

# **INTERNATIONAL LAW COMMISSION**

## **SECOND REPORT ON CRIMES AGAINST HUMANITY: POSITIVE ASPECTS AND CONCERNS**

**AMNESTY  
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Amnesty International has previously affirmed that the Draft articles on crimes against humanity should - in accordance with the ILC's mandate - codify existing rules under customary international law, as well as progressive developments that may contribute to bring all those suspected of criminal responsibility for crimes against humanity to justice, in fair trial and without recourse to the death penalty. The organization recalls the Special Rapporteur's own words in the sense that "[i]n several ways the adoption of a convention could promote desirable objectives not addressed in the Rome Statute" and the Commission's view that "[t]he present draft articles will contribute to the implementation of the principle of complementarity under the Rome Statute.....	21



# I. INTRODUCTION

In 2013 the International Law Commission (ILC), a subsidiary body of international law experts established by the United Nations General Assembly in 1947, whose objective is '[t]he promotion of the progressive development of international law and its codification',<sup>1</sup> decided to include on its long-term work programme the topic 'crimes against humanity'. A year later, the ILC moved the topic onto its programme of work and appointed Professor Sean D. Murphy as Special Rapporteur on that matter.<sup>2</sup>

In early 2015 the Special Rapporteur submitted his First Report addressing "[t]he potential benefits of developing draft articles that might serve as the basis of an international convention on crimes against humanity" and proposed two articles to that end.<sup>3</sup> In April, Amnesty International issued its first set of recommendations, 'Initial Recommendations for a Convention on Crimes against Humanity'.<sup>4</sup> Under the basis of the proposed articles, the ILC provisionally adopted the first four articles for a future convention on crimes against humanity.<sup>5</sup>

In early 2016, the Special Rapporteur submitted his Second Report on crimes against humanity ('Second Report'), proposing six new draft articles for consideration by the ILC.<sup>6</sup> The ILC shall discuss the Second Report and the proposed draft articles at its sixty-eighth session at the United Nations Office in Geneva from 2 May to 10 June 2016.

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<sup>1</sup> Article 1(1), Statute of the International Law Commission (adopted by the GA in res.174 (II) of 21 Nov. 1947, as amended by res.485 (V) of 12 Dec. 1950, 984 (X) of 3 Dec. 1955, 985 (X) of 3 Dec. 1955 and 36/39 of 18 Nov. 1981).

<sup>2</sup> *Yearbook of the International Law Commission 2014*, Supplement No.10 (A/69/10), para.266.

<sup>3</sup> International Law Commission, First Report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, A/CN.4/680, 17 Feb. 2015, para.2.

<sup>4</sup> Amnesty International, 'International Law Commission: Initial Recommendations for a Convention on Crimes against Humanity' (AI Index: IOR 40/1227/2015), 28 April 2015.

<sup>5</sup> *Yearbook of the International Law Commission 2015*, Supplement No. 10 (A/70/10), pp. 50-52 .

<sup>6</sup> International Law Commission, Second Report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, A/CN.4/690, 20 Jan. 2016.

## II. AMNESTY INTERNATIONAL POSITION ON A CONVENTION ON CRIMES AGAINST HUMANITY

When in 2014 the ILC announced the drafting of articles for the purposes of an international convention on crimes against humanity, Amnesty International welcomed the decision. The organization then stated that such a treaty could consolidate state obligations to investigate and prosecute crimes against humanity at national level and, therefore, has the potential to help end impunity.<sup>7</sup> However, Amnesty International recalled that the future convention should treat the standards in the Rome Statute of the International Criminal Court<sup>8</sup> (the Rome Statute) and other progressive iterations of obligations under international law as a baseline for the progressive development of international criminal law aimed at ending the perpetration of crimes against humanity and ensuring accountability.

Amnesty International notes that in its commentary to draft article 1 in August 2015, the ILC stated that “the present draft articles will avoid any conflicts with relevant existing treaties” and “the present draft articles will avoid any conflicts with the obligations of States arising under the constituent instruments of international or ‘hybrid’... criminal courts or tribunals, including the International Criminal Court”.<sup>9</sup> Nevertheless, Amnesty International reiterates that it calls on the ILC to ensure that all provisions meet the baseline established by the Rome Statute, respects all obligations under international law to prevent, repress and punish crimes against humanity and, where necessary, progressively develops international law to ensure accountability for all crimes against humanity. The draft convention must not merely represent the lowest common denominator.

