

**GENERAL
RECOMMENDATIONS TO
STATES FOR A
CONVENTION ON
PREVENTION AND
PUNISHMENT OF
CRIMES AGAINST
HUMANITY**

**UN GA SIXTH COMMITTEE FIRST
RESUMED SESSION ON THE
DRAFT ARTICLES ON PREVENTION
AND PUNISHMENT OF CRIMES
AGAINST HUMANITY (NEW YORK,
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I. INTRODUCTION

The UN General Assembly Sixth Committee First Resumed Session on the Draft Articles on Prevention and Punishment of Crimes against Humanity is scheduled to take place 10-14 April 2023.¹ Ahead of this session Amnesty International shares some recommendations with participating states. Most of the recommendations raised in this paper, which are aimed at contributing to consolidate state obligations to investigate and prosecute crimes against humanity at the national level, have already been addressed to the attention of the International Law Commission (ILC) during the drafting process (2014-2019).

As Amnesty International has previously stated, the Draft Articles on Prevention and Punishment of Crimes against Humanity, adopted by the ILC in 2019, contain a number of positive provisions which states should enshrine in the new treaty. However, some provisions would benefit from amendment, because they are flawed, not adequate for the purposes of fighting impunity, or fail to reflect the highest standards of international law.

For the purposes of this First Resumed Session the organization would like to highlight the following recommendations. They are not meant to be an exhaustive account of Amnesty International's views on the Draft Articles.

II. RECOMMENDATIONS TO STATES

1. The prohibition of crimes against humanity, a peremptory norm of general international law (*jus cogens*)

As the ILC has stated,² the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*).

Article 53 of the Vienna Convention on the Law of Treaties (VCLT) provides that a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a

¹ UN Doc. A/RES/77/249 adopted on 30 December 2022.

² ILC, Report on the Work of the Seventy-Third Session (2022), UN Doc. A/77/10, Chapter IV, Conclusion 23 and its commentary.

subsequent norm of general international law having the same character.³ In other words, peremptory norms - like the absolute prohibitions of slavery⁴ and torture,⁵ are hierarchically superior to other norms of international law and, therefore, override such norms in the case of conflict.

A leading scholarly authority has explained that among the legal obligations arising out *jus cogens* are the duty to prosecute or extradite, the non-applicability of statutes of limitations, the non-applicability of the defense of 'obedience to superior orders', the universal application of these obligations whether in time of peace or armed conflict and the non-derogation under 'states of emergency'.⁶

- Amnesty International calls on states to retain the fourth paragraph in the Preamble of the Draft Articles related to the *jus cogens* nature of the prohibition of crimes against humanity.

2. The definition of crimes against humanity (Draft Article 2)

Amnesty International considers that Draft Article 2 ('Definition of crimes against humanity'), which almost verbatim follows Article 7 of the Rome Statute of the International Criminal Court (Rome Statute),⁷ essentially codifies the vast majority of recognized crimes against humanity. However, Draft Article 2 could still be improved without substantially altering the spirit of the Rome Statute definitions.

Amnesty International considers that definitions of crimes in the Draft Convention should be at least as broad as the definitions in the Rome Statute, but whenever international treaties or customary law contain

³ Vienna Convention on the Law of Treaties (adopted in Vienna on 23 May 1969; entry into force: 27 January 1980), 1155 UNTS 331.

⁴ Chambre Africaine Extraordinaire D'Assises, *Ministère Public c. Hisssein Habré*, Jugement, 30 mai 2016, para.1484. See, also, G. Mettraux, *International Crimes, Law and Practise*, Volume II: Crimes against Humanity, OUP 2020, 415.

⁵ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports 2012, para. 99.

⁶ C. Cheriff Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, Law and Contemporary Problems, Vol.59, No. 4, 63.

⁷ Rome Statute of the International Criminal Court (adopted in Rome on 17 July 1998; entry into force: 1 July 2002), 2187 UNTS 3.

broader definitions, those definitions should be incorporated.

