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War Crimes Committee of the International Bar Association

Comments on the International Law Commission's Draft Articles on Crimes Against Humanity

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30 November 2018

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cc:

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To the Office of the United Nations Secretary-General, Members of the International Law Commission,

On behalf of the War Crimes Committee of the International Bar Association (IBA), we would like to express our strong support and appreciation for the work of the International Law Commission (the 'Commission') in relation to its draft articles on crimes against humanity. This initiative represents an undertaking of momentous significance, with implications for inter-state cooperation in relation to some of the most egregious crimes known to humankind, the forward progress and development of international criminal law and, perhaps most importantly, the treatment of and legal recourse available to survivors of crimes against humanity.

The IBA War Crimes Committee focuses its efforts specifically on atrocity crimes and international criminal law and practice. With more than 350 members worldwide, it constitutes a network of global attorneys specialising in international criminal and humanitarian law, and is directly involved with the IBA's programme in support of international, ad hoc and domestic war crimes tribunals. To this end, the Committee has reviewed and considered the draft articles on crimes against humanity, and provides the below comments with the intention of ensuring that the draft articles are as effective and meaningful as possible. While not intended to be exhaustive, the Committee's comments seek to assist the Commission by identifying particular areas where the language of the articles or the commentary thereto could be strengthened, clarified or rendered more effective in both the prosecution and prevention of crimes against humanity. To the extent that any of these comments raise additional questions or issues, we would welcome the opportunity for further engagement and dialogue on this matter.

As eloquently stated by Professor Philippe Sands QC, a central focus on the value of the individual is implicit in the concept of crimes against humanity.[1] While the crime of genocide has, in many circles, been regarded as the 'crime of crimes', the very nature of that crime – and its stringent intent requirement – means that the focus in the prosecution of genocide is necessarily the destruction of groups.[2] By contrast, the origin of the concept of crimes against humanity has at its heart the inherent value of the individual – while the crimes committed must be part of a widespread or systemic attack, a victim is a victim regardless of whether or not the perpetrator intends to destroy a group.

Certainly, the effective prosecution of both crimes, with their distinct elements, is critical in order to address the myriad atrocities demanding accountability today. While we are under no pretensions that the existence of the Genocide Convention has extinguished the crime, its presence has nevertheless played a key role in prosecutions around the world, political negotiations over which atrocities meet its definition, and how and whether states act to punish its commission. Similarly, the Committee anticipates that a future convention focused on the prevention and punishment of crimes against humanity would assist in the consistent definition and prosecution of the crime, weigh into diplomatic debates in relation to state action, and would carry with it crimes against humanity's central focus on the value and dignity of the human individual, separate and apart from that individual's membership in a group.

While the international community has, despite the absence of a convention, witnessed critical developments in the prosecution of crimes against humanity before international courts and tribunals, the draft articles would serve a number of important purposes. The existence of a convention would, inter alia, set forth a single definition of the crime to provide for consistent prosecutions between jurisdictions, enable inter-state legal assistance and cooperation in relation to investigations and prosecutions, and narrow the loopholes that allow perpetrators to exist with impunity.[3] The Committee notes further that, in light of the limited capacity of international courts and tribunals, the Commission's creation of a legal framework with horizontal application recognises the increasingly important role of domestic prosecutions of atrocity crimes, and accords with the principle of complementarity reflected in the Rome Statute.

Further, the existence of a convention focused on crimes against humanity would carry important implications with regard to the obligations of states. As widely noted in the case between Bosnia and Herzegovina against Serbia before the International Court of Justice (ICJ), the lack of a convention defining a state's responsibilities in relation to the prevention and punishment of crimes against humanity precluded the ICJ from exercising jurisdiction over such failures.[4] That these obligations be

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1 Philippe Sands, *East West Street* (Weidenfeld & Nicolson 2016) 380–381.

2 *Ibid* (noting further that genocide's intent requirement can have 'unhappy psychological consequences', as it 'enhances the sense of solidarity among the members of the victim group while reinforcing negative feelings towards the perpetrator group… and may unwittingly give rise to the very conditions that it seeks to address: by pitting one group against another, it makes reconciliation less likely.'). See also Gareth Evans, 'Crimes Against Humanity and Responsibility to Protect' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 1–7 (submitting that the Genocide Convention 'just does not reach many of the cases we morally want it to' and that, '[q]uite apart from all the good technical reasons for having a new Crimes Against Humanity Convention, the campaign to adopt it should put the concept of crimes against humanity right back on the central pedestal where it belongs').

