the [Rwandese Patriotic Front], the police and the Gendarmerie Nationale").

[71] *Blaškić*, Judgment, 3 March 2000 (see footnote 28 above), para. 214 ("[T]he specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian".); see also *Kordić*, Judgment, 26 February 2001 (see footnote 20 above), para. 180 ("individuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity"); *Akayesu*, Judgment, 2 September 1998 (see

(20) "Population" does not mean that the entire population of a given geographical location must be subject to the attack;[73] rather, the term implies the collective nature of the crime as an attack upon multiple victims.[74] As the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia noted in *Gotovina*, the concept means that the attack is upon more than just "a limited and randomly selected number of individuals".[75] The International Criminal Court decisions in the *Bemba* case and the *Situation in the Republic of Kenya* decision have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against more than just a limited group of individuals.[76]

(21) The first part of draft article 3, paragraph 2 (a), refers to "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population". Although no such language was contained in the statutory definition of crimes against humanity for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, this language reflects jurisprudence from both these tribunals,[77] and was expressly stated in article 7, paragraph 2 (a), of the 1998 Rome Statute. The Elements of Crimes under the 1998 Rome Statute provides that the "acts" referred to in article 7, paragraph 2 (a), "need not constitute a military attack".[78] The Trial Chamber in *Katanga* stated that "the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population".[79]

(22) The second part of draft article 3, paragraph 2 (a), states that the attack must be "pursuant to or in furtherance of a State or organizational policy to commit such an attack". The requirement of a "policy" element did not appear as part of the definition of crimes against humanity in the statutes of international courts and tribunals until the adoption of the 1998 Rome Statute.[80] While the Statutes of the International Criminal Tribunal for the

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footnote 27 above), para. 582 (finding that civilian population includes "members of the armed forces who laid down their arms and those persons placed *hors de combat*").

[72] *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 426.

[73] See *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 82; *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 77; *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 424; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 644; see also *Yearbook ... 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to art. 21 (defining crimes against humanity as "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population *in whole or in part*" (emphasis added)).

[74] See *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 644.

[75] *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment, 15 April 2011, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, para. 1704.

[76] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 81; *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 77; *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), para. 154.

[77] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 415 (defining attack as "a course of conduct involving the commission of acts of violence"); *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 122 (defining attack as the "event in which the enumerated crimes must form part"); *Akayesu*, Judgment, 2 September 1998 (see footnote 27), para. 581 ("The concept of 'attack' may be defined as an unlawful act of the kind enumerated [in the Statute] … An attack may also be non violent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner".).

[78] See International Criminal Court, *Elements of Crimes*, p. 5.

[79] *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1101.

[80] Article 6 (c) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Nürnberg Judgment, however, did use a "policy" descriptor when discussing article 6 (c) in the context of the concept of the "attack" as a whole. See *Judgment of 30 September 1946* (see footnote 2 above), p. 493 ("The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out".). Article II (1) (c) of Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity also contains no reference to a plan or policy in its definition of crimes against humanity. Control Council Law No. 10 on Punishment of Persons Guilty of War

Former Yugoslavia and the International Criminal Tribunal for Rwanda contained no policy requirement in their definition of crimes against humanity,[81] some early jurisprudence required it.[82] Indeed, the *Tadić* Trial Chamber provided an important discussion of the policy element early in the tenure of the International Criminal Tribunal for the Former Yugoslavia, one that would later influence the drafting of the 1998 Rome Statute. The Trial Chamber found that

> the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts ... Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.[83]

The Trial Chamber further noted that, because of the policy element, such crimes "cannot be the work of isolated individuals alone".[84] Later jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.[85]

(23) Prior to the 1998 Rome Statute, the work of the Commission in its draft codes tended to require a policy element. The Commission's 1954 draft Code of Offences against the Peace and Security of Mankind defined crimes against humanity as: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*".[86] The Commission decided to include the State instigation or tolerance requirement in order to exclude inhumane acts committed by private persons on their own without any State involvement.[87] At the same time, the definition of crimes against humanity included in the 1954 draft Code of Offences against the Peace and Security of Mankind did not include any requirement of scale ("widespread") or systematicity.

(24) The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also recognized a policy requirement, defining crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by an organization or group".[88] The Commission

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Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, in *Official Gazette of the Control Council for Germany*, vol. 3, p. 52 (1946).

[81] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia determined that there was no policy element on crimes against humanity in customary international law, see *Kunarac*, Judgment, 12 June 2002 (see footnote 46 above), para. 98 ("There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes".), although that position has been criticized in writings.

[82] *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), paras. 644, 653-655 and 626.

[83] *Ibid*., para. 653.

[84] *Ibid.*, para. 655 (citing to *Prosecutor v. Dragan Nikolić a/k/a "Jenki*", Case No. IT-94-2-R61, Review of indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 26).

[85] See, for example, *Kunarac*, Judgment, 12 June 2002 (see footnote 46 above), para. 98; *Kordić*, Judgment, 26 February 2001 (see footnote 20 above), para. 182 (finding that "the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity"); *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 124 ("For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan".); *Akayesu*, Judgment, 2 September 1998 (see footnote 27 above), para. 580.

[86] *Yearbook … 1954*, vol. II, p. 150 (emphasis added).

[87] *Ibid.*

[88] *Yearbook … 1996*, vol. II (Part Two), p. 47 (emphasis added).

included this requirement to exclude inhumane acts committed by an individual "acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization".[89] In other words, the policy element sought to exclude "ordinary" crimes of individuals acting on their own initiative and without any connection to a State or organization.

(25) Draft article 3, paragraph 2 (a), contains the same policy element as set forth in article 7, paragraph 2 (a), of the 1998 Rome Statute. The Elements of Crimes under the 1998 Rome Statute provide that a "'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population",[90] and that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack".[91]

(26) This "policy" element has been addressed in several cases at the International Criminal Court.[92] In the 2014 judgment in *Katanga*, an International Criminal Court Trial Chamber stressed that the policy requirement is not synonymous with "systematic", since that would contradict the disjunctive requirement in article 7 of the 1998 Rome Statute of a "widespread" or "systematic" attack.[93] Rather, while "systematic" requires high levels of organization and patterns of conduct or recurrence of violence,[94] to "establish a 'policy', it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community".[95] Further, the "policy" requirement does not require formal designs or pre-established plans, can be implemented by action or inaction, and can be inferred from the circumstances.[96] The Trial Chamber found that the policy need not be formally established or promulgated in advance of the attack and can be deduced from the repetition of acts, from preparatory activities, or from a collective mobilization.[97] Moreover, the policy need not be concrete or precise, and it may evolve over time as circumstances unfold.[98] Furthermore, the Trial Chamber in *Bemba* held that the requirement that the course of conduct was committed pursuant to or in furtherance of the State or organizational policy is satisfied not only where a perpetrator deliberately acts to further the policy, but also where a perpetrator has engaged in conduct envisaged by the policy, and with knowledge thereof.[99]

(27) Similarly, in its decision confirming the indictment of Laurent *Gbagbo*, an International Criminal Court Pre-Trial Chamber held that "policy" should not be conflated with "systematic".[100] Specifically, the Trial Chamber stated that "evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy

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[89] *Ibid.* In explaining its inclusion of the policy requirement, the Commission noted: "It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18".

[90] International Criminal Court, *Elements of Crimes* (see footnote 53 above), p. 9.

[91] *Ibid.* Other precedents also emphasize that deliberate failure to act can satisfy the policy element. See *Kupreškić*, Judgment, 14 January 2000 (see footnote 12 above), paras. 554-555 ("approved", "condoned", "explicit or implicit approval"); *Yearbook … 1954*, vol. II, p. 150 (art. 2 (11)) ("toleration"); Security Council, Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992), document S/1994/674, para. 85.

[92] See, for example, *Ntaganda*, Decision, 13 July 2012 (see footnote 35 above), para. 24; *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 81; *Katanga*, Decision, 30 September 2008 (see footnote 33 above), para. 396.

[93] *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1112; see also *ibid*., para. 1101; *Gbagbo*, Decision, 12 June 2014 (see footnote 52 above), para. 208.

[94] *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), paras. 1111-1113.

[95] *Ibid.*, para. 1113.

[96] *Ibid.*, paras. 1108-1109 and 1113.

[97] *Ibid.*, para. 1109; see also *Gbagbo*, Decision, 12 June 2014 (see footnote 52 above), paras. 211-212, and 215.

[98] *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1110.

[99] *Bemba*, Judgment, 15 June 2016 (see footnote 32 above), para. 161.

[100] *Gbagbo*, Judgment, 12 June 2014 (see footnote 52 above), paras. 208 and 216.

and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7 (1) and (2) (a) of the Statute".[101] The policy element requires that the acts be "linked" to a State or organization,[102] and it excludes "spontaneous or isolated acts of violence", but a policy need not be formally adopted[103] and proof of a particular rationale or motive is not required.[104] In the *Bemba* case, an International Criminal Court Pre-Trial Chamber found that the attack was pursuant to an organizational policy based on evidence establishing that the MLC troops "carried out attacks following the same pattern".[105] The Trial Chamber later found that the MLC troops knew that their individual acts were part of a broader attack directed against the civilian population in the Central African Republic.[106]

(28) The second part of draft article 3, paragraph 2 (a), refers to either a "State" or "organizational" policy to commit such an attack, as does article 7, paragraph 2 (a), of the 1998 Rome Statute. In its *Situation in the Republic of Kenya* decision, an International Criminal Court Pre-Trial Chamber suggested that the meaning of "State" in article 7, paragraph 2 (a), is "self-explanatory".[107] The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.[108]

(29) Jurisprudence from the International Criminal Court suggests that "organizational" includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, a Pre-Trial Chamber in *Katanga* stated: "Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population".[109] An International Criminal Court Trial Chamber in *Katanga* held that the organization must have "sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts" and "a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population".[110]

(30) In its *Situation in the Republic of Kenya* decision, a majority of an International Criminal Court Pre-Trial Chamber rejected the idea that "only State-like organizations may qualify" as organizations for the purpose of article 7, paragraph 2 (a), and further stated that "the formal nature of a group and the level of its organization should not be the defining criterion. Instead ... a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".[111] In 2012, an International Criminal Court Pre-Trial Chamber in *Ruto* stated that, when determining whether a particular group qualifies as an "organization" under article 7 of the 1998 Rome Statute:

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[101] *Ibid.*, para. 216.
[102] *Ibid.*, para. 217.
[103] *Ibid.*, para. 215.
[104] *Ibid.*, para. 214.
[105] *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 115.
[106] *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), para. 669.
[107] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 89.
[108] *Ibid.*
[109] *Katanga*, Decision, 30 September 2008 (see footnote 33 above), para. 396 (citing case law of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Commission's 1991 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103); see also *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 81.
[110] *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1119.
[111] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 90. This understanding was similarly adopted by the Trial Chamber in the *Katanga* judgment, which stated: "That the attack must further be characterised as widespread or systematic does not, however, mean that the organisation that promotes or encourages it must be structured so as to assume the characteristics of a State". *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1120. The Trial Chamber also found that "the 'general practice accepted as law'... adverts to crimes against humanity committed by States and organisations that are not specifically defined as requiring quasi-State characteristics". *Ibid.*, para. 1121.

> the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[112]

(31) As a consequence of the "policy" potentially emanating from a non-State organization, the definition set forth in paragraphs 1 to 3 of draft article 3 does not require that the offender be a State official or agent. This approach is consistent with the development of crimes against humanity under international law. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 Draft Code of Crimes, stated "that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone" and that it "does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code".[113] As discussed previously, the 1996 draft Code added the requirement that, to be crimes against humanity, the inhumane acts must be "instigated or directed by a Government *or by any organization or group*".[114] In its commentary to this requirement, the Commission noted: "The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State".[115]

(32) Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia accepted the possibility of non-State actors being prosecuted for crimes against humanity. For example, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case stated that, "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory".[116] That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army as prosecutable for crimes against humanity.[117]

(33) In the *Ntaganda* case at the International Criminal Court, charges were confirmed against a defendant associated with two paramilitary groups, the Union des patriotes congolais and the Forces patriotiques pour la libération du Congo in the Democratic Republic of the Congo.[118] Similarly, in the *Mbarushimana* case, the prosecutor pursued charges against a defendant associated with the Forces démocratiques de libération du Rwanda, described, according to its statute, as an "armed group seeking to 'reconquérir et défendre la souveraineté nationale' of Rwanda".[119] In the case against Joseph Kony relating

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[112] *Ruto*, Decision, 23 January 2012 (see footnote 38 above), para. 185; see also *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 32 above), para. 93; *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11, Corrigendum to the Decision pursuant to Article 15 of the 1998 Rome Statute on the authorisation of an investigation into the situation in the Republic of Côte d'Ivoire, 15 November 2011, Pre-Trial Chamber III, International Criminal Court, paras. 45-46.

[113] *Yearbook … 1991*, vol. II (Part Two), pp. 103-104.

[114] *Yearbook … 1996*, vol. II (Part Two), p. 47 (art. 18) (emphasis added).

[115] *Ibid.*

[116] *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.

[117] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005, Trial Chamber II, International Criminal Tribunal for Former Yugoslavia, paras. 212-213.

[118] *Ntaganda*, Decision, 13 July 2012 (see footnote 35 above), para. 22.