The concerns raised and recommendations made to the ILC in this document often restate past positions of the organization on international criminal law issues, and relate, basically, to the six new draft articles proposed by the Special Rapporteur. Amnesty International is planning to issue, in the future, papers exposing a more extensive analysis of the current and subsequent proposals made by the Special Rapporteur.

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<sup>7</sup> See press release 'Initiative to draft new convention on crimes against humanity, new chance to strengthen fight against impunity', 18 July 2014 (IOR 51/001/2014).

<sup>8</sup> Rome Statute of the International Criminal Court (adopted 18 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

<sup>9</sup> *Yearbook... 2015*, pp.52-53.

## III. POSITIVE ASPECTS OF THE SECOND REPORT

The Special Rapporteur proposes six new draft articles in his Second Report. Amnesty International finds that several provisions are positive and should be adopted, even provisionally, by the ILC. Among them:

### 1. THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*) IN ITS 'TRIPLE ALTERNATIVE' FORMULA

As Amnesty International recommended to the ILC in its 'Initial Recommendations for a Convention on Crimes against Humanity', draft article 9(1), as proposed by the Special Rapporteur, sets out the obligation to extradite or prosecute (*aut dedere aut judicare*) in its 'triple alternative formula'. In other words, draft article 9(1) provides that if a person alleged to have committed a crime against humanity "is found in any territory under the jurisdiction or control of a state, that State shall submit the matter to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal."

Amnesty International reiterates (despite some concerns regarding the expression 'in any territory under its jurisdiction or control', see IV.2. below) its strong support for a provision stipulating the obligation to extradite or prosecute (*aut dedere aut judicare*) in a 'triple alternative' formula, as a progressive development of international law and, likely, codifying an emerging rule under customary international law.<sup>10</sup>

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<sup>10</sup> In the Final report by the ILC Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) of 5 June 2014, A/CN.4/L.844, the ILC found that 'The Working Group wishes to make clear that the foregoing [the fact that "there was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes"] should not be construed as implying that either the Working Group or the Commission as a whole has found that the obligation to extradite or prosecute has not become or is not yet crystallising into a rule of customary international law, be it a general or regional one' (paras.10 and 12). See also, Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay* case, Judgment, 22 September 2006, para.132, ("[a] State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory").

**Recommendation: the ILC should adopt a provision enshrining the obligation to extradite or prosecute (*aut dedere aut judicare*) under the 'triple alternative' formula for crimes against humanity.**

## 2. THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO CRIMES AGAINST HUMANITY

The non-applicability of statutory limitations to crimes against humanity - as well as to genocide, war crimes and aggression - is a crystalized rule of customary international law<sup>11</sup> and a useful tool against impunity. Consequently, the organization supports the non-applicability of statute of limitations to crimes against humanity as proposed in draft article 5(3).

**Recommendation: the ILC should adopt a provision on the non-applicability of statute of limitations to crimes against humanity.**

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<sup>11</sup> ICTY, *Furundžija*, IT-95-17/1, T. Chamber, Judgment, 10 Dec. 1998, para.157; ECHR, *August Kolk and Petr Kislyiy against Estonia*, Judgment, 17 Jan. 2006; IACtHR, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Judgment, 24 Nov. 2010, 256; C. Van der Wyngaert and J. Dugard, in Cassese, Gaeta & Jones (ed.), *The Rome Statute of the International Criminal Court: a commentary* (OUP 2002), p.887 ('It is difficult to suggest that customary international law prohibits statutory limitations in respect of all international crimes in the light of the silence of multilateral treaties creating international crimes on this subject. This position is different in the case of 'core' crimes of genocide, war crimes, crimes against humanity and aggression. There is support for the view that the prohibitions of these crimes constitute norms of *jus cogens*, and a necessary consequence of such a characterization is the inapplicability of statutory limitations'); A. Cassese, M. Delmas-Marty, *Crimes Internationaux et Jurisdiction Internationales* (Presses Universitaires de France - PUF 2002). p.239 ('On a dit qu'en 1996 la CDI estimait qu'il n'existait pas de règle coutumière sur l'imprescriptibilité des crimes internationaux. Il faut maintenant considérer si, à la lumière des développements les plus récents, on assiste à la formation d'une règle internationale qui prévoit l'imprescriptibilité des crimes internationaux, du moins des crimes les plus graves (...) Aujourd'hui on peut donc affirmer qu'une règle coutumière qui reconnaît l'imprescriptibilité des crimes relevant de la juridiction de la Cour est en train de se former (ou bien de se consolider, si l'on est plus optimiste)').