Two of the crimes against humanity set out in Draft Article 2 (enforced disappearance and persecution) contain *jurisdictional thresholds* – as they do in Article 7 of the Rome Statute. These additional *jurisdictional thresholds* are not to be found in the crimes' definitions under customary international law. While states negotiating the Rome Statute may have wished to restrict the International Criminal Court's competence on some crimes, these *jurisdictional thresholds* are inappropriate for a treaty that is to be applied only by states parties to the Convention in their own national courts and not by any international criminal court.

Firstly, the definition of the crime against humanity of enforced disappearance includes the expression 'with the intention of removing them [the disappeared persons] from the protection of the law for a prolonged period of time'.⁸ Such an expression is absent in the definition of the crime contained in the International Convention for the Protection of All Persons from Enforced Disappearance (CPED),⁹ as well as in the 1992 Declaration on the Protection of all Persons from Enforced Disappearance.¹⁰ The wording there ('which place such a person outside the protection of the law') is generally agreed to be a consequence of an enforced disappearance, not a definitional limitation to whether the crime has occurred.

On the issue of 'prolonged period of time', it is Amnesty International's position that when the period of time in which a person should already have been brought before a judicial authority for control of the lawfulness of his or her detention (as required by national and international law) has elapsed, but the person has not in fact been brought before a judicial authority, there can be no question that the person has been placed outside the protection of the law, even if the period has not been 'prolonged'. Moreover, the initial stage of disappearance is often when the disappeared person is in an increased situation of vulnerability and at heightened risk of torture or extrajudicial execution. It is of utmost importance that the definition of this

⁸ Amnesty International, No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance, available at www.amnesty.org/en/documents/ior51/006/2011/en/, pp.5-6.

⁹ International Convention for the Protection of All Persons from Enforced Disappearance (adopted in New York on 20 December 2006; entry into force, 23 December 2010), 2716 UNTS 3.

¹⁰ Declaration on the Protection of all Persons from Enforced Disappearance, GA Res. 47/133 of 18 Dec. 1992.

crime against humanity includes this period.

- The organization recommends removing the expression 'with the intention of removing them from the protection of the law for a prolonged period of time' from the Draft Article 2(2)(i).

Secondly, Article 2(1)(h) of the Draft Articles demands that persecution must be committed 'in connection with any act referred to in this paragraph'. As the organization has previously explained in detail,¹¹ the crime against humanity of persecution should be an autonomous crime, independent of any other crime against humanity. The particularly heinous form of discrimination inherent in persecution in itself warrants criminalization, not only in the form of its manifestation in other crimes of humanity.

- The organization recommends removing the expression 'in connection with any act referred to in this paragraph' contained in Draft Article 2(1)(h) and codify the formulation of the crime against humanity of persecution as provided by customary international law.

3. Abrogation of definition of gender

Amnesty International welcomes the ILC decision not to include the definition of gender contained in Article 7(3) of the Rome Statute in the Draft Articles, as that definition does not fully acknowledge the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys. In addition, several laws implementing the Rome Statute into national law have omitted such a flawed definition.¹²

- States should not reintroduce the definition of gender of Article 7(3) of the Rome Statute in the Draft Articles.

4. Legality principle (*nullum crimen sine lege*) - exception

¹¹ See, Amnesty International, The problematic formulation of persecution under the Draft Convention on Crimes against Humanity, available at www.amnesty.org/en/documents/ior40/9248/2018/en/.