3 Leila Nadya Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity' (advance article, 2018) Journal of International Criminal Justice (noting that the absence of a global treaty on crimes against humanity creates an 'impunity gap', a 'state responsibility gap' and a 'situation of definitional uncertainty' in light of inconsistent definitions of the crime).

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 *('Bosnia v Serbia')*, p 43. See also Richard J Goldstone, 'Foreword' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) xvi–xvii; see also n 3 above at 3–4.

made explicit is essential to the enforcement of state responsibility before the international community.

With gratitude for the tireless work of the Commission, we turn now to the individual draft articles,[5] which are addressed in turn below.

Draft Article 2: general obligation

The Committee notes with appreciation the explicit reference, in draft Article 2, to crimes against humanity as crimes under international law whether or not committed in time of armed conflict. As noted in the Commission's commentary at paragraphs 5–9 and the citations thereto, the prosecutions before the International Military Tribunal at Nuremburg required a link between crimes against humanity and the existence of an international armed conflict, but the armed conflict nexus has, in most international courts and tribunals, subsequently been dropped.[6] The Committee submits that, in expressly rejecting the armed conflict nexus in draft Article 2, the proposed language is consistent with the evolution of jurisprudence on crimes against humanity before the ad hoc tribunals, and accurately reflects the state of the law today. Further, the proposed language brings within its definition egregious acts being committed around the world during peacetime, and expands the scope of states' undertaking to 'prevent and punish' to cover atrocities that should not escape their reach.

The Committee echoes the recommendation made by some commentators, however, that draft Article 2 be strengthened by explicitly referencing the possibility of holding states responsible for crimes against humanity.[7] Regardless of whether state responsibility is already implied in the text, such a reference would serve to underscore the point and add to the deterrent and preventative effect of the text.

Draft Article 3: definition of crimes against humanity

As noted in the commentary, the language used by the Commission in draft Article 3 to define crimes against humanity is effectively identical to the definition set forth in Article 7 of the Rome Statute.[8] Different opinions existed within the Committee concerning the retention of the Rome Statute definition. Among other concerns, certain elements of the Rome Statute definition differ from certain jurisprudence before the ad hoc tribunals and the Special Court for Sierra Leone, and may serve to limit the application of the crime.[9] Nevertheless, the Rome Statute definition has the benefit

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5 References to the draft articles hereto are to the UN General Assembly, *Report of the International Law Commission, Sixty-ninth session (1 May – 2 June and 3 July – 4 August 2017)*, UN Doc A/72/10 (4 August 2017) ('2017 ILC Report') http://legal.un.org/ilc/reports/2017 accessed 28 November 2018.

6 See, eg, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 Art 7; Statute of the International Criminal Tribunal for Rwanda (8 November 1994) UNSC Res 955, UN SCOR 49th session, 3453rd meeting, UN Doc S/Res/955 ('ICTR Statute'), Art 3. See also Hirad Abtahi, 'Crimes against Humanity and the Armed Conflict Nexus: From Nuremburg to the ICC' (2013) 3 European Society of International Law Conference Paper Series 1, 4–5 (explaining that, following the enactment of the ICTR Statute, the 'link between armed conflict and crimes against humanity dissolved rapidly', and that, by 1998, 'it was clear that international consensus had done away with the armed conflict nexus requirement').

7 See n 3 above at 20–21.

8 2017 ILC Report, p 29.

9 Eg, in relation to the requirement of the existence of a policy or plan, see, eg, *Prosecutor v Fofana and Kondewa* (Judgment) SCSL-04-14-T (2 August 2007) para 113 ('The existence of a policy or plan, or that the crimes were supported by a policy or plan to carry them out, may be evidentially relevant to establish the widespread or systematic nature of the attack and that it was directed against a civilian population, but it is not a separate legal requirement of crimes against humanity'); *Prosecutor v Sesay et al*, SCSL-04-15-T (Judgment) (2 March 2009) para 79; *Prosecutor v Kunarac et al* (Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) para 98.

of the consensus of 123 States Parties,[10] and its retention recognises the importance of building upon the jurisprudence developed using that definition of the crime, both at an international and domestic level.[11] Considering in particular the horizontal application of the draft articles,[12] ensuring that a consistent definition of crimes against humanity is used across jurisdictions would further reinforce the principle of complementary on which the International Criminal Court (ICC) is predicated.