## IV. CONCERNS ARISING FROM THE PROPOSED DRAFT ARTICLES

### 1. THE LACK OF A PROVISION EXPLICITLY PERMITTING STATES TO EXERCISE UNIVERSAL JURISDICTION

Draft article 6 ('Establishment of national jurisdiction') prescribes:

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when:
  - (a) The offence is committed in any territory under its jurisdiction or control or on board a ship or aircraft registered in that State;
  - (b) The alleged offender is one of its nationals; and
  - (c) The victim is one of its nationals and the State considers it appropriate.
2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when the alleged offender is present in any territory under its jurisdiction or control, unless it extradites or surrenders the person in accordance with draft article 9, paragraph 1.
3. Without prejudice to applicable rules of international law, this draft article does not exclude the establishment of other criminal jurisdiction by a State in accordance with its national law.

The proposed article, which provides for territorial jurisdiction, as well as for active and passive personality principles (in the latter case, if the state considers it appropriate) is basically to be welcomed - despite the already mentioned concern on the expression 'in any territory under its jurisdiction or control' (see IV.2. below). Likewise, paragraph 3, which permits states to exercise any other jurisdictional principle in conformity with its national law (like, for example, universal jurisdiction) is also into line with the main regional and international human rights treaties.<sup>12</sup>

However, the use of the 'and' at the end of subparagraph 6(1)(b) is likely an error. No other treaty contains such a conjunction, which seems to add a cumulative condition for the exercise of jurisdiction under active and passive personality principles. Amnesty International suggests that this be replaced with the more normal "or" to ensure that the article reflects international law.

Furthermore, draft article 6 misses the chance to set out a fundamental rule under customary international law in jurisdictional matters. It should *explicitly* - and not

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<sup>12</sup> See, among others, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85, (article 5(3)); the International Convention for the Protection of All Persons from Enforced Disappearance (article 9(3)); the Inter-American Convention to Prevent and Punish Torture (article 12), etc.

only *implicitly* - permit any state to initiate investigations for crimes against humanity committed outside its territory which are not linked to the state by the nationality of the suspect or the victim and regardless of where those suspected of criminal responsibility are physically located.<sup>13</sup>

While Amnesty International is opposed to trials *in absentia*, except in certain narrowly defined circumstances, this does not prevent investigation of allegations of crimes against humanity even where the suspect is not within the jurisdiction of a national court.<sup>14</sup> Thus, as the Constitutional Court of South Africa stated in a ruling that Amnesty International has already quoted before:

Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. An anticipatory investigation does not violate fair trial rights of the suspect or accused person. A determination of presence or anticipated presence requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise. Furthermore, any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation. By way of example, it is only once a docket has been completed and handed to a prosecutor that there can be an assessment as to whether or not to prosecute<sup>15</sup>

It is true, as the Special Rapporteur states, that '[t]reaties such as the Convention against Torture do not obligate States Parties to establish jurisdiction over the alleged offender if he or she is not present in the State's territory'.<sup>16</sup> However, as a leading scholar has explained, crimes against humanity '[a]re amenable to any international penal jurisdiction and, while no treaty requires the exercise of universal jurisdiction over perpetrators, it may be assumed that such jurisdiction is *permitted*'.<sup>17</sup> (emphasis added)

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<sup>13</sup> See the 12 non-governmental organizations' joint letter to the ILC Special Rapporteur on crimes against humanity, 16 February 2016 (IOR 53/3512/2016).

<sup>14</sup> Amnesty International, Making the Right Choices II, June 1997, at IV(c)(2) ("Amnesty International believes that trials *in absentia* of an accused, except in the case of an accused who has deliberately absented himself or herself after the trial has begun, or for as long as an accused continues to disrupt the proceedings, are unjust"). Amnesty International, Fair Trial Manual (POL 30/002/2014), 9 April 2014, Chapter 21(2) (The Manual is also available in Arabic, French, Spanish, and Russian).