¹² See, for example, Code pénal France, Articles 212-1 à 212-3; Chile, Ley 20.357 of 18 July 2009 (Official Gazette); Burkina Faso, Loi N°025-2018/AN, portant Code pénal, 31 May 2018; Congo (Republic of), Loi N°8 - 98, 31 October 1998; Dominican Republic, Código Penal, Ley No. 550-14, 19 December 2014; Korea (Republic of), Act on Punishment of Crimes under Jurisdiction of the International Criminal Court, Act No.8719, 21 December 2007, amended by Act No. 10577, 12 April 2011, etc.

to the rule

As provided by Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR), to which 173 states are party so far, nothing in the Draft Articles on Prevention and Punishment of Crimes against Humanity should prejudice the criminal investigation, trial or punishment of any person for any act or omission committed in the past which, at the time of its commission, was considered a crime against humanity according to the general principles of law recognized by the community of nations.¹³

- Amnesty International recommends incorporating a new provision into the Draft Articles based on Article 15(2) ICCPR.

5. Non-applicability of statutory limitations (Draft Article 6(6))

Draft Article 6(6) contains a ban on statutes of limitations. However, the wording of the article appears to require further national implementing legislation ('*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*') (emphasis added).

Draft Article 6(6) could be considerably enhanced by a revision which would provide a more 'self-executing' provision, similar to the one in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity¹⁴ or one based on Article 29 of the Rome Statute.¹⁵

- Amnesty International calls on states to provide for a 'self-executing'

¹³ See, Special Tribunal for Lebanon, Appeals Chamber (Judge Cassese presiding), case *STL-II-0111*, Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, paras.131-143. See, also, ICRC, Customary International Humanitarian Law, Rule 101 ('No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national *or international law* at the time it was committed...') (emphasis added).

¹⁴ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted in New York, 26 November 1968; entry into force: 11 November 1970), 754 UNTS 73. Article I ('No statutory limitation shall apply to the following crimes, irrespective of the date of their commission...').

¹⁵ Rome Statute, Article 29 ('The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.').

prohibition of statute of limitations.

6. Non-applicability of statutory limitations to civil tort suits or other claims for reparation

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

- Amnesty International encourages states to incorporate a provision whereby statutory limitations do not apply to criminal or civil proceedings in which victims of crimes against humanity seek full reparation.

7. Obligation to extradite or prosecute (*aut dedere aut judicare*) (Draft Article 10)

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 for the purposes of a criminal investigation, unless it decides to extradite the suspect to another state or surrender the person concerned to an international criminal court or tribunal.

Draft Article 10, the obligation to extradite or prosecute (*aut dedere aut judicare*), enshrines one of the most important provisions in terms of fighting impunity. A similar provision may be found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶ the International Convention for the Protection of All Persons from Enforced Disappearance,¹⁷ and the draft Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and Other International Crimes.¹⁸

- Amnesty International strongly encourages all states to retain Draft

¹⁶ Article 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted in New York, 10 December 1984; entry into force: 26 June 1987), 1465 UNTS 85.

¹⁷ Article 11, CPED.

¹⁸ See, for the initiative: www.gov.si/en/registries/projects/mla-initiative/.

Article 10.

8. Responsibility of commanders and other superiors (Draft Article 6(3))

The text of the provision on the responsibility of commanders and other superiors contained in the text of the Draft Articles adopted by the ILC on first reading in 2017 fell short of international law. Principles of superior responsibility with regard to civilians in the then Draft Article 6(3)(b)(i) and (ii) were 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.¹⁹ Therefore, Amnesty International welcomes the amendment of current Draft Article 6(3), which holds civilian superiors to the same standards as military commanders.

- Amnesty International calls on states to adopt current Draft Article 6(3).

9. Fair treatment of the alleged offender (Draft Article 11(1))

The Draft Articles should ensure that any person suspected of criminal responsibility for a crime against humanity, as well as any person so accused, is afforded the right to a fair trial in accordance with the highest standards of international law during all stages of proceedings. Draft Article 11(1) does not seem to fully reflect that right, as set out, for example, in Article 55 ('Rights of persons during an investigation') and Article 67 ('Rights of the accused') of the Rome Statute.