[119] *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, Case No. ICC-01/04-01/10, 16 December 2011, Pre-Trial Chamber I, International Criminal Court, para. 2.

to the situation in Uganda, the defendant is allegedly associated with the Lord's Resistance Army, "an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army"[120] which "is organised in a military-type hierarchy and operates as an army".[121] With respect to the situation in Kenya, a Pre-Trial Chamber confirmed charges of crimes against humanity against defendants due to their association in a "network" of perpetrators "comprised of eminent [Orange Democratic Movement Party (ODM)] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders".[122] Likewise, charges were confirmed with respect to other defendants associated with "coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity ('PNU') youth in different parts of Nakuru and Naivasha" that "were targeted at perceived [ODM] supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language".[123]

"With knowledge of the attack"

(34) The third overall requirement is that the perpetrator must commit the act "with knowledge of the attack". Jurisprudence from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda has concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.[124] This two-part approach is reflected in the Elements of Crimes under the 1998 Rome Statute, which for each of the proscribed acts requires as that act's last element: "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population". Even so,

> the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[125]

(35) In its decision confirming the charges against Laurent *Gbagbo*, an International Criminal Court Pre-Trial Chamber found that "it is only necessary to establish that the person had knowledge of the attack in general terms".[126] Indeed, it need not be proven that the perpetrator knew the specific details of the attack;[127] rather, the perpetrator's knowledge may be inferred from circumstantial evidence.[128] Thus, when finding in the *Bemba* case that the MLC troops acted with knowledge of the attack, an International Criminal Court Pre-

[120] *Situation in Uganda*, Case No. ICC-02/04-01/05, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 27 September 2005, Pre-Trial Chamber II, International Criminal Court, para. 5.

[121] *Ibid.*, para. 7.

[122] *Ruto*, Decision, 23 January 2012 (see footnote 38 above), para. 182.

[123] *Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, para. 102.

[124] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 418; *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 133.

[125] International Criminal Court, *Elements of Crimes*, at p. 9.

[126] *Gbagbo*, Decision, 12 June 2014 (see footnote 52 above), para. 214.

[127] *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 434 (finding that the knowledge requirement "does not entail knowledge of the details of the attack").

[128] See *Blaškić*, Judgment, 3 March 2000 (see footnote 28 above), para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including "the nature of the crimes committed and the degree to which they are common knowledge"); *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 657 ("While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances".); see also *Kayishema*, Judgment, 21 May 1999 (see footnote 29 above), para. 134 (finding that "actual or constructive knowledge of the broader context of the attack" is sufficient).

Trial Chamber stated that the troops' knowledge could be "inferred from the methods of the attack they followed", which reflected a clear pattern.[129] In the *Katanga* case, an International Criminal Court Pre-Trial Chamber found that:

> knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.[130]

(36) Furthermore, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.[131] According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most "be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack".[132] It is the perpetrator's knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that the underlying offence was committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.[133] For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture, and enslavement in regard to Muslim women and girls. A Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack "by directly taking advantage of the situation created" and "fully embraced the ethnicity-based aggression".[134] Likewise, an International Criminal Court Trial Chamber has held that the perpetrator must know that the act is part of the widespread or systematic attack against the civilian population, but the perpetrator's motive is irrelevant for the act to be characterized as a crime against humanity. It is not necessary for the perpetrator to have knowledge of all the characteristics or details of the attack, nor is it required for the perpetrator to subscribe to the "State or the organisation's criminal design".[135]

Prohibited acts

(37) Like article 7 of the 1998 Rome Statute, draft article 3, paragraph 1, at subparagraphs (a)-(k), lists the prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind, although the language differs slightly. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual's act must be "part of" a widespread or systematic attack directed against any civilian population.[136] Determining whether the requisite nexus exists requires making "an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act. Isolated acts that clearly differ in their context and circumstances from other acts that occur during an attack fall outside the scope of" draft

[129] *Bemba*, Decision, 15 June 2009 (see footnote 32 above), para. 126; see *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), paras. 166-169.
[130] *Katanga*, Decision, 30 September 2008 (see footnote 33 above), para. 402.
[131] See, for example, *Kunarac*, Judgment, 12 June 2002 (see footnote 46 above), para. 103; *Kupreškić*, Judgment, 14 January 2000 (see footnote 12 above), para. 558.
[132] *Kunarac*, Judgment, 12 June 2002 (see footnote 46 above), para. 103.
[133] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 33 above), para. 592.
[134] *Ibid.*
[135] *Katanga*, Judgment, 7 March 2014 (see footnote 33 above), para. 1125.
[136] See, for example, *Kunarac*, Judgment, 12 June 2002 (see footnote 46 above), para. 100; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 28 above), para. 649.

article 3, paragraph 1".[137] The offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the offence can be part of the attack if it can be sufficiently connected to the attack.[138]

Definitions within the definition

(38) As noted above, draft article 3, paragraph 2 (a), defines "attack directed against any civilian population" for the purpose of draft article 3, paragraph 1. The remaining subparagraphs (b)-(i) of draft article 3, paragraph 2, define further terms that appear in paragraph 1, specifically: "extermination"; "enslavement"; "deportation or forcible transfer of population"; "torture"; "forced pregnancy"; "persecution"; "the crime of apartheid"; and "enforced disappearance of persons". Further, draft article 3, paragraph 3, provides a definition for the term "gender". These definitions also appear in article 7 of the 1998 Rome Statute and were viewed by the Commission as relevant for retention in draft article 3.

Paragraph 4

(39) Paragraph 4 of draft article 3 provides: "This draft article is without prejudice to any broader definition provided for in any international instrument or national law". This provision is similar to article 1, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".[139] Article 10 of the 1998 Rome Statute (appearing in Part II on "Jurisdiction, admissibility, and applicable law") also contains a "without prejudice clause", which reads: "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".

(40) Paragraph 4 is meant to ensure that the definition of "crimes against humanity" set forth in draft article 3 does not call into question any broader definitions that may exist in other international instruments or national legislation. "International instrument" is to be understood in the broad sense and not only in the sense of being a binding international agreement. For example, the definition of "enforced disappearance of persons" as contained in draft article 3 follows article 7 of the 1998 Rome Statute but differs from the definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,[140] the 1994 Inter-American Convention on Forced Disappearance of Persons[141] and in the 2006 International Convention for the Protection of All Persons against Enforced Disappearance.[142] Those differences principally are that the latter instruments do not include the element "with the intention of removing them from the protection of the law", do not include the words "for a prolonged period of time" and do not refer to organizations as potential perpetrators of the crime when they act without State participation.

[137] *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), para. 165.

[138] See, for example, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin,* Case No. IT-95-13/1-A, Judgment, 5 May 2009, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 41; *Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Case No. IT-98-34-T, Judgment, 31 March 2003, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 234, *Judicial Supplement No. 42*, June 2003; *Mrkšić*, Judgment, 27 September 2007 (see footnote 29 above), para. 438; *Tadić*, Judgment, 15 July 1999, (see footnote 20 above), para. 249.

[139] Convention against Torture, art. 1, para. 2.

[140] Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, document A/RES/47/133.

[141] Inter-American Convention on Forced Disappearance of Persons (Belem, 9 June 1994), Organization of American States, *Treaty Series*, No. 60.

[142] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

(41) In the light of such differences, the Commission thought it prudent to include draft article 3, paragraph 4. In essence, while the first three paragraphs of draft article 3 define crimes against humanity for the purpose of the draft articles, this is without prejudice to broader definitions in international instruments or national laws. Thus, if a State wishes to adopt a broader definition in its national law, the present draft articles do not preclude it from doing so. At the same time, an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation. 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.

Article 4
Obligation of prevention

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

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

Commentary

(1) Draft article 4 sets forth an obligation of prevention with respect to crimes against humanity. In considering such an obligation, the Commission viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts. In many instances, those treaties address acts that, when committed under certain circumstances, can constitute crimes against humanity (for example, genocide, torture, apartheid, or enforced disappearance). As such, the obligation of prevention set forth in those treaties extends as well to prevention of the acts in question when they also qualify as crimes against humanity.

(2) An early significant example of an obligation of prevention may be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which 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".[143] Further, Article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III". Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". As such, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contains within it several elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention; and a provision on cooperation of States parties with the United Nations for the prevention of genocide.

(3) Such an obligation of prevention is a feature of most multilateral treaties addressing crimes since the 1960s. Examples include: the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[144] the 1973 Convention on the

[143] Genocide Convention, art. I.

[144] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971), United Nations, *Treaty Series*, vol. 974, No. 14118, p. 177. Article 10, paragraph 1,

Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[145] the 1973 Convention on the Prevention and Punishment of the Crime of Apartheid;[146] the 1979 International Convention against the Taking of Hostages;[147] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[148] the 1985 Inter-American Convention to Prevent and Punish Torture;[149] the 1994 Inter-American Convention on the Forced Disappearance of Persons;[150] the 1994 Convention on the Safety of United Nations and Associated Personnel;[151] the 1997 International Convention on the Suppression of Terrorist Bombings;[152] the 2000 United Nations Convention against Transnational Organized Crime;[153] the 2000 Protocol to

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provides: "Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1".

145 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167, art. 4 ("States Parties shall co-operate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories".)

146 International Convention on the Suppression and Punishment of the Crime of Apartheid, (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243, art. IV: ("The States Parties to the present Convention undertake ... (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime".)

147 International Convention against the Taking of Hostages (New York, 17 December 1979), United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205, art. 4, para. 1 ("States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of ... offences ... including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages".)

148 Convention against Torture, art. 2, para. 1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".)

149 Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985), Organization of American States, *Treaty Series*, No. 67, art. 1 ("The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention". Article 6 provides: "The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction".)

150 Inter-American Convention on Forced Disappearance of Persons, art. 1 ("The States Parties to this Convention undertake ... (c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; (d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention".)

151 Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994), United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363, art. 11 ("States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes".)

152 International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256, art. 15 ("States Parties shall cooperate in the prevention of the offences set forth in article 2".)

153 United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209, art. 9, para. 1 ("In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials".); art. 9, para. 2 ("Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions".); art. 29, para. 1 ("Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and

Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[154] the 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[155] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[156]

(4) Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain obligations to prevent and suppress human rights violations. Examples include: the 1966 International Convention on the Elimination of All Forms of Racial Discrimination;[157] the 1979 Convention on the Elimination of All Forms of Discrimination against Women;[158] and the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.[159] Some

control of the offences covered by this Convention".); art. 31, para. 1 ("States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime".)

[154] 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. 9, para. 1 ("States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization".)

[155] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 18 December 2002), United Nations, *Treaty Series*, vol. 2375, No. 24841, p. 237. The preamble provides: "Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures". Article 3 provides: "Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment".

[156] International Convention for the Protection of All Persons from Enforced Disappearance. The preamble provides: "Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance". Article 23 provides: "1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. 2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. 3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy".

[157] International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, p. 195, art. 3 ("States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction".)

[158] Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13, art. 2 ("States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women". Article 3 provides: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".)

[159] Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 5 November 2011), *Council of Europe Treaty Series*, No. 210, art. 4, para. 2 ("Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the

treaties do not refer expressly to "prevention" or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to "give effect" to or to "implement" the treaty, which may be seen as encompassing necessary or appropriate measures to prevent the act. Examples include the 1966 International Covenant on Civil and Political Rights[160] and the 1989 Convention on the Rights of the Child.[161]

(5) International courts and tribunals have addressed these obligations of prevention. The International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* noted that the duty to punish in the context of that convention is connected to but distinct from the duty to prevent. While "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent",[162] the Court found that "the duty to prevent genocide and the duty to punish its perpetrators ... are ... two distinct yet connected obligations".[163] Indeed, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty".[164]

(6) Such treaty practice, jurisprudence, and the well-settled acceptance by States that crimes against humanity are crimes under international law that should be punished whether or not committed in time of armed conflict, and whether or not criminalized under national law, imply that States have undertaken an obligation to prevent crimes against humanity. Paragraph 1 of draft article 4, therefore, formulates an obligation of prevention in a manner similar to that set forth in Article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, by beginning: "Each State undertakes to prevent crimes against humanity ...".

(7) In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice analysed the meaning of "undertake to prevent" as contained in Article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. At the provisional measures phase, the Court determined that such an undertaking imposes "a clear obligation" on the parties "to do all in their power to prevent the commission of any such acts in the future".[165] At the merits phase, the Court described the ordinary meaning of the word "undertake" in that context as

> to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties ... It is not merely hortatory or purposive. The undertaking is unqualified ... and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features

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use of sanctions, where appropriate; abolishing laws and practices which discriminate against women".)

160 International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, art. 2, para. 2 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant".)

161 Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, art. 4 ("States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention".)

162 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 219, para. 426.

163 *Ibid.*, p. 219, para. 425.

164 *Ibid.*, p. 220, para. 427.

165 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, at p. 22, para. 45.

> support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles.[166]

The undertaking to prevent crimes against humanity, as formulated in paragraph 1 of draft article 4, is intended to express the same kind of legally binding effect upon States; it, too, is not merely hortatory or purposive, and is not merely an introduction to later draft articles.

(8) In the same case, the International Court of Justice further noted that, when engaging in measures of prevention, "it is clear that every State may only act within the limits permitted by international law".[167] The Commission deemed it important to express that requirement explicitly in paragraph 1 of draft article 4, and therefore has included a clause indicating that any measures of prevention must be "in conformity with international law". Thus, the measures undertaken by a State to fulfil this obligation must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

(9) As set forth in paragraph 1 of draft article 4, this obligation of prevention either expressly or implicitly contains four elements. First, by this undertaking, States have an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law".[168] According to the International Court of Justice, when considering the analogous obligation of prevention contained in article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide:

> Under Article I the States parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[169]

(10) The Court also decided that the substantive obligation reflected in article I was not, on its face, limited by territory but, rather, applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligation [] in question".[170]

(11) A breach of this obligation not to commit directly such acts implicates the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on State responsibility. Indeed, in the context of disputes that may arise under the

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[166] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 162 above), p. 43, at p. 111, para. 162.
[167] *Ibid.*, p. 221, para. 430.
[168] *Ibid.*, p. 113, para. 166.
[169] *Ibid.*, p. 113, para. 166.
[170] *Ibid.*, p. 120, para. 183.