<sup>15</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, para.48.

<sup>16</sup> ILC, Second Report, para.114.

<sup>17</sup> N. Rodley and M. Pollard, *Treatment of Prisoners under International Law*, Second ed. (Oxford

Amnesty International reiterates that, since all states are permitted under customary international law to exercise jurisdiction on crimes against humanity regardless of where the crimes were committed, the Draft articles should explicitly permit them to do so. Furthermore, since it is a matter of fundamental importance that the jurisdictional basis in such cases be understood as rooted in international - rather than national - law, such an ability should be *explicitly* enshrined in the Convention, and not just *implicitly* covered by a general provision.

As the organization stated 15 years ago, '[T]he weight of scholarship, jurisprudence of international criminal courts and intergovernmental organization, political bodies and experts demonstrates that international criminal law permits any state to exercise universal jurisdiction over crimes against humanity.'<sup>18</sup>

That view seems to be shared by some national courts, like the *Cour de Cassation* of France, which, in the *Barbie* case, concluded:

Qu'en raison de leur nature, les crimes contre l'humanité pour lesquels Barbie est inculpé ne relèvent pas seulement du droit pénal interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères<sup>19</sup>

Likewise, the Court of Appeal of Amsterdam, in the *Bouterse* case, found that:

[c]ustomary international law, as it stood in 1982, gave a state competence to exercise extraterritorial (universal) jurisdiction over a person accused of a crime against humanity when that person was not a national of the state<sup>20</sup>

And the International Criminal Tribunal for the former Yugoslavia (ICTY) found in the *Furundžija* case that:

It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes<sup>21</sup>

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Clarendon Press, 2009) 185.

<sup>18</sup> Amnesty International, *Universal Jurisdiction: the duty of states to enact and enforce legislation*, Chapter five, AI Index: IOR 53/008/2001, September 2001, p.5.

<sup>19</sup> *Cour de Cassation, Chambre criminelle, Audience publique du 6 octobre 1983, N° de pourvoi : 83-93194.*

<sup>20</sup> Decision of 20 November 2000 by the fifth three-judge section charged with dealing with civil matters on the complaint — with the petition numbers R 97/163/12 Sv and R 97/176/12, para.5-2 (translation by the International Commission of Jurists).

<sup>21</sup> ICTY, *The Prosecutor v. A. Furundžija*, Case No. IT-95-17/1-T, T. Chamber II, Judgment, 10

While adopting the draft article on the scope of jurisdiction, it should also be borne in mind, *mutatis mutandi*, that the ICRC study on customary international humanitarian law has found, as a rule of such a nature, that: 'States have the right to vest universal jurisdiction in their national courts over war crimes'.<sup>22</sup>

**Recommendation: the ILC should permit, through an explicit provision, any state to initiate investigations for crimes against humanity committed outside its territory, which are not linked to the state by the nationality of the suspect or the victim and regardless of where those suspected of criminal responsibility are physically located.**

## 2. THE EXPRESSION 'IN ANY TERRITORY UNDER ITS JURISDICTION OR CONTROL'.

The expression 'in any territory under its jurisdiction or control' is found in draft articles 4, 6, 7, 8 and 9 and, in some cases, even more than once in an article.

For example, draft article 6(1)(a) stipulates that:

Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5, paragraphs 1 and 2, when... The offence is committed in any territory under its jurisdiction or control or on board a ship or aircraft registered in that State

And draft Article 7(1) provides that:

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reason to believe that a crime against humanity has been or is being committed in any territory under its jurisdiction or control

According to the ILC, this formula 'covers the territory of a State, but also covers activities carried out in other territory under the State's control'.<sup>23</sup> The ILC has previously explained that '[t]he function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de*

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Dec.1998, para.156

<sup>22</sup> J.M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law (ICRC, Cambridge), Rule 157, 604.

<sup>23</sup> *Yearbook of the International Law Commission 2015, A/70/10*, p.82.

*jure*, such as in cases of unlawful intervention, occupation and unlawful annexation.<sup>124</sup>

Amnesty International considers that the fact that the draft articles declare two separate forms of competence *ratione loci*, jurisdiction and control, implying that both terms are two separate concepts, whereas the fundamental human rights conventions mention only jurisdiction (covering both *de jure* and *de facto* jurisdiction), may have unintended yet adverse consequences on the interpretation of these existing conventions.