- The organization calls on states to amend Draft Article 11(1) by following an approach similar to the Rome Statute.

10. Prohibition of military courts

The Draft Convention should provide that persons suspected of criminal responsibility for crimes against humanity, including military personnel, shall be tried only in the competent jurisdictions of ordinary law in each

¹⁹ Article 87(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977. See also, *mutatis mutandi*, ICRC, Customary International Humanitarian Law, Rule 152 ('Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders').

state, to the exclusion of any exceptional jurisdiction and, in particular, of military courts or commissions.

- Amnesty International encourages states to incorporate a new article providing that trials for crimes against humanity shall only take place before the competent jurisdictions of ordinary law in each state, to the exclusion of any exceptional jurisdiction, including military courts or commissions.

11. The right to consular assistance (Draft Article 11(2))

Draft Article 11(2) should incorporate that the individual right to consular assistance²⁰ of any foreign national or stateless person deprived of his or her liberty exists regardless of their immigration status, as provided in UN Doc. A/RES/65/212.²¹ In addition, Draft Article 11(2) should also explicitly encompass the arranging of a lawyer by the state exercising consular assistance and upon request by the detainee, as provided by the Vienna Convention on Consular Relations (VCCR) - and which is absent so far in the Draft Article.²²

Finally, the Draft Article should include that the rights to have informed, communicate with and be visited by consular representatives should be afforded to individuals who are nationals of both the state that has arrested or detained them and a foreign state.

- Draft Article 11(2) should incorporate the right to consular assistance to any foreign national or stateless person deprived of his or her liberty regardless of their immigration status.
- The Draft Article should also provide for consular authorities to have the right to arrange for the legal representation of the person deprived of liberty upon request of the detainee, as provided by Article 36(1)(c) of the VCCR.

²⁰ *Lagrand case (Germany v. United States of America)*, Judgment, 27 June 2001, para77 ('the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person').

²¹ See, also, *Jadhav (India v. Pakistan)*, Judgment, I.C.J. Reports 2019, paras.75 and 86.

²² Vienna Convention on Consular Relations (adopted in Vienna on 24 April 1963; entry into force: 19 March 1967), 596 UNTS 261.

- Draft Article 11 should provide that the rights to have informed, communicate with and be visited by consular representatives must be afforded to individuals who are nationals of both the state that has arrested or detained them and the sending state.

12. Prohibition of amnesties and other similar measures of impunity

Amnesties and other similar measures of impunity should be explicitly prohibited in the Draft Articles, codifying a rule under customary international law.²³ The organization considers that a prohibition of amnesties for crimes under international law is a necessary legal consequence of the peremptory character (*jus cogens*) of the prohibition of certain conducts, including crimes against humanity.

The International Tribunal for the Former Yugoslavia,²⁴ the European Court of Human Rights,²⁵ the Inter American Court of Human Rights,²⁶ the Special Court for Sierra Leone,²⁷ the African Commission on Human and Peoples'

²³ See, Amnesty International, International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity, 2015, III (3).

²⁴ ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1, Trial Chamber, Judgment, 10 Dec. 1998, paras.155-6.

²⁵ ECHR, *Ould Dah v. France*, Decision of 17 March 2009.

²⁶ Inter American Court of Human Rights, case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of November 24, 2010 (Preliminary Objections, Merits, Reparations, and Costs), para.137.

²⁷ SCSL, Appeals Chamber, *Prosecutor v. Moinina Fofana*, Decision on preliminary motion on lack of jurisdiction: illegal delegation of jurisdiction by Sierra Leone, 25 May 2004, para.3.

Rights,²⁸ and national courts of Argentina,²⁹ Brazil,³⁰ Chile,³¹ El Salvador,³² Ethiopia,³³ and Peru,³⁴ among others states where crimes against humanity have been committed in the past, have shared the view that amnesties for those suspected of criminal responsibility for crimes against humanity are impermissible under customary international law.