1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article IX refers, *inter alia*, to disputes "relating to the responsibility of a State for genocide". Although much of the focus of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is upon prosecuting individuals for the crime of genocide, the International Court of Justice stressed that the breach of the obligation to prevent is not a *criminal* violation by the State but, rather, concerns a breach of international law that engages State responsibility.[171] The Court's approach is consistent with views previously expressed by the Commission,[172] including in the commentary to the 2001 articles on responsibility of States for internationally wrongful acts: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them".[173]

(12) Second, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation "to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing" such acts.[174] For the latter, the State party is expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", which in turn depends on the State party's geographic, political and other links to the persons or groups at issue.[175] Such a standard with respect to the obligation of prevention in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was analysed by the International Court of Justice as follows:

> [I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence,' which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent,

[171] *Ibid.*, p. 114, para. 167 (finding that international responsibility is "quite different in nature from criminal responsibility").

[172] *Yearbook ... 1998*, Vol. II (Part Two), p. 65 para. 248 (finding that the Genocide Convention "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility").

[173] *Yearbook ... 2001*, Vol. II (Part. Two), p. 142, para. (3) of the commentary to art. 58.

[174] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 162 above), p. 43, at p. 113, para. 166.

[175] *Ibid.*, p. 221, para. 430.

> might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[176]

At the same time, the Court maintained that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed".[177]

(13) Third, and following from the above, the undertaking set forth in paragraph 1 of draft article 4 obliges States to pursue actively and in advance measures designed to help prevent the offence from occurring, such as by taking "effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction", as indicated in subparagraph (a). This text is inspired by article 2, paragraph 1, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".[178]

(14) The term "other preventive measures" rather than just "other measures" is used to reinforce the point that the measures at issue in this clause relate solely to prevention. The term "effective" implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures. In commenting on the analogous provision in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has stated:

> States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State Party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.[179]

(15) As to the specific types of measures that shall be pursued by a State, in 2015 the Human Rights Council adopted a resolution on the prevention of genocide[180] that provides some insights into the kinds of measures that are expected in fulfilment of article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Among other things, the resolution: (a) reiterated "the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means";[181] (b) encouraged "Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention";[182] and (c) encouraged "States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to

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176 *Ibid.*

177 *Ibid.*, p. 221, para. 431; see *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 27 (*Draft articles on responsibility of States for internationally wrongful acts*, art. 14, para. 3: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs".).

178 Convention against Torture, art. 2, para. 1.

179 See Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, para. 4, in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI.

180 Report of the Human Rights Council, *Official Records of the General Assembly, Seventieth Session, Supplement No. 53* (A/70/53), chap. II, resolution 28/34, adopted by the Human Rights Council on 27 March 2015.

181 *Ibid.*, para. 2.

182 *Ibid.*, para. 3.

the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and subregional mechanisms".[183]

(16) In the regional context, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[184] contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed article 2, paragraph 1 (on the right to life), to contain such an obligation and to require that appropriate measures of prevention be taken, such as "putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".[185] At the same time, the Court has recognized that the State party's obligation in this regard is limited.[186] Likewise, although the 1969 American Convention on Human Rights[187] contains no express obligation to "prevent" violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States parties to "ensure" the free and full exercise of the rights recognized by the Convention,[188] has found that this obligation implies a "duty to prevent", which in turn requires the State party to pursue certain steps. The Court has said:

> This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.[189]

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[183] *Ibid.*, para. 4.

[184] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221 (hereinafter "European Convention on Human Rights").

[185] *Makaratzis v. Greece*, Application No. 50385/99, Judgment of 20 December 2004, Grand Chamber, European Court of Human Rights, para. 57, ECHR 2004-XI; see *Kiliç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, European Court of Human Rights, para. 62, ECHR 2000-III (finding that article 2, paragraph 1, obliged a State Party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction).

[186] *Mahmut Kaya v. Turkey*, Application No. 22535/93, Judgment of 28 March 2000, First Section, European Court of Human Rights, para. 86, ECHR 2000-III ("Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1,] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities".); see also *Kerimova and others v. Russia*, Application Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, and 5684/05, Final Judgment of 15 September 2011, First Section, European Court of Human Rights, para. 246; *Osman v. the United Kingdom*, Judgment of 28 October 1998, Grand Chamber, European Court of Human Rights, *Reports* 1998-VIII, para. 116.

[187] American Convention on Human Rights: "Pact of San José. Costa Rica" (San Jose, 22 November 1969), Organization of American States, *Treaty Series*, vol. 1144, No. 17955, p. 123.

[188] Article 1, paragraph 1, reads: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination". It is noted that article 1 of the African Charter on Human and Peoples' Rights provides that the States parties "shall recognise the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them". African Charter on Human and Peoples' Rights ("Banjul Charter") (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

[189] *Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), Inter-American Court of Human Rights, Series C, No. 4, para. 175; see also *Gómez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 110, para. 155; *Juan Humberto Sánchez v. Honduras*, Judgment of 7 June 2003 (Preliminary Objection, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 99, paras. 137 and 142.

Similar reasoning has animated the Court's approach to interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.[190]

(17) Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offenses. Such an obligation usually would oblige the State at least to: (a) adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (b) continually to keep those laws and policies under review and as necessary improve them; (c) pursue initiatives that educate governmental officials as to the State's obligations under the draft articles; (d) implement training programmes for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (e) once the proscribed act is committed, fulfil in good faith any other obligations to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others.[191] Some measures, such as training programmes, may already exist in the State to help prevent wrongful acts (such as murder, torture or rape) that relate to crimes against humanity. The State is obligated to supplement those measures, as necessary, specifically to prevent crimes against humanity. Here, too, international responsibility of the State arises if the State has failed to use its best efforts to organize the governmental and administrative apparatus, as necessary and appropriate, in order to prevent as far as possible crimes against humanity.

(18) Subparagraph (a) of paragraph 1 of draft article 4, refers to a State pursuing effective legislative, administrative, judicial or other preventive measures "in any territory under its jurisdiction". Such a formulation covers the territory of a State, but also covers activities carried out in other territory under the State's jurisdiction. As the Commission has previously explained,

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[190] *Tibi v. Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 114, para. 159; see also *Gómez-Paquiyauri Brothers v. Peru*, (see footnote 189 above), para. 155.

[191] For comparable measures with respect to prevention of specific types of human rights violations, see Committee on the Elimination of Discrimination against Women, general recommendation No. 6 (1988) on effective national machinery and publicity, paras. 1-2, *Report of the Committee on the Elimination of Discrimination against Women, Official Records of the General Assembly, Forty-third Session, Supplement No. 38* (A/43/38), chap. V, par. 770, p. 110; Committee on the Elimination of Discrimination against Women, general recommendation No. 15 (1990) on the avoidance of discrimination against women in national strategies for the prevention and control of AIDS, *Report of the Committee on the Elimination of Discrimination against Women, Official Records of the General Assembly, Forty-fifth Session, Supplement No. 38* (A/45/38), chap. IV, para. 438; Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 9, *Report of the Committee on the Elimination of Discrimination against Women, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38* (A/47/38), chap. I; Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, para. 9, in *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 41* (A/59/41), annex XI; Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), Volume I, Annex III; Committee on the Rights of the Child, general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, paras. 50-63, in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 41* (A/61/41), annex II; Committee on the Elimination of Racial Discrimination, general recommendation 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 5 (*Report of the Committee on the Elimination of Racial Discrimination,* in *Official Records of the General Assembly, Sixtieth Session, Supplement No. 18* (A/60/18), chap. IX, para. 460; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex, principle 3 (a) ("The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations".)

it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by ICJ in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia.[192]

(19) Fourth, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation to pursue certain forms of cooperation, not just with each other but also with organizations, such as the United Nations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies. The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations,[193] which indicates that one of the purposes of the Charter is to "achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all". Further, in Articles 55 and 56 of the Charter, all Members of the United Nations pledge "to take joint and separate action in cooperation with the Organization for the achievement of" certain purposes, including "universal respect for, and observance of, human rights and fundamental freedoms for all". Specifically with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized in its 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the Assembly declared that "States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose".[194]

(20) Consequently, subparagraph (b) of paragraph 1 of draft article 4 indicates that States shall cooperate with each other to prevent crimes against humanity and cooperate with relevant intergovernmental organizations. The term "relevant" is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization's functions, on the relationship of the State to that organization, and on the context in which the need for cooperation arises. Further, subparagraph (b) provides that States shall cooperate, as appropriate, with other organizations. These organizations include non-governmental organizations that could play an important role in the prevention of crimes against humanity in specific countries. The term "as appropriate" is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.

(21) Draft article 4, paragraph 2, indicates that no exceptional circumstances may be invoked as a justification for the offence. This text is inspired by article 2, paragraph 2, of

[192] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paragraph 12 of the commentary to draft article 1 of the draft articles on the prevention of transboundary harm from hazardous activities, p. 151 (citing to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 118); see also *Yearbook … 2006*, vol. II (Part Two), p. 70 para. (25) of the commentary to draft principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 242, para. 29 (referring to "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control").

[193] Charter of the United Nations (San Francisco, 26 June 1945).

[194] Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 3.

the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[195] but has been refined to fit better in the context of crimes against humanity. The expression "state of war or threat of war" has been replaced by the expression "armed conflict," as was done in draft article 2. In addition, the words "such as" are used to stress that the examples given are not meant to be exhaustive.

(22) Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1, paragraph 2, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance contains similar language,[196] as does article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture.[197]

(23) One advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors. At the same time, the paragraph is addressing this issue only in the context of the obligation of prevention and not, for example, in the context of possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility.

Article 6
Criminalization under national law

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

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

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

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

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

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

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

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

[195] Convention against Torture, art. 2, para. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".)

[196] International Convention for the Protection of All Persons from Enforced Disappearance, art.1, para. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance".)

[197] Inter-American Convention to Prevent and Punish Torture, art. 5 ("The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture".)

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

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

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

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

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

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

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

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

Commentary

(1) Draft article 6 sets forth various measures that each State must take under its criminal law to ensure that crimes against humanity constitute offences, to preclude any superior orders defence or any statute of limitation, and to provide for appropriate penalties commensurate with the grave nature of such crimes. Measures of this kind are essential for the proper functioning of the subsequent draft articles relating to the establishment and exercise of jurisdiction over alleged offenders.

Ensuring that "crimes against humanity" are offences in national criminal law

(2) The International Military Tribunal at Nürnberg recognized the importance of punishing individuals, *inter alia*, for crimes against humanity when it stated that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[198] The Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided that: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".[199] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provided in its preamble that "the effective punishment of … crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security". The preamble to the 1998 Rome Statute affirms "that the most serious crimes of concern to the international community as a

[198] *Judgment of 30 September 1946* (see footnote 2 above), p. 466.

[199] *Yearbook … 1950*, vol. II, document A/1316, Part III, p. 374, para. 97 (Principle 1).

whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

(3) Many States have adopted laws on crimes against humanity that provide for the prosecution of such crimes in their national system. The 1998 Rome Statute, in particular, has inspired the enactment or revision of a number of national laws on crimes against humanity that define such crimes in terms identical to or very similar to the offence as defined in article 7 of that Statute. At the same time, many States have adopted national laws that differ, sometimes significantly, from the definition set forth in article 7. Moreover, still other States have not adopted any national law on crimes against humanity. Those States typically do have national criminal laws that provide for punishment in some fashion of many of the individual acts that, under certain circumstances, may constitute crimes against humanity, such as murder, torture or rape.[200] Yet those States have not criminalized crimes against humanity as such and this lacuna may preclude prosecution and punishment of the conduct, including in terms commensurate with the gravity of the offence.

(4) The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 4, paragraph 1, that: "Each State Party shall ensure that all acts of torture are offences under its criminal law".[201] The Committee against Torture has stressed the importance of fulfilling such an obligation so as to avoid possible discrepancies between the crime as defined in the Convention and the crime as it is addressed in national law:

> 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.[202]

(5) To help avoid such loopholes with respect to crimes against humanity, draft article 6, paragraph 1, provides that each State shall take the necessary measures to ensure that crimes against humanity, as such, constitute offences under its criminal law. Draft article 6, paragraphs 2 and 3 (discussed below), then further obligate the State to criminalize certain ways by which natural persons might engage in such crimes.

(6) Since the term "crimes against humanity" is defined in draft article 3, paragraphs 1 to 3, the obligation set forth in draft article 6, paragraph 1, requires that the crimes so defined are made offences under the State's national criminal laws. While 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, paragraphs 1 to 3. The term "crimes against humanity" used in draft article 6 (and in subsequent draft articles), however, does not include the "without prejudice" clause contained in draft article 3, paragraph 4. While that clause recognizes the possibility of a broader definition of "crimes against humanity"

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[200] See *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/12 OA, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, Appeals Chamber, International Criminal Court (finding that a national prosecution for the ordinary domestic crimes of disturbing the peace, organizing armed gangs and undermining State security was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution).

[201] Convention against Torture. art. 4, para. 1.

[202] See Committee against Torture, general comment No. 2 (2007); see also Committee against Torture, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44* (A/58/44), chap. III, consideration of reports submitted by States parties under article 19 of the Convention, Slovenia, para. 115 (a), and Belgium, para. 130.

in any international instrument or national law, for the purposes of these draft articles the definition of "crimes against humanity" is limited to draft article 3, paragraphs 1 to 3.