The Human Rights Committee General Comment 31, while interpreting the expression 'within its territory and subject to its jurisdiction' contained in Article 2(1) of the International Covenant on Civil and Political Rights,<sup>25</sup> has found that:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party (...) This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.<sup>26</sup>

The Torture Convention contains a similar provision, namely:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases... When the offences are committed *in any territory under its jurisdiction* or on board a ship or aircraft registered in that State<sup>27</sup> (emphasis added).

The Committee against Torture has recalled, in a similar sense:

[i]ts general comment No. 2, in which it states that the jurisdiction of a State

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<sup>24</sup> *Yearbook of the International Law Commission 2001*, A/56/10, p.384.

<sup>25</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

<sup>26</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.10.

<sup>27</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5(1)(a).

party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law (...) This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention<sup>28</sup>

In sum, Amnesty International considers that the expression 'in any territory under its jurisdiction and control' contained in several draft articles, despite the laudable attempt to make clear that it covers both *de jure* jurisdiction and *de facto* control, may undermine existing treaty human rights law, and should be replaced by the 'in any territory under its jurisdiction' formula, in the understanding, as stated by the treaty bodies, that it covers both *de jure* and *de facto* jurisdiction (and thus covers situations of effective control over enjoyment of the right). This would reflect the position under international law that obligations under the Convention, including positive obligations of arrest, investigation and prosecution, are applicable wherever the state has effective control, authority or power over the arrest of the person suspected of an offence defined in the Convention.<sup>29</sup>

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<sup>28</sup> Committee against Torture, Forty-first session (3-21 November 2008), Decision, Communication No. 323/2007, CAT/C/41/D/323/2007, 21 November 2008, para.8. See also International Convention for the Protection of All Persons from Enforced Disappearance, article 9(1)(a) ('Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance... When the offence is committed *in any territory under its jurisdiction* or on board a ship or aircraft registered in that State'). (emphasis added)

<sup>29</sup> Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10 ("States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party"). With regard to the issue of state control over an area outside national territory, see also, inter alia, Human Rights Committee, Concluding observations on Israel, CCPR/C/ISR/CO/3, para. 5; Committee against Torture, Concluding observations on Israel, CAT/C/ISR/CO/4, para. 11; European Court of Human Rights, *Al-Skeini and others v United Kingdom*, Application No. 55721/07, paras 139 and 149; European Court of Human Rights, *Ivantoc and others v Moldova and Russia*, Application No. 23687/05, paras 116 to 120; European Court of Human Rights, *Ilaşcu and others v Russia and Moldova*, Application No. 48787/99, paras 314 to 316; European Court of Human Rights, *Cyprus v Turkey*, Application No. 25781/94, para. 77; European Court of Human Rights, *Loizidou v Turkey (Merits)*, Application No. 15318/89, para. 52; European Court of Human Rights, *Loizidou v Turkey (Preliminary objections)*, Application No. 15318/89, paras 62 to 64. International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, 2011, Article 7 ("The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be

**Recommendation: the ILC should remove the terms 'or control' in draft article 4, 6, 7, 8 and 9.**

### 3. SUPERIOR ORDERS AND ORDERS OF THE GOVERNMENT

While draft article 5(3)(a) correctly reflects the rule under international law that superior orders do not exclude criminal responsibility for crimes under the convention, it does not make the same rule explicit with regard to orders of a government.

Draft article 5(3)(a) proposed by the Special Rapporteur states:

Each State also shall take the necessary measures to ensure that... [T]he fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate

A leading scholar has noted, whilst commenting on article 33 of the Rome Statute (Superior orders and prescription of law), that an order of a Government may be issued by all its branches or persons belonging to the Government and in charge of functions which permit them to act on behalf of a Government. Orders of a Government - a legally established or *de facto* one - do not necessarily have to address persons individually and, as an example, the late professor Otto Triffterer said that: 'An order of a Government to all civilian and military forces to cleanse a certain territory of a specific ethnical group is - even though not addressing individuals as such - an order to everyone belonging to the specific unit and therefore one of the orders envisaged by article 33.'<sup>30</sup>

In pointed contrast, Draft article 5(3)(a) deviates from previous ILC conclusions. Three times in the past the ILC found that the *order of a government* or a superior may not relieve a person from individual criminal responsibility for crimes against humanity.