Thus, while the Committee ultimately supports the retention of the Rome Statute elements of the crime insofar as the text of the draft articles is concerned, it also notes that the draft articles are not an exhaustive compilation of customary international law with regard to crimes against humanity, and cannot be read to limit the application of broader interpretations of customary international law on those crimes. The draft articles do not, in fact, relieve those states that do not ratify them from the obligation to abide by customary international law on crimes against humanity. Nor do they preclude application of broader definitions and interpretations of the elements of crimes against humanity and the underlying acts to the obligations of states and individuals under customary law.

The Committee further recognises the importance of the language in draft Article 3(2)(a) defining the policy requirement for crimes against humanity as a course of conduct 'pursuant to or in furtherance of a State *or organizational* policy to commit such attack'.[13] The text's reference to an organisational policy, rather than merely the policy of a state, brings within the draft article's ambit not just state, but also non-state actors – an important element in light of these actors' importance to ongoing atrocity crimes today. To this end, the Committee also commends the Commission's reference to jurisprudence from the International Criminal Tribunal for the former Yugoslavia in paragraph 32 of the commentary to this article, regarding the possibility of prosecuting non-state actors for crimes against humanity.[14]

As the Commission indicated may be necessary in the commentary to draft Article 3,[15] the Committee recommends that draft Article 3(1)(h) be amended to reflect recent developments in relation to the crime of aggression. Specifically, this draft article presently refers to the crime of persecution 'in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes'. In light of the activation of the ICC's jurisdiction over the crime of aggression in December 2017, which took effect in July 2018,[16] the Committee recommends that this draft article be amended to refer to the crime of persecution in connection with the crime of genocide, war crimes or the crime of aggression.

As noted above, despite its concerns, the Committee ultimately supports the retention of the definitions set forth in Article 7 of the Rome Statute, both to ensure widespread consensus of terms and in light of the need for consistent definitions to be used in prosecutions across jurisdictions. However, should the Commission decide to open up discussions concerning any of these definitions

10 UN Treaty Collection, Chapter XVIII: Penal Matters, 10. Rome Statute of the International Criminal Court (2018), https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf accessed 4 November 2018.

11 See n 3 above, at 14.

12 2017 ILC Report, p 22 (submitting that, '[w]hereas the 1998 Rome Statute establishing the International Criminal Court regulates relations between the International Criminal Court and its States parties (a "vertical" relationship), the focus of the present draft articles is on the adoption of national laws and on inter-State cooperation (a "horizontal" relationship)').

13 Emphasis added.

14 2017 ILC Report, p 41.

15 *Ibid*, p 31.

16 Assembly of States Parties, 'Activation of the jurisdiction of the Court over the crime of aggression' (14 December 2017) Resolution ICC-ASP/16/Res 5.

during subsequent sessions, at the forefront of any such conversation should be the definition of 'gender' set forth in draft Article 3(3), which echoes Article 7(3) of the Rome Statute. The current definition, which refers solely to the 'two sexes, male and female, within the context of society', leaves considerable room for improvement in relation to the rights of transgender, non-binary and intersex persons. Indeed, the Committee notes that the narrow definition used in the Rome Statute has been the source of considerable tension and controversy,[17] and that the draft articles may present an opportunity to improve the language to bring within its ambit the persecution of gender in a broader sense. To this end, expanding the definition used to 'all genders, regardless of sex assigned at birth, and including non-binary persons' would serve to widen protections for non-cisgender persons. An alternative approach would be to remove the definition of 'gender' entirely, as it may be preferable to leave the term open to interpretation and determination rather than to replicate a problematic and narrow definition.[18]

Draft Article 4: obligation of prevention

The Committee highlights the importance of the language used in draft Article 4(1) in relation to states undertaking an obligation of prevention, a notion that reinforces the concept of the responsibility to protect.[19] The Committee further commends the use of the language set forth in Article 4(2) stating that exceptional circumstances, including 'armed conflict, internal political instability or other public emergency' cannot be invoked to justify crimes against humanity.