(7) Like the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, many treaties in the areas of international humanitarian law, human rights and international criminal law require that a State party ensure that the prohibited conduct is an "offence" or "punishable" under its national law, though the exact wording of the obligation varies.[203] Some treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [204] and the 1949 Geneva Conventions,[205] contain an obligation to enact "legislation", but the Commission viewed it appropriate to model draft article 6, paragraph 1, on more recent treaties, such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Committing, attempting to commit, assisting in or contributing to a crime against humanity

(8) Draft article 6, paragraph 2, provides that each State shall take the necessary measures to ensure that certain ways by which natural persons might engage in crimes against humanity are criminalized under national law, specifically: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

(9) In the context of crimes against humanity, a survey of both international instruments and national laws suggests that various types (or modes) of individual criminal responsibility are addressed. First, all jurisdictions that have criminalized "crimes against humanity" impose criminal responsibility upon a person who "commits" the offence (sometimes referred to in national law as "direct" commission, as "perpetration" of the act or as being a "principal" in the commission of the act). For example, the Nürnberg Charter, in article 6, provided jurisdiction for the International Military Tribunal over "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes". Likewise, the Statutes of both the International Criminal Tribunal for the Former Yugoslavia [206] and the International Criminal Tribunal for Rwanda[207] provided that a person who "committed" crimes against humanity "shall be individually responsible for the crime". The 1998 Rome Statute provides that: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment" and "a person shall be criminally

[203] See, for example: Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105, art. 2; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2; International Convention Against the Taking of Hostages, art. 2; Convention against Torture, art. 4; Inter-American Convention to Prevent and Punish Torture, art. 6; Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; Inter-American Convention on Forced Disappearance of Persons, art. III; International Convention for the Suppression of Terrorist Bombings, art. 4; International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), United Nations, *Treaty* Series, vol. 2178, No. 38349, p. 197, art. 4; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (Algiers, 14 July 1999), *ibid*., vol. 2219, No. 39464, p. 179, art. 2 (a); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 5, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Association of Southeast Asian Nations Convention on Counter Terrorism (Cebu, 13 January 2007), art. IX, para. 1, in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 336.

[204] Genocide Convention, art. V.

[205] Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV. For the Commentary of 2016 on art. 49 (Penal sanctions) of Geneva Convention I (hereinafter "2016 ICRC Commentary on art. 49"), see International Committee of the Red Cross (ICRC).

[206] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1.

[207] Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime, whether as an individual [or] jointly with another".[208] Similarly, the instruments regulating the Special Court for Sierra Leone,[209] the Special Panels for Serious Crimes in East Timor,[210] the Extraordinary Chambers in the Courts of Cambodia,[211] the Supreme Iraqi Criminal Tribunal[212] and the Extraordinary African Chambers within the Senegalese Judicial System[213] all provide for the criminal responsibility of a person who "commits" crimes against humanity. National laws that address crimes against humanity invariably criminalize the "commission" of such crimes. Treaties addressing other types of crimes also inevitably call upon States parties to adopt national laws proscribing "commission" of the offence. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides for individual criminal responsibility for the "commission" of genocide.[214]

(10) Second, all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in some way other than "commission" of the offence. Such conduct may take the form of an "attempt" to commit the offence, or acting as an "accessory" or "accomplice" to the offence or an attempted offence. With respect to an "attempt" to commit the crime, the Statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone contained no provision for such responsibility. In contrast, the 1998 Rome Statute provides for the criminal responsibility of a person who attempts to commit the crime, unless he or she abandons the effort or otherwise prevents completion of the crime.[215] In the *Banda and Jerbo* case, a pre-trial chamber asserted that criminal responsibility for attempt "requires that, in the ordinary course of events, the perpetrator's conduct [would] have resulted in the crime being completed, had circumstances outside the perpetrator's control not intervened".[216]

(11) Third, with respect to "accessorial" responsibility, such a concept is addressed in international instruments through various terms, such as "ordering", "soliciting", "inducing", "instigating", "inciting", "aiding and abetting", "conspiracy to commit", "being an accomplice to", "participating in" or "joint criminal enterprise". Thus, the Statute of the International Criminal Tribunal for the Former Yugoslavia provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".[217] The Statute of the International Criminal

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[208] See Rome Statute, art. 25, paras. 2 and 3 (a).

[209] Statute of the Special Court for Sierra Leone, art. 6

[210] United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 5 (2000) (hereinafter "East Timor Tribunal Charter").

[211] Extraordinary Chambers of Cambodia Agreement, art. 5. See also Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117.

[212] Statute of the Iraqi Special Tribunal, *International Legal Materials*, vol. 43, p. 231, art. 10 (b) (2004) (hereinafter, "Supreme Iraqi Criminal Tribunal Statute"). The Iraqi Interim Government enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal's name to "Supreme Iraqi Criminal Tribunal". See Law of the Supreme Iraqi Criminal Tribunal, Law No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005).

[213] Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990, *International Law Materials*, vol. 52, p. 1028, arts. 4 (b) and 6 (2013) (hereinafter "Extraordinary African Chambers Statute").

[214] Genocide Convention, arts. III (a) and IV.

[215] Rome Statute, art. 25, para. 3 (f).

[216] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the Decision on the confirmation of charges, 7 March 2011, Pre-Trial Chamber I, International Criminal Court, para. 96.

[217] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Tadić*,

Tribunal for Rwanda used virtually identical language.[218] Both tribunals have convicted defendants for participation in such offences within their respective jurisdictions.[219] Similarly, the instruments regulating the Special Court for Sierra Leone,[220] the Special Panels for Serious Crimes in East Timor,[221] the Extraordinary Chambers in the Courts of Cambodia,[222] the Supreme Iraqi Criminal Tribunal[223] and the Extraordinary African Chambers within the Senegalese Judicial System[224] all provided for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

(12) The 1998 Rome Statute provides for criminal responsibility if the person commits "such a crime … through another person", if the person "[o]rders, solicits or induces the commission of the crime which in fact occurs or is attempted", if the person for "the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission" or if the person in "any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with common purpose", subject to certain conditions.[225] The Commission decided to use the various terms set forth in the 1998 Rome Statute as the basis for the terms used in draft article 6, paragraph 2.

(13) In these various international instruments, the related concepts of "soliciting", "inducing" and "aiding and abetting" the crime are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constitutes the offence. Indeed, the Convention on the Prevention and Punishment of the Crime of Genocide addresses not just the commission of genocide, but also "[c]onspiracy to commit genocide", "[d]irect and public incitement to commit genocide", an "[a]ttempt to commit genocide" and "[c]omplicity in genocide".[226] The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity broadly provides that: "If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission".[227]

(14) Further, the concept in these various instruments of "ordering" the crime differs from (and complements) the concept of "command" or other superior responsibility. Here, "ordering" concerns the criminal responsibility of the superior for affirmatively instructing that action be committed that constitutes an offence. In contrast, command or other superior responsibility concerns the criminal responsibility of the superior for a failure to act; specifically, in situations where the superior knew or had reason to know that subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

Judgment, 15 July 1999 (see footnote 20 above) (finding that "the notion of common design as a form of accomplice liability is firmly established in customary international law").

218 Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

219 See, for example, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, para. 246 (finding that: "If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor").

220 Statute of the Special Court for Sierra Leone, art. 6, para. 1.

221 East Timor Tribunal Charter, sect. 14.

222 Extraordinary Chambers of Cambodia Agreement, art. 29.

223 Supreme Iraqi Criminal Tribunal Statute, art. 15.

224 Extraordinary African Chambers Statute, art. 10.

225 Rome Statute, art. 25, para. 3 (a-d).

226 Genocide Convention, art. III (b)-(e).

227 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. 2.

(15) Treaties addressing crimes other than crimes against humanity typically provide for criminal responsibility of persons who participate in the commission of the offence, using broad terminology that does not seek to require States to alter the preferred terminology or modalities that are well settled in national law. In other words, such treaties use general terms rather than detailed language, allowing States to spell out the precise details of the criminal responsibility through existing national statutes, jurisprudence and legal tradition. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance broadly provides: "Each State Party shall take the necessary measures to hold criminally responsible at least … [a]ny person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance".[228] The language of draft article 6, paragraph 2, takes the same approach.

Command or other superior responsibility

(16) Draft article 6, paragraph 3, addresses the issue of command or other superior responsibility. In general, this paragraph provides that superiors are criminally responsible for crimes against humanity committed by subordinates, in circumstances where the superior has engaged in a dereliction of duty with respect to the subordinates' conduct.

(17) International jurisdictions that have addressed crimes against humanity impute criminal responsibility to a military commander or other superior for an offence committed by subordinates in certain circumstances.[229] Notably, the Nürnberg and Tokyo tribunals used command responsibility with respect to both military and civilian commanders, an approach that influenced later tribunals.[230] As indicated by a trial chamber of the International Criminal Tribunal for Rwanda in *Prosecutor v. Alfred Musema*: "As to whether the form of individual criminal responsibility referred to under Article 6(3) of the [International Criminal Tribunal for Rwanda] Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle".[231]

(18) The Statute of the International Criminal Tribunal for the Former Yugoslavia provides that: "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".[232] Several defendants were convicted by the International Criminal Tribunal for the Former Yugoslavia on such a basis.[233] The same language appears in the Statute of the International Criminal Tribunal for Rwanda,[234] which also convicted several defendants on such a basis.[235] Similar language

[228] International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (a).

[229] See, for example, *United States of America v. Wilhelm von Leeb, et al.* ("The High Command Case"), in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. 11 (Washington D.C., United States Government Printing Office, 1950), pp. 543-544.

[230] *Ibid*.; see also *International Criminal Law: International Enforcement*, M.C. Bassiouni, ed., vol. III, 3rd ed. (Leiden, Martinus Nijhoff, 2008, p. 461); and K.J. Heller, *The Nurenberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press, 2011), pp. 262-263.

[231] See *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment and sentence, 27 January 2000, Trial Chamber I, International Criminal Tribunal for Rwanda, para. 132.

[232] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 3.

[233] See, for example, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Supplement No. 6*, June/July 1999 paras. 66-77; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 330-400 and 605-810.

[234] Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 3.

[235] See *Akayesu*, Judgment, 2 September 1998 (see footnote 27 above); *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and sentence, 4 September 1998, Trial Chamber, International Criminal Tribunal for Rwanda.

appears in the instruments regulating the Special Court for Sierra Leone,[236] the Special Tribunal for Lebanon,[237] the Special Panels for Serious Crimes in East Timor,[238] the Extraordinary Chambers in the Courts of Cambodia,[239] the Supreme Iraqi Criminal Tribunal[240] and the Extraordinary African Chambers within the Senegalese Judicial System.[241]

(19) Article 28 of the 1998 Rome Statute contains a detailed standard by which criminal responsibility applies to a military commander or person effectively acting as a military commander with regard to the acts of others.[242] As a general matter, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the commander knew or should have known that his or her subordinates were committing or about to commit the offence; and (c) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution. This standard has begun influencing the development of "command responsibility" in national legal systems, both in the criminal and civil contexts. Article 28 also addresses the issue of other "superior and subordinate relationships" arising in a non-military or civilian context. Such superiors include civilians that "lead" but are not "embedded" in military activities. Here, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the civilian superior knew or consciously disregarded information regarding the offences; (c) the offences concerned activities that were within the effective responsibility and control of the superior; and (d) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress commission of all the offences or to submit the matter for investigation and prosecution.

(20) A trial chamber of the International Criminal Court applied this standard when convicting Jean-Pierre Bemba Gombo in March 2016 of crimes against humanity. Among other things, the trial chamber found that Mr. Bemba was a person effectively acting as a military commander who knew that the Mouvement de Libération du Congo forces under his effective authority and control were committing or about to commit the crimes charged. Additionally, the trial chamber found that Mr. Bemba failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates during military operations in 2002 and 2003 in the Central African Republic or to submit the matter to the competent authorities after crimes were committed.[243]

(21) National laws also often contain this type of criminal responsibility for war crimes, genocide and crimes against humanity, but differing standards are used. Moreover, some States have not developed such a standard in the context of crimes against humanity. For these reasons, the Commission viewed it appropriate to elaborate a clear standard so as to encourage harmonization of national laws on this issue.[244] To that end, draft article 6, paragraph 3, is modelled on the standard set forth in the 1998 Rome Statute.

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[236] Statute of the Special Court for Sierra Leone, art. 6, para. 3.

[237] Statute of the Special Tribunal for Lebanon, Security Council resolution 1757 (2007) of 30 May 2007 (annex and attachment included), art. 3, para. 2.

[238] East Timor Tribunal Charter, sect. 16.

[239] Extraordinary Chambers of Cambodia Agreement, art. 29.

[240] Supreme Iraqi Criminal Tribunal Statute, art. 15.

[241] Rome Statute; Extraordinary African Chambers Statute, art. 10.

[242] Rome Statute, art. 28; see, for example, *Kordić*, Judgment, 26 February 2001 (see footnote 20 above), para. 369.

[243] *Bemba*, Judgment, 21 March 2016 (see footnote 32 above), paras. 630, 638 and 734.

[244] See Commission on Human Rights report on the sixty-first session, *Official Records of the Economic and Social Council, 2005, Supplement No. 3* (E/2005/23-E/CN.4/2005/135), resolution 2005/81 on impunity of 21 April 2005, para. 6 (urging "all States to ensure that all military commanders and other superiors are aware of the circumstances in which they may be criminally responsible under international law for … crimes against humanity … including, under certain circumstances, for these crimes when committed by subordinates under their effective authority and control").

(22) Treaties addressing offences other than crimes against humanity also often acknowledge an offence in the form of command or other superior responsibility.[245]

Superior orders

(23) Draft article 6, paragraph 4, provides that each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate.