The Principles of International Law Recognized in the Charter of the Nurnberg

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considered under international law an act of the latter organization if the organization exercises effective control over that conduct") and related commentary, including p. 22, para. 8 ("[...] when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question").

<sup>30</sup> O. Triffterer, in O. Triffterer (second ed.), Commentary to the Rome Statute (Baden Baden, Nomos 2008), article 33, margin No.18. See also E. Heugas-Darraspen, in Statut de Rome de la Cour pénale internationale, Commentaire article par article, article 33, p.950 ("En réalité, ce qui compte, tant dans le cas du gouvernement que dans celui du supérieur hiérarchique, c'est que cette personne ou cette entité ait donné un ordre a l'accusé dans l'exercice des prérogatives de puissance publique. Autrement dit, il doit s'agir d'un ordre auquel le subordonné ne peut pas se soustraire").

Tribunal and in the Judgment of the Tribunal, adopted by the ILC in 1950, declares:

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him<sup>31</sup>

The 1954 Draft Code of Offences against the Peace and Security of Mankind declares:

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order<sup>32</sup>

The 1996 Draft Code of Crimes against the Peace and Security of Mankind affirms:

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires<sup>33</sup>

In addition, the Charter of the International Military Tribunal (Nuremberg),<sup>34</sup> the Charter of the International Military Tribunal for the Far East,<sup>35</sup> the Control Council Law No.10,<sup>36</sup> the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>37</sup> the Statute of the International Criminal Tribunal for Rwanda

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<sup>31</sup> Principle IV.

<sup>32</sup> Article 4.

<sup>33</sup> Article 5 (Order of a Government or a superior).

<sup>34</sup> Article 8 ("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").

<sup>35</sup> Article 6, Responsibility of accused ("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").

<sup>36</sup> Article 4(2)(b) ("The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation").

<sup>37</sup> Article 7(4) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires").



(ICTR),<sup>38</sup> the Rome Statute of the International Criminal Court,<sup>39</sup> and the Statute of the Special Court for Sierra Leone,<sup>40</sup> all provide that those who commit crimes against humanity and other crimes under international law pursuant to an order of a Government (in addition to military and civilian superiors) shall not be relieved of individual criminal responsibility. The International Convention for the Protection of All Persons from Enforced Disappearance contains a similar provision.<sup>41</sup>

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<sup>38</sup> Article 6(4) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires").

<sup>39</sup> Article 33(1) ("The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility (...)").

<sup>40</sup> Article 6(4) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires").

<sup>41</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 Dec. 2006, entered into force 23 Dec. 2010, 2716 UNTS 3, Art.6(2) ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance").

National legislation of several states, like Burkina Faso,<sup>42</sup> Canada,<sup>43</sup> Chile,<sup>44</sup> Comoros,<sup>45</sup> the Democratic Republic of Congo,<sup>46</sup> Germany,<sup>47</sup> Korea (Republic of),<sup>48</sup>

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<sup>42</sup> Loi No 052-2009/AN portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour Pénale Internationale par les juridictions burkinabés, Article 11 ('Le fait qu'un crime relevant de la présente loi a été commis sur l'ordre d'un gouvernement, d'une autorité publique ou d'un supérieur, militaire ou civil, n'exonère pas la personne qui l'a commis de sa responsabilité pénale...').

<sup>43</sup> Canada, Crimes Against Humanity and War Crimes Act, 8 Aug. 2011, Sec.14(1) ('In proceedings for an offence under any of sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior — whether military or civilian — to perform the act or omission that forms the subject-matter of the offence...');

<sup>44</sup> Chile, Ley 20.357 (26 June 2009), article 36 ('La orden de cometer una acción o de incurrir en una omisión constitutiva de delito conforme a esta ley, así como la orden de no impedirlos, impartida por una autoridad o jefe militar o el que actúe efectivamente como tal, a un subalterno, lo hace responsable como autor').

<sup>45</sup> Loi 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome, art.11 ('Le fait qu'un crime relevant de la présente loi a été commis sur l'ordre d'un gouvernement, d'une autorité publique ou d'un supérieur, militaire ou civil, n'exonère pas la personne qui l'a commis de sa responsabilité pénale...').