Likewise, since the adoption of the Rome Statute several states have passed laws or amended national constitutions prohibiting amnesties for crimes under international law, including crimes against humanity. Among them, for example, Argentina,³⁵ Burkina Faso,³⁶ Burundi,³⁷ Central African

²⁸ African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Decision of 15 May 2006, para.201.

²⁹ Corte Suprema de Justicia de la Nación, *Mazzeo, Julio L. y otros s/ rec. de casación e inconstitucionalidad*, 13 July 2007, para.19 ("[e]s la propia imposibilidad de declinar el juzgamiento de crímenes de lesa humanidad [por prescripción, indulto o cosa juzgada] la que se ha transformado en una norma del denominado derecho internacional imperativo o *ius cogens*").

³⁰ Tribunal Regional Federal da 2ª Região, *181-Habeas Corpus Criminal*, Turma Espec.I, Penal, Previdenciário e Propriedade Industrial ("[T]ais crimes, evidentemente, se enquadram na descrição de crimes contra a humanidade e o dever do Brasil de processar e punir seus agentes deriva do caráter cogente do Direito Internacional ao qual o Brasil se encontrava sujeito desde a época dos fatos").

³¹ Suprema Corte, Sala penal, *Molco case*, Rol N° 559-2004, 13 Dec. 2006; and Corte de Apelaciones de Valparaíso, ROL:96-10, MJJ24129, 4 June 2010.

³² Sala de lo Constitucional de la Corte Suprema de Justicia, *44-2013/145-2013, Inconstitucionalidad*, 13 July 2016.

³³ Central High Court, Addis Ababa, *Col. Mengistu Haile Mariam et al. case*, May 23rd, 1995 ('It is, however, a well-established custom and belief that war crimes and crimes against humanity are not subject to amnesty and aren't barred by limitation').

³⁴ Corte Superior de Justicia de Lima (Primera Sala Penal Especial), *Julio Rolando Salazar Monroe et al.*, 03-2003-1° SPE/CSJLI, 8 April 2008, para.216.

³⁵ *Ley 27.156*, 31 July 2015, article 1 ('Las penas o procesos penales sobre los delitos de genocidio, de lesa humanidad y crímenes de guerra contemplados en los artículos 6°, 7° y 8° del Estatuto de Roma de la Corte Penal Internacional y en los tratados internacionales de derechos humanos con jerarquía constitucional, no pueden ser objeto de amnistía, indulto o conmutación de pena, bajo sanción de nulidad absoluta e insanable del acto que lo disponga').

³⁶ *Loi 052/2009 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 burkinabé*, Art.14 ('Les infractions et les peines prévues par la présente loi sont imprescriptibles. Elles ne sont susceptibles ni d'amnistie ni de grâce').

³⁷ *Loi n°1/05 du 22 avril 2009, Code Pénal du Burundi*, Art.171 ('Le génocide, le crime contre l'humanité et le crime de guerre ne peuvent faire objet d'aucune loi d'amnistie').

Republic,³⁸ Colombia,³⁹ Comoros,⁴⁰ Côte d'Ivoire,⁴¹ Democratic Republic of

³⁸ *Loi No.08-020 portant amnistie générale à l'endroit des personnalités, des militaires, des éléments et responsables civils des groupes rebelles*, 13 Oct. 2008, Art.2 ('Sont exclues de la présente Loi d'Amnistie, les incriminations visées par le Statut de Rome, notamment: les crimes de génocide; les crimes contre l'humanité; les crimes de guerre ou toute autre crime relevant de la compétence de la Cour Pénale Internationale').