(24) All jurisdictions that address crimes against humanity provide grounds for excluding criminal responsibility to one degree or another. For example, most jurisdictions preclude criminal responsibility if the alleged perpetrator suffered from a mental disease that prevented the person from appreciating the unlawfulness of his or her conduct. Some jurisdictions provide that a state of intoxication also precludes criminal responsibility, at least in some circumstances. The fact that the person acted in self-defence may also preclude responsibility, as may duress resulting from a threat of imminent harm or death. In some instances, the person must have achieved a certain age to be criminally responsible. The exact grounds vary by jurisdiction and, with respect to national systems, are usually embedded in that jurisdiction's approach to criminal responsibility generally, not just in the context of crimes against humanity.

(25) At the same time, most jurisdictions that address crimes against humanity provide that perpetrators of such crimes cannot invoke as a defence to criminal responsibility that they were ordered by a superior to commit the offence.[246] Article 8 of the Nürnberg Charter provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Consistent with article 8, the International Military Tribunal found that the fact that "a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality".[247] Likewise, article 6 of the Charter of the Tokyo Tribunal provided: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".[248]

(26) While article 33 of the 1998 Rome Statute allows for a limited superior orders defence, it does so exclusively with respect to war crimes; orders to commit acts of genocide or crimes against humanity do not fall within the scope of the defence. The instruments regulating the International Criminal Tribunal for the Former Yugoslavia,[249] the International Criminal Tribunal for Rwanda,[250] the Special Court for Sierra Leone,[251] the Special Tribunal for Lebanon,[252] the Special Panels for Serious Crimes in East Timor,[253] the Extraordinary Chambers in the Courts of Cambodia,[254] the Supreme Iraqi Criminal Tribunal[255] and the Extraordinary African Chambers within the Senegalese Judicial

[245] See, for example, 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; International Convention for the Protection of All Persons from Enforced Disappearance, at art. 6, para. 1.

[246] See Commission on Human Rights, resolution 2005/81 on impunity, para. 6(urging all States "to ensure that all relevant personnel are informed of the limitations that international law places on the defence of superior orders").

[247] *Trial of the Major War Criminals …* (see footnote 198 above), p. 466.

[248] Tokyo Charter, art. 6.

[249] Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7, para. 4.

[250] Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4.

[251] Statute of the Special Court for Sierra Leone, art. 6, para. 4.

[252] Statute of the Special Tribunal for Lebanon, art. 3, para. 3.

[253] East Timor Tribunal Charter, sect. 21.

[254] Extraordinary Chambers of Cambodia Agreement, art. 29.

[255] Supreme Iraqi Criminal Tribunal Statute, art. 15.

System[256] all similarly exclude superior orders as a defence. While superior orders are not permitted as a defence to prosecution for an offence, some of the international and national jurisdictions mentioned above allow orders from a superior to serve as a mitigating factor at the sentencing stage.[257]

(27) Such exclusion of superior orders as a defence exists in a range of treaties addressing crimes, such as: the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[258] the 1985 Inter-American Convention to Prevent and Punish Torture;[259] the 1994 Inter-American Convention on Forced Disappearance of Persons;[260] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[261] In the context of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticized national legislation that permits such a defence or is ambiguous on the issue.[262] In some instances, the problem arises from the presence in a State's national law of what is referred to as a "due obedience" defence.[263]

Statutes of limitations

(28) One possible restriction on the prosecution of a person for crimes against humanity in national law concerns the application of a "statute of limitations" (or "period of prescription"), meaning a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution. Draft article 6, paragraph 5, provides that each State shall take the necessary measures to ensure that the offences referred to in the draft article shall not be subject to any statute of limitations.

(29) No rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg or Tokyo Charters, or in the constituent instruments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone. In contrast, Control Council Law No. 10, adopted in December 1945 by the Allied Control Council for Germany to ensure the continued prosecution of alleged offenders, provided

256 Extraordinary African Chambers Statute, art. 10, para. 5.

257 See, for example, Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 4; Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4; Statute of the Special Court for Sierra Leone, art. 6, para. 4; East Timor Tribunal Charter, sect. 21.

258 Convention against Torture, art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

259 Inter-American Convention to Prevent and Punish Torture, art. 4 ("The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability").

260 Inter-American Convention on Forced Disappearance of Persons, art. VIII ("The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them").

261 International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 2 ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance"). This provision "received broad approval" at the drafting stage. See Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 72 (see also the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 6).

262 Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Guatemala, para. 32 (13).

263 See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44* (A/59/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Chile, para. 56 (i); see also, *ibid*., *Sixtieth Session, Supplement No. 44* (A/60/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Argentina, para. 31 (a) (praising Argentina for declaring its due obedience act "absolutely null and void").

that in any trial or prosecution for crimes against humanity (as well as war crimes and crimes against the peace) "the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945".[264] Likewise, the 1998 Rome Statute expressly addresses the matter, providing that: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".[265] The drafters of the 1998 Rome Statute strongly supported this provision as applied to crimes against humanity.[266] Similarly, the Law on the Establishment of Extraordinary Chambers in Cambodia, the Supreme Iraqi Criminal Tribunal and the East Timor Tribunal Charter all explicitly defined crimes against humanity as offences for which there is no statute of limitations.[267]

(30) With respect to whether a statute of limitations may apply to the prosecution of an alleged offender in national courts, in 1967 the General Assembly noted that "the application to war crimes and crimes against humanity of the rule of municipal law relating to the period of limitation for ordinary crimes is a serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes".[268] The following year, States adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which requires State parties to adopt "any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment" of these two types of crimes.[269] Similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which uses substantially the same language.[270] At present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.

(31) Many treaties addressing crimes in national law other than crimes against humanity have not contained a prohibition on a statute of limitations. For example, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains no prohibition on the application of a statute of limitations to torture-related offences. Even so, the Committee against Torture has stated that, taking into account their grave nature, such offences should not be subject to any statute of limitations.[271] Similarly, while the 1966 International Covenant on Civil and Political Rights[272] does not directly address the issue, the Human Rights Committee has called for

[264] Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, para. 5.

[265] Rome Statute, art. 29.

[266] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, document A/CONF.183/13 (vol. II), p. 138, 2nd meeting (A/CONF.183/C.1/SR.2), paras. 45-74.

[267] Extraordinary Chambers of Cambodia Agreement, art. 5; Supreme Iraqi Criminal Tribunal Statute, art. 17 (d); East Timor Tribunal Charter, sect. 17.1; see also report of the Third Committee (A/57/806), para. 10 (Khmer Rouge trials) and General Assembly resolution 57/228 B of 13 May 2003. Further, it should be noted that the Extraordinary Chambers in the Courts of Cambodia were provided jurisdiction over crimes against humanity committed decades prior to its establishment, between 1975 and 1979, when the Khmer Rouge held power.

[268] General Assembly resolution 2338 (XXII) of 18 December 1967, entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity"; see also General Assembly resolution 2712 (XXV) of 15 December 1970; General Assembly resolution 2840 (XXVI) of 18 December 1971.

[269] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. IV.

[270] European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, art. 1.

[271] See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 44* (A/62/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Italy, para. 40 (19).

[272] International Covenant for Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

the abolition of statutes of limitations in relation to serious violations of the Covenant.[273] In contrast, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance does address the issue of statutes of limitations, providing that: "A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (a) Is of long duration and is proportionate to the extreme seriousness of this offence".[274] The *travaux préparatoires* of the Convention indicate that this provision was intended to distinguish between those offences that might constitute a crime against humanity — for which there should be no statute of limitations — and all other offences under the Convention.[275]

Appropriate penalties

(32) Draft article 6, paragraph 6, provides that each State shall ensure that the offences referred to in the article shall be punishable by appropriate penalties that take into account the grave nature of the offences.

(33) The Commission provided in its 1996 draft code of crimes against the peace and security of mankind that: "An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime".[276] The commentary further explained that the "character of a crime is what distinguishes that crime from another crime … The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author".[277] Thus, "while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty".[278]

(34) To the extent that an international court or tribunal has jurisdiction over crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. The Statute of the International Criminal Tribunal for the Former Yugoslavia provides that: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[279] Furthermore, the International Criminal Tribunal for the Former Yugoslavia is to "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".[280] The Statute of the International Criminal Tribunal for Rwanda includes identical language, except that recourse is to be had to "the general practice regarding prison sentences in the courts of Rwanda".[281] Even for convictions for the most serious crimes of international concern, this can result in a wide range of sentences. Article 77 of the 1998 Rome Statute also allows for flexibility of this kind, by providing for a term of imprisonment of up to 30 years or life imprisonment "when justified by the extreme gravity of the crime and the individual

[273] See, for example, report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40* (A/63/40), vol. I, chap. IV, consideration of reports submitted by States parties under article 40 of the Covenant and of country situations in the absence of a report resulting in public concluding observations, Panama (sect. A, para. 79), para. (7).

[274] International Convention for the Protection of All Persons from Enforced Disappearance, art. 8, para. 1 (a). In contrast, the Inter-American Convention on Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations.

[275] Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59) (see footnote 261 above), paras. 43-46 and 56.

[276] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, art. 3.

[277] *Ibid*., para. (3) of the commentary to art. 3.

[278] *Ibid*.

[279] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 1.

[280] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 2.

[281] Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 1.

circumstances of the convicted person".[282] Similar formulations may be found in the instruments regulating the Special Court for Sierra Leone,[283] the Special Tribunal for Lebanon,[284] the Special Panels for Serious Crimes in East Timor,[285] the Extraordinary Chambers in the Courts of Cambodia,[286] the Supreme Iraqi Criminal Tribunal,[287] and the Extraordinary African Chambers within the Senegalese Judicial System.[288] Likewise, to the extent that a national jurisdiction has criminalized crimes against humanity, the penalties attached to such an offence may vary, but are expected to be commensurate with the gravity of the offence.

(35) International treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, allow them the discretion to determine the punishment, based on the circumstances of the particular offender and offence.[289] The 1948 Convention on the Prevention and Punishment of the Crime of Genocide simply calls for "effective penalties for persons guilty of genocide or any of the other acts enumerated …".[290] The 1949 Geneva Conventions also provide a general standard and leave to individual States the discretion to set the appropriate punishment, by simply requiring: "The High Contracting Parties [to] undertake to enact any legislation necessary to provide effective penal sanctions for … any of the grave breaches of the present Convention …".[291] More recent treaties addressing crimes in national legal systems typically indicate that the penalty should be "appropriate". Although the Commission initially proposed the term "severe penalties" for use in its draft articles on diplomatic agents and other protected persons, the term "appropriate penalties" was instead used by States in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.[292] That term has served as a model for subsequent treaties. At the same time, the provision on "appropriate" penalties in the 1973 Convention was accompanied by language calling for the penalty to take into account the "grave nature" of the offence. The Commission commented that such a reference was intended to emphasize that the penalty should take into account the important "world interests" at stake in punishing such an offence.[293] Since 1973, this approach — that each "State Party shall make these offences punishable by the appropriate penalties which take into account their grave nature" — has been adopted for numerous treaties, including the 1984 Convention

[282] Rome Statute, art. 77.
[283] Statute of the Special Court for Sierra Leone, art. 19.
[284] Statute of the Special Tribunal for Lebanon, art. 24.
[285] East Timor Tribunal Charter, sect. 10.
[286] Extraordinary Chambers of Cambodia Agreement, art. 39.
[287] Supreme Iraqi Criminal Tribunal Statute, art. 24.
[288] Extraordinary African Chambers Statute, art. 24.
[289] See the report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 58 (indicating that "[s]everal delegations welcomed the room for manoeuvre granted to States" in this provision); report of the Ad hoc Committee on the Drafting of an International Convention Against the Taking of Hostages, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 39* (A/32/39), annex I (Summary records of the 1st to the 19th meetings of the Committee), 13th meeting (15 August 1977), para. 4 (similar comments by the representative of the United States of America); Commission on Human Rights resolution 2005/81 on impunity, para. 15 (calling upon "all States … to ensure that penalties are appropriate and proportionate to the gravity of the crime").
[290] Genocide Convention, art. V.
[291] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146; see 2016 ICRC Commentary on art. 49 (footnote 205 above), paras. 2838-2846.
[292] See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2 ("[e]ach State Party shall make these crimes punishable by appropriate penalties …").
[293] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), para. (12) of the commentary to draft article 2, para. 2.

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[294] In some treaties, the issue of gravity is expressed using terms such as "extreme seriousness", "serious nature" or "extreme gravity" of the offences.[295]

Legal persons

(36) Paragraphs 1 to 6 of draft article 6 are directed at criminal liability of offenders who are natural persons, although the term "natural" is not used, which is consistent with the approach taken in treaties addressing crimes. Paragraph 7, in contrast, addresses the liability of "legal persons" for the offences referred to in draft article 6.

(37) Criminal liability of legal persons has become a feature of the national laws of many States in recent years, but it is still unknown in many other States.[296] In States where the concept is known, such liability sometimes exists with respect to international crimes.[297] Acts that can lead to such liability are, of course, committed by natural persons, who act as officials, directors, officers, or through some other position or agency of the legal person. Such liability, in States where the concept exists, is typically imposed when the offence at issue was committed by a natural person on behalf of or for the benefit of the legal person.

(38) Criminal liability of legal persons has not featured significantly to date in the international criminal courts or tribunals. The Nürnberg Charter, in articles 9 and 10, authorized the International Military Tribunal to declare any group or organization as a criminal organization during the trial of an individual, which could lead to the trial of other individuals for membership in the organization. In the course of the Tribunal's proceedings, as well as subsequent proceedings under Control Council Law No. 10, a number of such organizations were so designated, but only natural persons were tried and punished.[298] The International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda did not have criminal jurisdiction over legal persons, nor does the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal, or the Extraordinary African Chambers within the Senegalese Judicial System. The drafters of the 1998 Rome Statute noted that "[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute"[299] and, although proposals for inclusion of a provision on such responsibility were made, the 1998 Rome Statute ultimately did not contain such a provision.