<sup>46</sup> Code pénal (2016), Article 23 quater ('Le fait qu'une des infractions visées par le titre IX de la présente loi a été commise sur ordre d'un gouvernement ou d'un supérieur, militaire ou civil, n'exonère pas son auteur de sa responsabilité pénale).

<sup>47</sup> Act to Introduce the Code of Crimes against International Law of 26 June 2002, Section 3 - Acting upon orders ('Whoever commits an offence pursuant to Sections 8 to 14 in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful').

<sup>48</sup> Act on the punishment of crimes within the jurisdiction of the International Criminal Court, 21 Dec. 2007, article 4 (Superior orders) ('If any person who is under legal obligation to obey orders of the Government or the superior commits genocide or other crimes against humanity without knowing that the order was unlawful and have justifiable reason for not knowing this, he or she shall not be punished').

Mauritius,<sup>49</sup> the Netherlands,<sup>50</sup> the Philippines,<sup>51</sup> Samoa,<sup>52</sup> Switzerland,<sup>53</sup> etc., also provide in terms of superior orders for those who act pursuant 'to an order of a Government'.

In conclusion, although the prohibition of superior orders contained in Draft article 5(3)(a) is undoubtedly an asset, the provision should be carefully worded so as not to exclude those who may commit a crime against humanity 'pursuant to an order of a Government'.

**Recommendation: the ILC should amend draft article 5(3)(a) so as to also include those who may commit a crime against humanity 'pursuant to an order of a Government.'**

#### 4. THE RIGHT TO CONSULAR ASSISTANCE

Draft article 10(2) provides:

Any such person taken into custody by a State that is not of his or her nationality shall be:

(a) Permitted 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;

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<sup>49</sup> The International Criminal Court Act 2011, 26 July 2011, Article 6(2)(a) ("It shall not be a defence to an offence under section 4 nor a ground for a reduction of sentence for a person convicted of an offence under that section to plead that he did the act constituting such offence in obedience to, or in conformity with, the law in force at the time, or pursuant to an order by a Government or a superior, whether military or civilian...").

<sup>50</sup> International Criminal Offences Act (Wet internationale misdrijven – WIM), 19 June 2003, Section 11(1) ("The fact that a crime as defined in this Act was committed pursuant to a regulation issued by the legal power of a State or pursuant to an order of a superior does not make that act lawful").

<sup>51</sup> Republic Act no. 9851, 27 July 2009, Section 12 (Orders from a Superior) ("The fact that a crime defined and penalized under this Act has been committed by a person pursuant to an order of a government or a superior, whether military or civilian, shall not relieve that person of criminal responsibility...").

<sup>52</sup> International Criminal Court Act 2007, Section 10 ("Notwithstanding section 9, it shall not be a defence to an offence under sections 5, 6 or 7 for the person charged with the offence to plead that the person committed the act constituting such offence pursuant to an order by a Government or a superior, whether military or civilian...").

<sup>53</sup> Code pénal, 18 June 2010, Article 264 L ("Le subordonné qui commet un des actes visés aux titres 12bis et 12ter sur ordre d'un supérieur ou en obéissant à des instructions le liant d'une manière similaire est punissable s'il a conscience, au moment des faits, du caractère punissable de son acte").

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

(c) Informed without delay of his or her rights under this subparagraph.

Draft article 10(2) provides for the right to consular assistance. That provision is obviously inspired by the provisions of Article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations (VCCR), to which 177 states are parties.<sup>54</sup> As the International Court of Justice found in the *LaGrand* case '[a]rticle 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State (...)'.<sup>55</sup>

While Amnesty International welcomes the incorporation of the right to consular assistance to the Draft Articles, the wording of article 10(2) is a matter of concern.

First, unlike the VCCR, which provides for the right to consular assistance to those foreigners or stateless persons 'in prison, custody or detention',<sup>56</sup> draft article 10(2) just makes reference to those 'in custody'. Needless to say, such a deviation from the provisions of the VCCR may encourage some states to limit or restrict the scope of protection of the right to consular assistance.

Second, and again unlike the VCCR, draft article 10(2) does not provide for the right of consular agents to arrange for the legal representation of the foreigner or stateless persons deprived of liberty.