³⁹ *Acuerdo de Paz*, 24 Nov. 2016, art.40 ('No serán objeto de amnistía ni indulto ni de beneficios equivalentes los delitos de lesa humanidad, el genocidio, los graves crímenes de guerra -esto es, toda infracción del Derecho Internacional Humanitario cometida de forma sistemática -, la toma de rehenes u otra privación grave de la libertad, la tortura, las ejecuciones extrajudiciales, la desaparición forzada, el acceso carnal violento y otras formas de violencia sexual, la sustracción de menores, el desplazamiento forzado, además del reclutamiento de menores, todo ello conforme a lo establecido en el Estatuto de Roma').

⁴⁰ *Loi 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome*, Art.14 ('Les infractions et les peines prévues par la présente loi sont imprescriptibles. Elles ne sont susceptibles ni d'amnistie ni de grâce');

⁴¹ *Loi n° 2003-309 du 8 août 2003 portant amnistie*, Art.4 ('La présente loi d'amnistie ne s'applique pas: b) aux infractions constitutives de violations graves des droits de l'homme et du droit international humanitaire; d) aux infractions visées par les articles 5 à 8 du Traité de Rome sur la Cour Pénale Internationale (CPI) et la Charte Africaine des Droits de l'Homme et des Peuples").

Congo,⁴² Ecuador,⁴³ Panama,⁴⁴ Paraguay,⁴⁵ Uruguay,⁴⁶ and Venezuela⁴⁷. Equally important are the Philippines' Republic Act No.10353 of 23 July 2012,⁴⁸ and Mexico's Law of 26 June 2017,⁴⁹ which prohibit amnesty for enforced disappearances and torture, respectively.

- Amnesty International urges all states to incorporate a new provision whereby amnesties and other similar measures of impunity shall be explicitly prohibited in the Draft Convention.

⁴² *Loi n°014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques*, Art.4 ('Sont exclus du champ d'application de la présente loi, le crime de génocide, les crimes contre l'humanité, les crimes de guerre, le terrorisme, les infractions de torture, de traitements cruels, inhumains ou dégradants, les infractions de viol et autres violences sexuelles, l'utilisation, la conscription ou l'enrôlement d'enfants et toutes autres violations graves, massives et caractérisées des droits humains').

⁴³ *Constitución de la República del Ecuador*, Art.80 ('Las acciones y penas por delitos de genocidio, lesa humanidad, crímenes de guerra, desaparición forzada de personas o crímenes de agresión a un Estado serán imprescriptibles. Ninguno de estos casos será susceptible de amnistía').

⁴⁴ *Código Penal de Panamá*, Art.115(3) ('No se aplicará el indulto ni la amnistía en los delitos contra la Humanidad y en el delito de desaparición forzada de personas').

⁴⁵ *Ley No.5877 que implementa el Estatuto de Roma que crea la Corte Penal Internacional*, Official Gazette, 29 September 2017, Art.10 ('Los hechos punibles y penas tipificadas en la presente Ley, no podrán declararse extinguidos por indulto, conmutación, amnistía o por cualquier otro instituto de clemencia que impida el juzgamiento de los sospechosos o el cumplimiento efectivo de las condenas impuestas').

⁴⁶ *Ley 18.026* of 4 Oct. 2006, Art.8 ('Improcedencia de amnistía y similares. Los crímenes y penas tipificados en los Títulos I a III de la Parte II de la presente ley, no podrán declararse extinguidos por indulto, amnistía, gracia, ni por ningún otro instituto de clemencia, soberana o similar, que en los hechos impida el juzgamiento de los sospechosos o el efectivo cumplimiento de la pena por los condenados').

⁴⁷ *Constitución de la República Bolivariana de Venezuela*, 2009, Art.29 ('[L]as acciones para sancionar los delitos de lesa humanidad, violaciones graves a los derechos humanos y los crímenes de guerra son imprescriptibles (...) Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía').