(39) Liability of legal persons also has not been included in many treaties addressing crimes at the national level, including: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions; the 1970 Convention

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294 Convention against Torture, art. 4; see also Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 4 (b); International Convention for the Suppression of the Financing of Terrorism, art. 4 (b); OAU Convention on the Prevention and Combating of Terrorism, art. 2 (a).

295 See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Inter-American Convention to Prevent and Punish Torture, art. 6; Inter-American Convention on Forced Disappearance of Persons, art. III.

296 See, for example, *New TV S.A.L. Karma Mohamed Tashin Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision of 2 October 2014 on interlocutory appeal concerning personal jurisdiction in contempt proceedings, Appeals Panel, Special Tribunal for Lebanon, para. 58 ("the practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems").

297 See, for example, Ecuador Código Orgánico Integral Penal, *Registro Oficial, Suplemento, Año 1, N° 180*, 10 February 2014, art. 90. Penalty for a legal person (providing, in a section addressing crimes against humanity, that: "When a legal person is responsible for any of the crimes of this Section, it will be penalized by its dissolution").

298 See, for example, *United States v. Krauch and others, in Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII-VIII (Washington D.C., Nürnberg Military Tribunals, 1952).

299 See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June-17 July 1998, vol. III (A/CONF.183/13), document A/CONF.183/2, art. 23, para. 6, footnote 71.

for the Suppression of Unlawful Seizure of Aircraft; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1997 International Convention for the Suppression of Terrorist Bombings; and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The Commission's 1996 draft Code of Crimes only addressed the criminal responsibility of "an individual".[300]

(40) On the other hand, the 2014 African Union protocol amending the statute of the African Court of Justice and Human Rights, though not yet in force, provides jurisdiction to the reconstituted African Court over legal persons for international crimes, including crimes against humanity.[301] Further, although criminal jurisdiction over legal persons (as well as over crimes against humanity) is not expressly provided for in the statute of the Special Tribunal for Lebanon, the Tribunal's Appeals Panel concluded in 2014 that the Tribunal had jurisdiction to prosecute a legal person for contempt of court.[302]

(41) Moreover, there are several treaties that address the liability of legal persons for criminal offences, notably: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;[303] the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; [304] the 1999 International Convention for the Suppression of the Financing of Terrorism;[305] the 2000 United Nations Convention against Transnational Organized Crime;[306] the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; [307] the 2003 United Nations Convention against Corruption;[308] the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;[309] and a series of

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300 *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, p. 23.

301 See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, art. 46C.

302 *Al Khayat* (footnote 296 above). The Tribunal ultimately found that the legal person, Al Jadeed TV, was not guilty. See *Al Jadeed [Co.] S.A.L./New T.V.S.A.L.(N.T.V.) Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/T/CJ, Contempt Judge, Decision of 18 September 2015, Special Tribunal for Lebanon, para. 55; *Al Jadeed [Co.] S.A.L./New T.V.S.A.L.(N.T.V.) Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/A/AP, Appeals Panel, Decision of 8 March 2016.

303 See International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I, para. 2 ("The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid").

304 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989), United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57, art. 2, para. 14 ("For the purposes of this Convention: ... 'Person' means any natural or legal person") and art. 4, para. 3 ("The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal").

305 International Convention for the Suppression of the Financing of Terrorism, art. 5. For the proposals submitted during the negotiations that led to art. 5, see "Measures to eliminate international terrorism: report of the working group" (A/C.6/54/L.2) (26 October 1999).

306 United Nations Convention against Transnational Organized Crime, art. 10.

307 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000), United Nations, *Treaty Series*, vol. 2171, No. 27531, p. 227.

308 United Nations Convention against Corruption, art. 26. For background, see United Nations Office on Drugs and Crime, *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (United Nations publication, Sales No. E. 10.V.13), pp. 233-235 and *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2nd revised edition, 2012), pp. 107-113. For the analogous convention adopted by the Organisation for Economic Co-operation and Development, see Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 21 November 1997), art. 2 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official".).

309 Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (London, 14 October 2005), art. 5 (for the 1988

treaties concluded within the Council of Europe.[310] Other regional instruments address the issue as well, mostly in the context of corruption.[311] Such treaties typically do not define the term "legal person", leaving it to national legal systems to apply whatever definition would normally operate therein.

(42) The Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.

(43) Paragraph 7 of draft article 6 is modelled on the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol was adopted by the General Assembly in 2000 and entered into force in 2002. As of July 2017, 173 States are party to the Optional Protocol and another 9 States have signed but not yet ratified it. Article 3, paragraph 1, of the Optional Protocol obligates States parties to ensure that certain acts are covered under its criminal or penal law, such as the sale of children for sexual exploitation or the offering of a child for prostitution. Article 3, paragraph 4, then reads: "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".

(44) Paragraph 7 of draft article 6 uses the same language, but replaces "State Party" with "State" and replaces "for offences established in paragraph 1 of the present article" with "for the offences referred to in this draft article". As such, paragraph 7 imposes an obligation upon the State that it "shall take measures", meaning that it is required to pursue such measures in good faith. At the same time, paragraph 7 provides the State with considerable flexibility to shape those measures in accordance with its national law. First, the clause "[s]ubject to the provisions of its national law" should be understood as according to the State considerable discretion as to the measures that will be adopted; the obligation is "subject to" the State's existing approach to liability of legal persons for criminal offences under its national law. For example, in most States, liability of legal persons for criminal offences will only apply under national law with respect to certain types of legal persons and not to others. Indeed, under most national laws, "legal persons" in this context likely excludes States, Governments, other public bodies in the exercise of State authority, and public international organizations.[312] Likewise, the liability of legal persons under national laws can vary based on: the range of natural persons whose conduct can be attributed to the legal person; which modes of liability of natural persons can result in liability of the legal person; whether it is necessary to prove the *mens rea* of a natural

Convention and the Protocol thereto, see United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201).

[310] See, for example, Council of Europe, Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), United Nations, *Treaty Series*, vol. 2216, No. 39391, p. 225, art. 18, supplemented by the Additional Protocol (Strasbourg, 15 May 2003) (relating to bribery of arbitrators and jurors), *ibid*., vol. 2466, No. 39391, p. 168; European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977), *ibid*., vol. 1137, No. 17828, p. 93, art. 10.

[311] See, for example, Inter-American Convention against Corruption, art. 8; Southern African Development Community Protocol against Corruption (Blantyre, Malawi, 14 August 2001), art. 4, para. 2; African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), art. 11, para. 1.

[312] The Council of Europe Criminal Law Convention on Corruption makes explicit such exclusion (see, for example, art. 1 (d), "For the purposes of this Convention: … 'legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations".).

person to establish liability of the legal person; or whether it is necessary to prove that a specific natural person committed the offence.[313]

(45) Second, each State is obliged to take measures to establish the legal liability of legal persons "where appropriate". Even if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the specific context of crimes against humanity.

(46) For measures that are adopted, the second sentence of paragraph 7 provides that: "Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative". Such a sentence appears not just in the 2000 Optional Protocol, as discussed above, but also in other widely adhered-to treaties, such as the 2000 United Nations Convention against Transnational Organized Crime[314] and the 2003 United Nations Convention against Corruption. [315] The flexibility indicated in such language again acknowledges and accommodates the diversity of approaches adopted within national legal systems. As such, there is no obligation to establish criminal liability if doing so is inconsistent with a State's national legal principles; in those cases, a form of civil or administrative liability may be used as an alternative. In any event, whether criminal, civil or administrative, such liability is without prejudice to the criminal liability of natural persons provided for in draft article 6.

Article 7
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 referred 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.

Commentary

(1) Draft article 7 provides that each State must establish jurisdiction over the offences referred to in draft article 6 in certain cases, such as when the crime occurs in territory

[313] For a brief overview of divergences in various common law and civil law jurisdictions on liability of legal persons, see *Al Jadeed*, Contempt Judge, Decision of 18 September 2015 (see footnote 302 above), paras. 63-67.

[314] United Nations Convention against Transnational Organized Crime, art. 10, para. 2 ("Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative".); see also the International Convention for the Suppression of the Financing of Terrorism, art. 5, para. 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".).

[315] United Nations Convention against Corruption, art. 26, para. 2 ("Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative".).

under its jurisdiction, has been committed by one of its nationals or when the offender is present in territory under its jurisdiction.

(2) As a general matter, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern, so that there is no safe haven for those who commit the offence. Thus, according to the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind, "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes" set out in the draft Code, other than the crime of aggression, "irrespective of where or by whom those crimes were committed".[316] The breadth of such jurisdiction was necessary because: "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court".[317] The preamble to the 1998 Rome Statute provides "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", and further "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

(3) As such, when treaties concerning crimes address national law implementation, they typically include a provision on the establishment of national jurisdiction. For example, discussions within a working group of the Human Rights Commission convened to draft an international instrument on enforced disappearance concluded that: "The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective".[318] At the same time, such treaties typically only obligate a State party to exercise its jurisdiction when an alleged offender is present in the State party's territory (see draft article 9 below), leading either to a submission of the matter to the prosecuting authorities within that State party or to extradition or surrender of the alleged offender to another State party or competent international tribunal (see draft article 10 below).

(4) Reflecting on the acceptance of such an obligation in treaties, and in particular within the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, stated:

> The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases.[319]

(5) Provisions comparable to those appearing in draft article 7 exist in many treaties addressing crimes.[320] While no treaty yet exists relating to crimes against humanity, Judges

[316] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, art. 8.

[317] *Ibid*., para. (5) of the commentary to art. 8.

[318] Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 65.

[319] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 451, para. 75.

[320] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 5, para. 1 (a)-(b); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 3; International Convention Against the Taking of Hostages, art. 5; Inter-American Convention to Prevent and Punish Torture, art. 12; Convention against Torture, art. 5; Convention on the Safety of United Nations and Associated Personnel, art. 10; Inter-American

Higgins, Kooijmans and Buergenthal indicated in their separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that:

> The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking [and] torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted.[321]

(6) Draft article 7, paragraph 1 (a), requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction". Rather than refer solely to a State's "territory", the Commission considered it appropriate to refer to territory "under [the State's] jurisdiction" which, as was the case for draft article 4, is intended to encapsulate the territory *de jure* of the State, as well as other territory under its jurisdiction. Further, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State; indeed, States that have adopted national laws on crimes against humanity typically establish jurisdiction over acts occurring on such a vessel or aircraft.

(7) Draft article 7, paragraph 1 (b), calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction". Paragraph 1 (b) also indicates that the State may, on an optional basis, establish jurisdiction where the offender is "a stateless person who is habitually resident in the territory of that State". This formulation is based on the language of certain existing conventions, such as article 5, paragraph 1 (b), of the 1979 International Convention Against the Taking of Hostages.

(8) Draft article 7, paragraph 1 (c), concerns jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as "passive personality jurisdiction". Given that many States prefer not to exercise this type of jurisdiction, this jurisdiction is optional; a State may establish such jurisdiction "if that State considers it appropriate", but the State is not obliged to do so. This formulation is also based on the language of a wide variety of existing conventions.

(9) Draft article 7, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in the territory under the State's jurisdiction and the State does not extradite or surrender the person in accordance with the present draft articles. In such a situation, even if the crime was not committed in its territory, the alleged offender is not its national and the victims of the crime are not its nationals, the State nevertheless is obligated to establish jurisdiction given the presence of the alleged offender in territory under its jurisdiction. This obligation helps to prevent an alleged offender from seeking refuge in a State that otherwise has no connection with the offence.

(10) Draft article 7, paragraph 3, makes clear that, while each State is obligated to enact these types of jurisdiction, it does not exclude any other jurisdiction that is available under the national law of that State. Indeed, to preserve the right of States parties to establish national jurisdiction beyond the scope of the treaty, and without prejudice to any applicable rules of international law, treaties addressing crimes typically leave open the possibility that a State party may have established other jurisdictional grounds upon which to hold an alleged offender accountable.[322] In their joint separate opinion in the *Arrest Warrant* case,

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Convention on Forced Disappearance of Persons, art. IV; International Convention for the Suppression of Terrorist Bombings, art. 6; International Convention for the Suppression of the Financing of Terrorism, art. 7; OAU Convention on the Prevention and Combating of Terrorism, art. 6, para. 1; United Nations Convention against Transnational Organized Crime, art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, paras. 1-2; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VII, paras. 1-3.

[321] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

[322] See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, revised draft United Nations Convention against Transnational Organized Crime

Judges Higgins, Kooijmans and Buergenthal cited, *inter alia*, such a provision in the Convention against Torture, and stated:

> We reject the suggestion that the battle against impunity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis.[323]

(11) Establishment of the various types of national jurisdiction set out in draft article 7 are important for supporting an *aut dedere aut judicare* obligation, as set forth in draft article 10 below. In his separate opinion in the *Arrest Warrant* case, Judge Guillaume remarked on the "system" set up under treaties of this sort:

> Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. *It must have first conferred jurisdiction on its courts to try him if he is not extradited*. Thus, universal punishment of all the offences in question is assured, as the perpetrators are denied refuge in all States.[324]

Article 8
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.

Commentary

(1) Draft article 8 addresses situations where there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in territory under a State's jurisdiction. That State is best situated to conduct such an investigation, so as to determine whether crimes in fact have occurred or are occurring and, if so, whether governmental forces under its control committed the crimes, whether forces under the control of another State did so or whether they were committed by members of a non-State organization. Such an investigation can lay the foundation not only for identifying alleged offenders and their location, but also for helping to prevent the continuance of ongoing crimes or their recurrence by identifying their source. Such an investigation should be contrasted with a preliminary inquiry into the facts concerning a particular alleged offender who is present in a State, which is addressed below in draft article 9, paragraph 2.