Third, from Amnesty International's standpoint, the right to consular assistance - which should also encompass a range of other acts, including arranging a lawyer, obtaining evidence from the home country and monitoring treatment, including respect for the individual's rights - should be provided to any foreign national or stateless person *regardless of their immigration status*.<sup>57</sup>

In that sense Resolution 65/212 of the General Assembly has reaffirmed,

emphatically the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, *regardless of their immigration status*, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention<sup>58</sup> (emphasis added)

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<sup>54</sup> Vienna Convention on Consular Relations, done at Vienna on 24 April 1963. Entered into force on 19 March 1967. United Nations, Treaty Series, vol. 596, p. 261.

<sup>55</sup> *LaGrand* (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p.497.

<sup>56</sup> See article 36(1)(c), VCCR. In addition, article 36(1)(b) refers to the case where 'a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner'.

<sup>57</sup> Amnesty International, Fair Trial Manual, p.214.

<sup>58</sup> Res.65/212, Protection of Migrants, adopted by the General Assembly on 21 December 2010,

**Recommendation: the ILC should incorporate in draft article 10(2) the right to consular assistance to any foreigner or stateless person deprived of his or her liberty in any form whatsoever - and not only those 'in custody' - and that such a right is regardless of their immigration status.**

## 5. THE LACK OF A PROVISION PROHIBITING STATUTE OF LIMITATIONS FOR CIVIL TORT CLAIMS

As statutory limitations do not apply to genocide, crime against humanity and war crimes, they should not apply to criminal or civil proceedings in which victims of crimes against humanity seek full reparation. Amnesty International considers that, as a progressive development of international law, the Draft articles should enshrine not only the non-applicability of statutes of limitations for criminal proceedings on crimes against humanity, but also for civil tort claims - whether made in a civil proceeding or as part of a criminal proceeding. The organization has already explained that opinion.<sup>59</sup>

The 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' provides:

When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries<sup>60</sup>

**Recommendation: the ILC should provide that statute of limitations does not apply to civil tort claims based on crimes against humanity, whether made in civil, administrative or criminal proceedings.**

## IV. RECOMMENDATIONS

Amnesty International has previously affirmed that the Draft articles on crimes against humanity should - in accordance with the ILC's mandate - codify existing rules under customary international law, as well as progressive developments that may contribute to bring all those suspected of criminal responsibility for crimes against humanity to justice, in fair trial and without recourse to the death penalty. The organization recalls the Special Rapporteur's own words in the sense that "[i]n several ways the adoption of a convention could promote desirable objectives not

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A/RES/65/212, 4(g).

<sup>59</sup> See Amnesty International, No impunity for enforced disappearances, Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (IOR 51/006/2011), November 2011, p.18.

<sup>60</sup> Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 23.

addressed in the Rome Statute<sup>61</sup> and the Commission's view that "[t]he present draft articles will contribute to the implementation of the principle of complementarity under the Rome Statute."<sup>62</sup>

In sum, Amnesty International recommends the International Law Commission to:

***Aut dedere aut judicare***

- Adopt a provision enshrining the obligation to extradite or prosecute (*aut dedere aut judicare*) under the 'triple alternative' formula for crimes against humanity.

**Statute of limitations**

- Adopt a provision on the non-applicability of statute of limitations to crimes against humanity.

**Universal jurisdiction**

- Permit any state, through an explicit provision, to initiate investigations for crimes against humanity committed outside its territory, which are not linked to the state by the nationality of the suspect or the victims and regardless of where those suspected of criminal responsibility are physically located.

**The expression 'in any territory under its jurisdiction or control'**

- Remove the terms 'or control' in draft articles 4, 6, 7, 8 and 9.

**Superior orders**

- Amend draft article 5(3)(a) so as to also include those who may commit a crime against humanity 'pursuant to an order of a Government'.

**The right to consular assistance**

- Incorporate in draft article 10(2) the right to consular assistance to any foreigner or stateless person deprived of his or her liberty in any form whatsoever - and not only those 'in custody'-and to state that such a right is regardless of their immigration status.

**Statute of limitations for civil tort claims**

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<sup>61</sup> ILC, First Report, para.21.

<sup>62</sup> ILC, 2015 Annual Report, p.53.

- Provide that statute of limitations does not apply to civil tort claims based on crimes against humanity, whether made in civil, administrative or criminal proceedings.

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