⁴⁸ Sec.23 ('Persons who are charged with and/or guilty of the act of enforced or involuntary disappearance shall not benefit from any special amnesty law or other similar executive measures that shall exempt them from any penal proceedings or sanctions');

⁴⁹ *Ley general para prevenir, investigar y sancionar la tortura y otros tratos o penas crueles, inhumanos o degradantes*, 21 June 2017, Art.17 ('Artículo 17.- Ninguna persona procesada o sentenciada por el delito de tortura podrá beneficiarse de inmunidades, indultos, amnistías, figuras análogas o con similares efectos').

13. *Non-refoulement* (Draft Article 5)

Amnesty International welcomes the inclusion of Draft Article 5. Nevertheless, the Draft Article should be expanded: *non-refoulement* should not only be limited to prohibiting expulsion, return, surrender or extradition where there are substantial grounds for believing that a person would face a risk of being subjected to a crime against humanity, but also to any other crime under international law, such as genocide, war crimes, torture, enforced disappearance, or extrajudicial execution, or serious human rights violations or abuses, including application of the death penalty, flagrantly unfair trials, or trials before military courts or commissions.

- Amnesty International recommends that Draft Article 5 be amended so as to provide for the prohibition of any transfer or removal, such as expulsion, return, surrender or extradition, in case of a risk of being also subjected to any crime under international law or other serious human rights violations or abuses, including the death penalty, unfair trials, or trials before military courts or commissions.

14. Victims

Victims of crimes against humanity have rights to truth, justice, and reparation. The right to truth entails an obligation of states to promptly, impartially and effectively investigate crimes against humanity and to ensure that the truth of any crime is publicized. The right to justice requires a prompt and effective remedy and entails the obligation of states to combat impunity and to bring all those suspected of criminal responsibility to justice through fair trials before ordinary civilian courts and without recourse to death penalty. Finally, the right to reparation entails a right of victims to full, prompt, and effective restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for material, physical, financial, and moral harms they suffered due to the crimes.

Many key provisions concerning victims' rights to remedy and reparations are set out in the 'UN Principles and Guidelines on Justice for Victims of Crime and Abuse of Power and to Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.'⁵⁰ The Principles provide victims' have rights to remedies, including to: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered and; (c) Access to relevant information concerning violations and reparation

⁵⁰ UN Doc., GA Res.60/147, 16 December 2005.

mechanisms.

Victims also play an important role in investigations and prosecutions of crimes under international law, including crimes against humanity before international, as well as domestic courts and other tribunals. Without the courage and determination of victims who act as complainants or witnesses, many cases would never reach trial. As such, the need to support, protect and empower victims is critical in the effective investigation and prosecution of crimes against humanity.

For this reason, Amnesty International calls on states to ensure that victims' rights are embedded throughout the Convention's text where necessary. In particular, the Convention should provide for victims' rights to: (i) effective protection; (ii) effective support; (iii) notice of their rights; (iv) timely notice of developments during the proceedings; (v) participate in proceedings; (vi) have legal representation during proceedings; (vii) obtain full and effective reparation.

In this regard, 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 several amendments to the Draft Article to ensure that victims' rights are fully recognized and ultimately realized, namely:

- Rather than leaving the definition of a 'victim' of crimes against humanity to individual states, Draft Article 12 should contain a definition of victim, similar, for example, to the one set out in Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court;⁵¹
- Draft Article 12 should include a provision expressly providing for the right to complain to relevant authorities regarding the

⁵¹ Rule 85. Definition of victims. For the purposes of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

commission of crimes against humanity, which must be investigated.⁵²

- 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 investigation⁵³, and include a specific right to the verification of the facts and full and public disclosure of the truth;
- Draft Article 12(2) should clarify that victims should be able to fully contribute to an investigation, to present their views and concerns where their personal interests are affected and that victims should be provided with legal representation⁵⁴;
- 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 (including appropriate compensation, restitution, rehabilitation,

⁵² See, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13 (requiring States Parties to ensure that any individual who alleges he has been subjected to torture has the right to complain to, and to have his case promptly and impartially examined by, the competent authorities). See also International Convention for the Protection of All Persons from Enforced Disappearance, Article 12

⁵³ See, International Convention for the Protection of All Persons from Enforced Disappearance, Article 24(2); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Article 8(1)(b); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 12 (the Committee against Torture has found that Article 12 is violated when the failure to inform the complainant of the results of an investigation obstructs other legal processes, including private prosecutions, available to victims).

