

17-Point Program for a Convention on Crimes against Humanity

In 2017 the International Law Commission (ILC) provisionally approved, on first reading, the Draft Articles on crimes against humanity - in view 'of developing draft articles that might serve as the basis of an international convention on crimes against humanity'. The Draft Articles have already been transmitted to Governments, international organizations and others for comments and observations by 1 December 2018. It includes 15 draft articles, a draft preamble, an annex and a General Commentary on the 15 articles.

The following recommendations are raised by Amnesty International in order to enhance the draft text and make it a useful tool against impunity.

1. Definition of crimes against humanity

Although the definition contained in draft article 3 covers the vast majority of crimes against humanity possible, it could be improved. For example, the definition of enforced disappearance includes the wording 'with the intention of removing them from the protection of the law for a prolonged period of time', which is absent in the definition contained in the International Convention for the Protection of All Persons from Enforced Disappearance (CIPED), should be removed. And persecution - which under draft article 3 may only be committed in connection with other crimes under international law - should be a separate and autonomous crime against humanity, independent of any other crime, like in the Statute of the International Criminal Tribunal for the Former Yugoslavia.

2. Lifting immunities in the case of crimes against humanity

States may, by agreement, waive, limit or exclude, to the extent they see fit, the inviolability or immunity from jurisdiction accorded to their own heads of state, heads of government or ministers of foreign affairs before foreign jurisdictions. In consequence, Amnesty International recommends for the Convention a provision similar to that in Article 27(2) of the Rome Statute of the International Criminal Court.

3. *Nullum crimen sine lege* - exception to the rule

Nothing in the Convention must prejudice the investigation, trial and punishment of any person for any act or omission which, at the time of its commission, was a crime against humanity under general principles of international law. The Convention should contain an explicit provision, inspired by Article 15(2) of the International Covenant on Civil and Political Rights.

4. Non-applicability of statutory limitations

Crimes against humanity should not be subject to statutes of limitation.

5. Non-applicability of statutory limitations to civil tort suits

As statutory limitations do not apply to genocide, crimes against humanity and war crimes, they should not apply to criminal or civil proceedings in which victims of any crime under international law, including crimes against humanity, seek full reparation.

6. Obligation to extradite or prosecute (*aut dedere aut judicare*)

When a person suspected of criminal responsibility for a crime against humanity is found in any place subject to the jurisdiction of a state party, the state concerned must bring that person to justice, unless it decides to extradite him or her to another state or surrender the person concerned to an international criminal court or tribunal. Draft Article 10 should therefore be retained.

7. Responsibility of commanders and other superiors

Principles of superior responsibility with regard to civilians contained in draft Article 6(3) are not as strict as required by customary international law, as well as conventional international law, such as Protocol I, which holds civilian superiors to the same standards as military commanders. To ensure that national systems of justice are as effective as possible, the organization recommends that on the matter customary international law is incorporated. Draft Article 6(3) should be amended accordingly.

8. The right to a fair trial for persons under investigation and prosecution

The Convention must ensure suspects and accused the amplest right to a fair trial in accordance with the highest standards of international law, during all stages of proceedings. Draft article 11 does not seem to fully reflect that right, as enshrined, for example in Article 55 (Rights of persons during an investigation) and Article 67 (Rights of the accused) of the Rome Statute of the International Criminal Court.

9. Prohibition of amnesties and other similar measures of impunity

Amnesties and other similar measures of impunity must be explicitly prohibited in the Convention, codifying a rule under customary international law.

10. Prohibition of military courts

The Convention should provide that persons suspected of criminal responsibility for crimes against humanity shall be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of military jurisdictions.

11. Prohibition of reservations

Inspired by the precedent set by Article 120 of the Rome Statute of the International Criminal Court the Convention must declare that no reservation whatsoever may be made to any provision of this treaty.

12. The right to consular assistance

Draft Article 11(2) should incorporate the right to consular assistance to any foreigner or stateless person deprived of his or her liberty *regardless of their immigration status*, as provided in UN Doc. A/RES/65/212. In addition, draft Article 11(2) should also encompass a range of other acts, which are absent so far, including arranging a lawyer, obtaining evidence from the home country and monitoring treatment, including respect for the individual's rights.

13. Non-refoulement

Although draft Article 5 should in general be welcomed, the decisive element is that of change in jurisdiction, which in some cases may even occur within the same country, such as when occupying forces hand over a person to another occupying force, or forces of the occupied state.

In such a sense, Amnesty International considers that the expressions 'territory under' at para.1 and 'the territory under' at para.2 should be removed from draft Article 5, since both restrict the scope of the obligation. Nevertheless, draft Article 5 could be further enhanced: *non-refoulement* should not only be limited to prohibiting extradition or other removals whenever there are substantial grounds for believing that a person would be in danger of being subjected only to a crime against humanity, but also to any other crime under international law, like genocide, war crimes, torture, enforced disappearance, or extrajudicial execution, or when the person may reasonably face other risks of serious human rights violations, application of the death penalty, trials before military courts or commissions, etc.

14. Victims

Amnesty International welcomes, in general, draft Article 12, which sets out states' obligations in relation to victims, witnesses and others, including access to justice, protection, participation, and reparation. However, the organization recommends a number of amendments to the draft Article to ensure that victims' rights are fully recognized and ultimately realised, namely:

- Draft Article 12 should contain a definition of victim, like the one set out in Article 24 of CPED, and avoid leaving the definition to states' domestic legislation;
- Draft Article 12 should be amended to impose an obligation on states parties to examine the complaints lodged by victims or their representatives, in order to determine whether there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed;
- Draft Article 12 should also require the state party to inform victims of the progress and results of the examination of the complaint and any subsequent investigation.
- Draft Article 12(2) should clarify that victims should be provided with legal representation where appropriate.
- Draft Article 12(3) should be amended to recognize that victims of crimes against humanity have a right to "prompt, full and effective" reparation; that multiple measures drawing from all forms of reparation will be required to address the harm suffered by victims; and that, in addition to ensuring that victims can obtain reparation in states' legal system, states should also establish reparation programs to meet their obligations.

15. Right to truth

Establishing the truth about crimes against humanity is particularly important given that widespread or systematic attacks against civilian populations often involve spreading misinformation that promotes or seeks to justify discrimination against victims, as well as targeting said groups. The extent of the crimes is often concealed and contested. Therefore, a new provision, inspired by Article 24(2) of the Enforced Disappearance Convention and Principle 4 of the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, should be included.

16. Designation of a non-political central authority on cooperation and mutual legal assistance

The provision requiring states parties to designate a central authority with the responsibility and power to receive mutual legal assistance requests and to implement them or see that they are implemented (draft Annex, 2), reflects best practice. However, it does not eliminate one of the most serious obstacles to mutual legal assistance, which is that decisions whether to make or to grant requests for such assistance are often made by political officials, not professional law enforcement officials, prosecutors or judges.

17. Federal states obligations - the territorial scope of the Convention

Inspired by Article 29 of the Vienna Convention on the Law of Treaties (VCLT), which reflects customary international law, the 1966 International Covenant on Civil and Political Rights, the 1989 International Covenant on Civil and Political Rights Second Optional Protocol, aiming at the Abolition of the Death Penalty, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the new Convention should incorporate a provision whereby the new Treaty is binding upon each party in respect of all places under the state and its various components' jurisdiction.

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