(2) A comparable obligation has featured in some treaties addressing other crimes.[325] For example, article 12 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 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

(A/AC.254/4/Rev.4), footnote 102, p. 20; see also Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, European Treaty Series, No. 173, para. 83 ("Jurisdiction is traditionally based on territoriality or nationality. In the field of corruption these principles may, however, not always suffice to exercise jurisdiction, for example over cases occurring outside the territory of a Party, not involving its nationals, but still affecting its interests (e.g. national security). Paragraph 4 of this article allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well".).

[323] *Arrest Warrant of 11 April 2000* (see footnote 321 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

[324] *Ibid*., Separate Opinion of Judge Guillaume, para. 9 (emphasis added).

[325] See, for example, Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 2; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *European Treaty Series*, No. 210, art. 55, para. 1.

under its jurisdiction". That obligation is different from the State party's obligation under article 6, paragraph 2, of the 1984 Convention against Torture to undertake an inquiry into the facts concerning a particular alleged offender. As indicated, article 12 of the 1984 Convention against Torture requires that the investigation be carried out whenever there is "reasonable ground to believe" that the offence has been committed, regardless of whether victims have formally filed complaints with the State's authorities.[326] Indeed, since it is likely that the more systematic the practice of torture is in a given country, the fewer the number of official torture complaints that will be made, a violation of article 12 of the 1984 Convention against Torture is possible even if the State has received no such complaints. The Committee against Torture has indicated that State authorities must "proceed automatically" to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with "no special importance being attached to the grounds for the suspicion".[327]

(3) The Committee against Torture has also found violations of article 12 if the State's investigation is not "prompt and impartial".[328] The requirement of promptness means that as soon as there is suspicion of a crime having been committed, investigations should be initiated immediately or without any delay. In most cases where the Committee found a lack of promptness, no investigation had been carried out at all or had only been commenced after a long period of time had passed. For example, the Committee considered "that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention".[329] The rationale underlying the promptness requirement is that physical traces that may prove torture can quickly disappear and that victims may be in danger of further torture, which a prompt investigation may be able to prevent.[330]

(4) The requirement of impartiality means that States must proceed with their investigations in a serious, effective and unbiased manner. In some instances, the Committee against Torture has recommended that investigation of offences be "under the direct supervision of independent members of the judiciary".[331] In other instances, it has stated that "all government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so".[332] The Committee has stated that an impartial investigation gives equal weight to assertions that the offence did or did not occur, and then pursues appropriate avenues of inquiry, such as checking available government records, examining relevant government officials or ordering exhumation of bodies.[333]

(5) Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. For example, although the 1966 International Covenant on Civil and Political Rights contains no such express obligation, the Human Rights Committee has repeatedly asserted that States must investigate, in good

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[326] See *Encarnacíon Blanco Abad v. Spain*, Communication No. 59/1996, 14 May 1998, para. 8.2, in report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex X, sect. A.3; *Danilo Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, para. 7.3, *ibid*., *Sixty-first Session, Supplement No. 44* (A/61/44), annex VIII, sect. A.

[327] See *Dhaou Belgacem Thabti v. Tunisia*, Communication No. 187/2001, 14 November 2003, para. 10.4, *ibid*., *Fifty-ninth Session, Supplement No. 44* (A/59/44), annex VII, sect. A.

[328] See, for example, *Bairamov v. Kazakhstan*, Communication No. 497/2012, 14 May 2014, paras. 8.7-8.8, *ibid*., *Sixty-ninth Session, Supplement No. 44* (A/69/44), annex XIV.

[329] *Qani Halimi-Nedzibi v. Austria*, Communication No. 8/1991, 18 November 1993, para. 13.5, *ibid*., *Forty-ninth Session, Supplement No. 44* (A/49/44), annex V.

[330] *Encarnacíon Blanco Abad v. Spain* (see footnote 326 above), para. 8.2.

[331] Report of the Committee against Torture, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44* (A/49/44), chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Ecuador, paras. 97-105, at para. 105.

[332] *Ibid*., *Fifty-sixth Session, Supplement No. 44* (A/56/44), chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Guatemala, paras. 67-76, at para. 76 (d).

[333] *Khaled Ben M'Barek v. Tunisia*, Communication No. 60/1996, 10 November 1999, paras. 11.9-11.10, *ibid*., *Fifty-fifth Session, Supplement No. 44* (A/55/44), annex VIII, sect. A.

faith, violations of the Covenant.[334] Regional human rights bodies have also interpreted their legal instruments as implicitly containing a duty to conduct an investigation.[335]

Article 9
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.

Commentary

(1) Draft article 9 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present. Paragraph 1 calls upon the State to take the person into custody or take other legal measures to ensure his or her presence, in accordance with that State's law, but only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. Such measures are a common step in national criminal proceedings, in particular to avoid further criminal acts and a risk of flight by the alleged offender.

(2) Paragraph 2 provides that the State shall immediately make a preliminary inquiry into the facts. The national criminal laws of States typically provide for such a preliminary inquiry to determine whether a prosecutable offence exists.

(3) Paragraph 3 provides that the State shall also immediately notify the States referred to in draft article 7, paragraph 1, of its actions, and whether it intends to exercise jurisdiction. Doing so allows those other States to consider whether they wish to exercise jurisdiction, in which case they might seek extradition. In some situations, the State may not be fully aware of which other States have established jurisdiction (such as a State that optionally has established jurisdiction with respect to a stateless person who is habitually resident in that State's territory); in such situations, the feasibility of fulfilling the obligation may depend on the circumstances.

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[334] See Human Rights Committee, general comment No. 31, para. 15; see also *Nazriev v. Tajikistan*, Communication No. 1044/2002, views adopted on 17 March 2006, para. 8.2, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 40* (A/61/40), vol. II, annex V, sect. P); *Kouidis v. Greece*, Communication No. 1070/2002, views adopted on 28 March 2006, para. 9, *ibid*., sect. T; *Agabekov v. Uzbekistan*, Communication No. 1071/2002, views adopted on 16 March 2007, para. 7.2, *ibid*., *Sixty-second Session, Supplement No. 40* (A/62/40), vol. II, annex VII, sect. I; *Karimov v. Tajikistan* and *Nursatov v. Tajikistan*, Communication Nos. 1108/2002 and 1121/2002, Views adopted on 26 March 2007, para. 7.2, *ibid*., sect. H.

[335] See, for example, *Ergi v. Turkey*, Judgment, 28 July 1998, European Court of Human Rights, *Reports of Judgments and Decisions 1998-IV*, paras. 82 and 85-86; *Bati and Others v. Turkey*, Application Nos. 33097/96 and 57834/00, Final Judgment of 3 September 2004, First Section, European Court of Human Rights, ECHR 2004-IV, para. 133; *Paniagua Morales et al. v. Guatemala*, judgment of 8 March 1998, Inter-American Court of Human Rights, Series C, No. 37; *Extrajudicial Executions and Forced Disappearances of Persons v. Peru, Report No. 101/01*, 11 October 2001, Inter-American Commission of Human Rights, OEA/Ser./L/V/II.114 doc. 5 rev., p. 563.

(4) Both the General Assembly and the Security Council have recognized the importance of such preliminary measures in the context of crimes against humanity. Thus, the General Assembly has called upon "all the States concerned to take the necessary measures for the thorough investigation of … crimes against humanity … and for the detection, arrest, extradition and punishment of all … persons guilty of crimes against humanity who have not yet been brought to trial or punished".[336] Similarly, it has said that "refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of … crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law".[337] The Security Council has emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for … crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation".[338]

(5) Treaties addressing crimes typically provide for such preliminary measures,[339] such as article 6 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[340] Reviewing, *inter alia*, the provisions contained in article 6, the International Court of Justice has explained that "incorporating the appropriate legislation into domestic law … would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts …, a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution …".[341] The Court found that the preliminary inquiry is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. Those authorities who conduct the inquiry have the task of drawing up a case file containing relevant facts and evidence; "this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned".[342] The Court further noted that "the choice of means for conducting the inquiry remains in the hands of the States Parties", but that "steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case".[343] Further, the purpose of such preliminary measures is "to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the objective and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts".[344]

Article 10
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

[336] General Assembly resolution 2583 (XXIV) of 15 December 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 1.

[337] General Assembly resolution 2840 (XXVI) of 18 December 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 4.

[338] Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

[339] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 6; International Convention Against the Taking of Hostages, art. 6; Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Suppression of Terrorist Bombings, art. 7; International Convention for the Suppression of the Financing of Terrorism, art. 9; OAU Convention on the Prevention and Combating of Terrorism, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII.

[340] Convention against Torture, art. 6.

[341] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 319 above), p. 450, para. 72.

[342] *Ibid*., p. 453, para. 83.

[343] *Ibid*., p. 454, para. 86.

[344] *Ibid*., p. 451, para. 74.

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.

Commentary

(1) Draft article 10 obliges a State, in the territory under whose jurisdiction an alleged offender is present, to submit the alleged offender to prosecution within the State's national system. The only alternative means of meeting this obligation is if the State extradites or surrenders the alleged offender to another State or competent international criminal tribunal that is willing and able itself to submit the matter to prosecution. This obligation is commonly referred to as the principle of *aut dedere aut judicare*, a principle that has been recently studied by the Commission[345] and that is contained in numerous multilateral treaties addressing crimes.[346] While a literal translation of *aut dedere aut judicare* may not fully capture the meaning of this obligation, the Commission chose to retain the term in the title, given its common use when referring to an obligation of this kind.

(2) The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind defined crimes against humanity in article 18 and further provided, in article 9, that: "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual".[347]

(3) Most multilateral treaties containing such an obligation[348] use what is referred to as "The Hague formula", after the 1970 Hague Convention for the Suppression of Unlawful

[345] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI.

[346] "Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'", study by the Secretariat (A/CN.4/630).

[347] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D (art. 9); see also Commission on Human Rights resolution 2005/81 on impunity, para. 2 (recognizing "that States must prosecute or extradite perpetrators, including accomplices, of international crimes such as … crimes against humanity … in accordance with their international obligations in order to bring them to justice, and urg[ing] all States to take effective measures to implement these obligations").

[348] See Organization of American States (OAS), Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (Washington, D.C., 2 February 1971), United Nations, *Treaty Series*, vol. 1438, No. 24371, p. 195, art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa (Libreville, 3 July 1977), *ibid*., vol. 1490, No. 25573, p. 89, arts. 8 and 9, paras. 2-3; European Convention on the Suppression of Terrorism, art. 7; Inter-American Convention to Prevent and Punish Torture, art. 14; South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (Kathmandu, 4 November 1987), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 174, at art. IV, p. 176; Inter-American Convention on Forced Disappearance of Persons, art. 6; Inter-American Convention on International Traffic in Minors (Mexico, 18 March 1994), OAS, *Treaty Series*, No. 79, art. 9; Inter-American Convention against Corruption (Caracas, 29 March 1996), art. 13, para. 6; Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (Washington, D.C., 14 November 1997), art. 19, para. 6; League of Arab States, Arab Convention on the Suppression of Terrorism (Cairo, 22 April 1998), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 178, at art. 6, p. 183; Council of Europe, Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), *European Treaty Series*, No. 173, art. 27, para. 5; Convention of the Organisation of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1 July 1999), annex to resolution 59/26-P, art. 6; Council of Europe, Convention on Cybercrime (Budapest, 23 November 2001), *European Treaty Series*, No. 185, art. 24, para. 6; African Union Convention on Preventing and Combating Corruption, art. 15, para. 6; Council of Europe, Convention on the Prevention of Terrorism (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 196, art. 18; Council of Europe Convention on Action

Seizure of Aircraft.[349] Under that formula, the obligation arises whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition. Although regularly termed the obligation to extradite or "prosecute", the obligation is to "submit the case to its competent authorities for the purpose of prosecution", meaning to submit the matter to prosecutorial authorities, which may or may not decide to prosecute. In particular, if the competent authorities determine that there is insufficient evidence of guilt, then the accused need not be indicted, nor stand trial or face punishment.[350] The *travaux préparatoires* of the Convention for the 1970 Suppression of Unlawful Seizure of Aircraft indicate that the formula established "the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution".[351]

(4) In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice analysed The Hague formula in the context of article 7 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> "90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the 'obligation to prosecute') was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the 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 the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.
>
> "91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven …
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> …
>
> "94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or

against Trafficking in Human Beings (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 197, art. 31, para. 3; and ASEAN Convention on Counter Terrorism, art. XIII, para. 1.

[349] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 7.

[350] See Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", study by the Secretariat (A/CN.4/630), pp. 74-75.

[351] Statement of Chairperson Gilbert Guillaume (delegate from France), International Civil Aviation Organization, *Legal Committee, Seventeenth Session, Montreal, 9 February-11 March 1970, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Montreal, 1970), 30th meeting (3 March 1970) (Doc. 8877-LC/161), para. 15.

may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

"95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

…

"114. While Article 7, paragraph 1, of the Convention 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.

"115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is 'to make more effective the struggle against torture' (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

…

"120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him".[352]

(5) The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;[353] referral of the matter to a regional organization;[354] or difficulties with implementation under the State's internal law.[355]

(6) The first sentence of draft article 10 recognizes that the State's obligation can be satisfied by extraditing or surrendering the alleged offender not just to a State, but also to an international criminal tribunal that is competent to prosecute the offender. This third option has arisen in conjunction with the establishment of the International Criminal Court and other international criminal tribunals.[356] While the term "extradition" is often associated with the sending of a person to a State and the term "surrender" is typically used for the sending of a person to a competent international criminal tribunal, draft article 10 is written so as not to limit the use of the terms in that way. The terminology used in national criminal systems and in international relations can vary[357] and, for that reason, the Commission considered that a more general formulation is preferable. Further, while draft article 10

[352] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 319 above), pp. 454-461, paras. 90-91, 94-95, 114-115 and 120.