⁵⁴ See, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 6(2)(b) (requiring assistance to enable victims' views and concerns to be presented and considered at appropriate stages of criminal proceedings, in a manner not prejudicial to the rights of the defence); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Article 8(1)(c) (allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law).

satisfaction and guarantees of non-repetition); 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.⁵⁵

- Amnesty International also recommends that the Preamble to the Draft Convention explicitly acknowledge the rights of victims to access justice, truth and reparation and the crucial role played by victims and witnesses who support investigations and prosecutions, as well as the need to strengthen efforts aimed at ensuring their protection, support and empowerment.⁵⁶

15. The territorial scope of the Convention, including obligations in federal states

States have an obligation to respect and ensure human rights for all persons in any territory subject to their jurisdiction, which includes all persons over whose enjoyment of human rights it exercises power or effective control. This means that a state's obligations also apply to all places where it exercises authority over a person's enjoyment of a right, even if outside of a state's territory.

Inspired by Article 29 of the VCLT, the Article 50 of 1966 International Covenant on Civil and Political Rights, Article 9 of the 1989 International Covenant on Civil and Political Rights' Second Optional Protocol, aiming at the Abolition of the Death Penalty, and Article 41 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the new Convention should incorporate a provision whereby the new Treaty shall be binding upon each party in respect of all places under the state and

⁵⁵ See, United Nations 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, Principle 16.

⁵⁶ See e.g. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Preamble (declaring that effective action requires a comprehensive international approach inter alia to protect victims, including by protecting their internationally recognized human rights), Article 2 (noting that the purposes of the Protocol include protection and assistance to victims); International Convention for the Protection of All Persons from Enforced Disappearance, Preamble (considering the right of victims to justice and reparation and affirming victims' right to the truth).

its various components' jurisdiction.

- Amnesty International calls on all states to provide that the new Treaty be binding upon each party in respect of all places under the state and its various components' jurisdiction.

III. LIST OF AMNESTY INTERNATIONAL PAPERS PUBLISHED ON THE DRAFT ARTICLES ON PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY SINCE 2014

- Initiative to draft new convention on crimes against humanity, new chance to strengthen fight against impunity, www.amnesty.org/en/documents/ior51/001/2014/en/
- International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity, www.amnesty.org/en/documents/ior40/1227/2015/en/
- International Law Commission: second report on crimes against humanity: positive aspects and concerns, www.amnesty.org/en/documents/ior40/3606/2016/en/
- Joint letter to the International Law Commission Special Rapporteur on crimes against humanity, www.amnesty.org/en/documents/ior53/3512/2016/en/
- International Law Commission: commentary to the Third Report on crimes against humanity, www.amnesty.org/en/documents/ior40/5817/2017/en/
- Joint letter to the Special Rapporteur of the International Law Commission on Crimes Against Humanity, www.amnesty.org/en/documents/ior53/5579/2017/en/
- Amnesty International conditional support to the Draft Articles on Crimes against Humanity adopted by the International Law Commission in first reading, www.amnesty.org/en/documents/ior40/7328/2017/en/

- 17-Point Program for a Convention on Crimes against Humanity, www.amnesty.org/en/documents/ior51/7914/2018/en/
- The problematic formulation of persecution under the Draft Convention on crimes against humanity, www.amnesty.org/en/documents/ior40/9248/2018/en/
- UN: Time has come to turn the Draft Articles on Prevention and Punishment of Crimes against Humanity, duly amended, into a UN Convention: Public statement, www.amnesty.org/en/documents/ior40/3150/2020/en/

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