[353] *Ibid*. p. 460, para. 112.

[354] *Ibid*.

[355] *Ibid*. p. 460, para. 113.

[356] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI, sect. C (Final report on the topic), para. (35), pp. 155-156.

[357] See, for example, European Union, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, L 190, 18 July 2002, p. 1. Article 1 of the framework decision provides: "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and *surrender* by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (emphasis added).

might condition the reference to an international criminal tribunal so as to say that it must be a tribunal whose jurisdiction the sending State has recognized,[358] such a qualification was viewed as unnecessary.

(7) The second sentence of draft article 10 provides that, when a State submits the matter to prosecution or extradites or surrenders the person, its "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". Most treaties containing The Hague formula include such a clause, the objective of which is to help ensure that the normal procedures and standards of evidence relating to serious offences are applied.

(8) The obligation upon a State to submit the case to the competent authorities may conflict with the ability of the State to implement an amnesty, meaning legal measures that have the effect of prospectively barring criminal prosecution of certain individuals (or categories of individuals) in respect of specified criminal conduct alleged to have been committed before the amnesty's adoption, or legal measures that retroactively nullify legal liability previously established.[359] An amnesty granted by a State in which crimes have occurred may arise pursuant to its constitutional, statutory, or other law, and might be the product of a peace agreement ending an armed conflict. Such an amnesty might be general in nature or might be conditioned by certain requirements, such as disarmament of a non-State actor group, a willingness of an alleged offender to testify in public to the crimes committed, or an expression of apology to the victims or their families by the alleged offender.

(9) With respect to prosecution before international criminal tribunals, the possibility of including a provision on amnesty was debated during the negotiation of the 1998 Rome Statute of the International Criminal Court, but no such provision was included. Nor was such a provision included in the statutes of the international criminal tribunals for the former Yugoslavia or Rwanda. The former, however, held that an amnesty adopted in national law in relation to the offence of torture "would not be accorded international legal recognition".[360] The instruments establishing the Special Court for Sierra Leone[361] and the Extraordinary Chambers in the Courts of Cambodia[362] provided that an amnesty adopted in national law is not a bar to their respective jurisdictions. In addition, these courts recognized that there is a "crystallising international norm" [363] or "emerging consensus" [364] prohibiting amnesties in relation to serious international crimes, particularly in relation to blanket or general amnesties, based on a duty to investigate and prosecute those crimes and punish their perpetrators.

(10) With respect to prosecution before national courts, recently negotiated treaties addressing crimes in national law have not expressly precluded amnesties, including treaties addressing serious crimes. For example, the possibility of including a provision on amnesty was raised during the negotiation of the 2006 International Convention for the

[358] See International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 1.

[359] Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009), HR/PUB/09/1, p. 5.

[360] See *Prosecutor v. Furundžija* (see footnote 219 above), para. 155.

[361] Statute of the Special Court for Sierra Leone, art. 10 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution".).

[362] Extraordinary Chambers of Cambodia Agreement, art. 40 ("The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers".).

[363] See *Prosecutor v. Kallon and Kamara*, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004, paras. 66-74 and 82-84.

[364] See *Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis In Idem and Amnesty and Pardon)*, Case No. 002/19-09-2007/ECCC/TC, Judgment of 3 November 2011, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, paras. 40-53.

Protection of All Persons from Enforced Disappearance, but no such provision was included.[365] Regional human rights courts and bodies, including the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights, however, have found amnesties to be impermissible or as not precluding accountability under regional human rights treaties. [366] Expert treaty bodies have interpreted their respective treaties as precluding a State party from passing, applying or not revoking amnesty laws.[367] Further, the position of the Secretariat of the United Nations is not to recognize or condone amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights for United Nations-endorsed peace agreements.[368]

(11) With respect to the present draft articles, it is noted that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the

[365] Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), paras. 73-80.

[366] See, for example, *Barrios Altos v. Peru*, Judgment of 14 March 2001, Inter-American Court of Human Rights, Series C, no. 75, paras. 41-44; *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, Inter-American Court of Human Rights, Series C, no. 154, para. 114; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, Decision of 15 May 2006, African Commission on Human and Peoples' Rights, paras. 211-212. The European Court of Human Rights has taken a more cautious approach, recognizing the "growing tendency in international law" to regard amnesties for grave breaches of fundamental human rights as unacceptable, as they are incompatible with the unanimously recognized obligation of States to prosecute and punish such crimes. See *Marguš v. Croatia*, Application No. 4455/10, Judgment of 27 May 2014, European Court of Human Rights, Grand Chamber, para. 139.

[367] See, for example, Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, on article 7 in *Report of the Human Rights Committee, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI A, para. 15; Human Rights Committee, general comment No. 31, para. 18; Human Rights Committee, *Hugo Rodríguez v Uruguay*, communication No. 322/1988, Views adopted on 19 July 1994, para. 12.4. The Committee against Torture has held that amnesties against torture are incompatible with the obligations of States parties under the Convention against Torture. See, for example, general comment No. 3 (2012) on the implementation of article 14, in *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X, para. 41. The Committee on the Elimination of Discrimination against Women has also recommended that States parties ensure that substantive aspects of transitional justice mechanisms guarantee women's access to justice by, *inter alia*, rejecting amnesties for gender-based violence. Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations in *Report of the Committee on the Elimination of Discrimination against Women, Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 38* (A/69/38), chap. VII, para. 44, and CEDAW/C/GC/30, para. 81 (b).

[368] See, for example, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (23 August 2004), document S/2004/616, paras. 10, 32 and 64 (c). This practice was first manifested when the Special Representative of the Secretary-General of the United Nations attached a disclaimer to the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stating that "the amnesty provision contained in article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law". Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, document S/2000/915, para. 23. For additional views, see Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (see footnote 359 above), p. 11 ("Under various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law. Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations".); report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, document A/56/156, para. 33.

offence.[369] Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others.

Article 11
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.

Commentary

(1) Draft article 11 is focused on the obligation of the State to accord to an alleged offender who is present in territory under the State's jurisdiction fair treatment, including a fair trial and full protection of his or her rights. Moreover, draft article 11 acknowledges the right of an alleged offender, who is not of the State's nationality but who is in prison, custody or detention, to have access to a representative of his or her State.

(2) All States provide within their national law for protections of one degree or another for persons who they investigate, detain, try or punish for a criminal offence. Such protections may be specified in a constitution, statute, administrative rule or judicial precedent. Further, detailed rules may be codified or a broad standard may be set referring to "fair treatment", "due process", "judicial guarantees" or "equal protection". Such protections are extremely important in ensuring that the extraordinary power of the State's criminal justice apparatus is not improperly brought to bear upon a suspect, among other things preserving for that individual the ability to contest fully the State's allegations before an independent court (hence, allowing for an "equality of arms").

(3) Important protections are also now well recognized in international criminal law and human rights law. At the most general level such protections are acknowledged in articles 10 and 11 of the 1948 Universal Declaration of Human Rights,[370] while more specific standards binding upon States are set forth in article 14 of the 1966 International Covenant on Civil and Political Rights. As a general matter, instruments establishing standards for an international court or tribunal seek to specify the standards set forth in article 14 of the Covenant, while treaties addressing national law provide a broad standard that is intended to acknowledge and incorporate the specific standards of article 14 and of

[369] See, for example, *Ould Dah v. France*, Application No. 13113/03, Decision on admissibility of 17 March 2009, European Court of Human Rights, Fifth Section, para. 49, ECHR 2009.

[370] Universal Declaration of Human Rights, arts. 10-11.

other relevant instruments "at all stages" of the national proceedings involving the alleged offender.[371]

(4) These treaties addressing national law do not define the term "fair treatment", but the term is viewed as incorporating the specific rights possessed by an alleged offender, such as those under article 14 of the 1966 International Covenant on Civil and Political Rights. Thus, when crafting article 8 of the draft articles on crimes against diplomatic agents, the Commission asserted that the formulation of "fair treatment at all stages of the proceedings" was "intended to incorporate all the guarantees generally recognized to a detained or accused person", and that an "example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights".[372] Further, the Commission noted that the "expression 'fair treatment' was preferred, because of its generality, to more usual expressions such as 'due process', 'fair hearing' or 'fair trial' which might be interpreted in a narrow technical sense".[373] Finally, the Commission also explained that the formulation of "all stages of the proceedings" is "intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case".[374]

(5) While the term "fair treatment" includes the concept of a "fair trial", in many treaties reference to a fair trial is expressly included to stress its particular importance. Indeed, the Human Rights Committee has found the right to a fair trial to be a "key element of human rights protection" and a "procedural means to safeguard the rule of law".[375] Consequently, draft article 11, paragraph 1, refers to fair treatment "including a fair trial".

(6) In addition to fair treatment, an alleged offender is also entitled to the highest protection of his or her rights, whether arising under applicable national or international law, including human rights law. Such rights are set forth in the constitutions, statutes or other rules within the national legal systems of States. At the international level, they are set out in global human rights treaties, in regional human rights treaties[376] or in other applicable instruments.[377] Consequently, draft article 11, paragraph 1, also recognizes that the State

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[371] See, for example, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 9; International Convention Against the Taking of Hostages, art. 8, para. 2; Convention against Torture, art. 7, para. 3; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201, art. 10, para. 2; Convention on the Rights of the Child, art. 40, para. 2 (b); International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989), *ibid*., vol. 2163, No. 37789, p. 75, art. 11; International Convention for the Suppression of Terrorist Bombings, art. 14; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999), United Nations, *Treaty Series*, vol. 2253, No. 3511, art. 17, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 17; United Nations Convention against Transnational Organized Crime, art. 16, para. 13; United Nations Convention against Corruption, art. 44, para. 14; International Convention for the Suppression of Acts of Nuclear Terrorism, art. 12; International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. 8, para. 1.

[372] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), commentary to art. 8, p. 320.

[373] *Ibid*.

[374] *Ibid*.

[375] Human Rights Committee, general comment No. 32 (2007), on Article 14, Right to equality before courts and tribunals and to a fair trial, para. 2 and paras. 18-28, in *Official Records of the General Assembly, Sixty-second session, Supplement No. 40* (A/62/40), annex VI.

[376] See, for example, American Convention on Human Rights, art. 8; African Charter on Human and Peoples' Rights, art. 7; European Convention on Human Rights, art. 6.

[377] See, for example, Universal Declaration of Human Rights; American Declaration of the Rights and Duties of Man (Bogota, 2 May 1948), adopted by the Ninth International Conference of American States; Cairo Declaration on Human Rights in Islam, Organisation of Islamic Cooperation Resolution No. 49/19-P, annex; Charter of the Fundamental Rights of the European Union, adopted in Nice on 7 December 2000, *Official Journal of the European Communities*, No. C 364, 18 December 2000, p. 1.

must provide full protection of the offender's "rights under applicable national and international law, including human rights law".

(7) Paragraph 2 of draft article 11 addresses the State's obligations with respect to an alleged offender who is not of the State's nationality and who is in "prison, custody or detention". That term is to be understood as embracing all situations where the State restricts the person's ability to communicate freely with and be visited by a representative of his or her State of nationality. In such situations, the State in the territory under whose jurisdiction the alleged offender is present is required to allow the alleged offender to communicate, without delay, with the nearest appropriate representative of the State or States of which such a person is a national, or the State or States otherwise entitled to protect that person's rights. Further, the alleged offender is entitled to be visited by a representative of that State or those States. Finally, the alleged offender is entitled to be informed without delay of these rights. Moreover, paragraph 2 applies these rights as well to a stateless person, requiring that such person be entitled to communicate without delay with the nearest appropriate representative of the State which, at that person's request, is willing to protect that person's rights and to be visited by that representative.

(8) Such rights are spelled out in greater detail in article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations,[378] which accords rights to both the detained person and to the State of nationality[379] and in customary international law. Recent treaties addressing crimes typically do not seek to go into such detail but, like draft article 11, paragraph 2, instead simply reiterate that the alleged offender is entitled to communicate with, and be visited by, his or her State of nationality (or, if a stateless person, with the State where he or she usually resides or that is otherwise willing to protect that person's rights).[380]

(9) Paragraph 3 of draft article 11 provides that 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, provided that such laws and regulations do not prevent such rights being given the full effect for which they are intended. Those national laws and regulations may relate, for example, to the ability of an investigating magistrate to impose restrictions on communication for the protection of victims or witnesses, as well as standard conditions with respect to visitation of a person being held at a detention facility. A comparable provision exists in article 36, paragraph 2, of the 1963 Vienna Convention on Consular Relations[381] and has been included as well in many treaties addressing crimes.[382] The Commission explained the provision in its commentary to what became the 1963 Vienna Convention as follows:

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[378] Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, art. 36, para. 1.

[379] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 492, para. 74 ("Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection"), and, at p. 494, para. 77 ("Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights").

[380] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 6, para. 3; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 6, para. 2; International Convention Against the Taking of Hostages, art. 6, para. 3; Convention against Torture, art. 6, para. 3; Convention on the Safety of United Nations and Associated Personnel, art. 17, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 3; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 3; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 4.

[381] Vienna Convention on Consular Relations, art. 36, para. 2.

[382] See, for example, International Convention Against the Taking of Hostages, art. 4; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 4; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 4; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 4; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 5.

> "(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.
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> …
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> "(7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the rights in question".[383]

(10) In the *LaGrand* case, the International Court of Justice found that the reference to "rights" in article 36, paragraph 2, of the 1963 Vienna Convention on Consular Relations "must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual".[384]

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[383] *Yearbook … 1961*, vol. II, document A/4843, draft articles on consular relations and commentary, commentary to art. 36, paras. (5) and (7).

[384] *LaGrand* (see footnote 379 above), p. 497, para. 89.