Draft Article 6: criminalisation under national law

The Committee strongly supports the inclusion of a provision regarding the liability of legal persons under draft Article 6(8). This provision represents an important step with regard to the forward progress and development of international law, and assists in building a global framework in which legal persons can be held accountable for their involvement in atrocity crimes.

While respectful of the need to afford flexibility and discretion to states in this area, particularly in light of the variant approaches taken in relation to the liability of legal persons, the Committee believes that the language in this provision needs to be strengthened in order for the provision to be meaningful. As a preliminary matter, the Committee submits that the inclusion of the phrase 'where appropriate' in draft Article 6 with regard to states' obligations to take measures to establish the liability of legal persons is unduly lenient. According to the commentary to this provision, the phrase is included because, '[e]ven if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the specific context of crimes against humanity'.[20] In light of the fact, however, that

17 See Valerie Oosterveld, 'Gender-Based Crimes Against Humanity' in Leila Nadya Sadat (ed) *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 81–83 (noting that the definition was 'agreed to only after difficult and contentious diplomatic negotiations' and proposing to set forth a new definition, stating that 'gender is the social construction of maleness and femaleness and can vary within and across cultures, over time, and may be influenced by its intersection with other factors, such as age').

18 *Ibid*, 81–83.

19 See Gareth Evans, 'Crimes Against Humanity and Responsibility to Protect' in Leila Nadya Sadat (ed) *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 1–7 (submitting that the campaign for a convention on crimes against humanity is 'marching in lockstep with the continuing effort to entrench and operationalize the new norm of the responsibility to protect', which are 'the legal and political faces of the same coin').

20 2017 ILC Report, p 76.

the prosecution of crimes against humanity in any given case is always subject to the discretion of state authorities pursuant to draft Article 10,[21] including the phrase 'where appropriate' in draft Article 6(8) is difficult to justify, and serves to deprive the article of its effective purpose. This is particularly true given that the draft article is already 'subject to' the provisions of a state's national law in order to accord each state with 'considerable discretion as to the measures that will be adopted' and the fact that the measures need not be criminal, but may alternatively be civil or administrative.[22]

Further, the definition of crimes against humanity under draft Article 3 already serves to ensure that only the egregious acts that meet the chapeau elements of the definition are subject to prosecution: the acts must be, inter alia, committed as part of a 'widespread or systematic attack' directed against a civilian population, committed 'with knowledge of the attack' and 'pursuant to or in furtherance of a[n]… organizational policy to commit such attack'.[23] It is difficult to fathom why legal persons who commit acts that meet these stringent requirements, and are deemed by state authorities to be worthy of prosecution in line with that state's legal regime, should be able to evade liability solely as a result of their status as legal persons. Indeed, to provide otherwise would be to ignore the reality that corporations are some of the most powerful actors on the international stage today.

The Commission might also consider amending the phrase 'Subject to the provisions of its national law', which currently can be read to suggest that states may choose to provide for no liability of legal persons at all in relation to crimes against humanity. To the extent that, according to paragraph 49 of the commentary,[24] this phrase is intended to make the obligations under this article subject to the state's existing approach to the liability of legal persons, such as providing for liability with respect to certain types of legal persons and not to others, the Commission may want to consider replacing the phrase with 'Consistent with the provisions of its national law'. The remainder of the sentence could also be clarified, as it presently refers to the liability of legal persons for the 'offences referred to in this draft Article', but, as is plain from the commentary, paragraphs 1–7 of the draft article implicitly refer to natural persons. Rather, draft Article 6(8) could be revised as follows: 'Consistent with the provisions of its national law, States shall take measures to establish the liability of legal persons for crimes against humanity.'

Importantly, the Committee also recommends that the commentary to this draft article be revised to reflect key jurisprudence in this area from the Special Tribunal for Lebanon (STL). Specifically, paragraph 45 of the commentary, and the citations thereto, currently reflect the STL's Al Khayat case,[25] but not its case against Akhbar Beirut et al, which notably constituted the first conviction of a legal person before an international criminal tribunal.[26]

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21 This discretion is evident from both the text of draft Article 10, which requires states not to prosecute but to 'submit the case to its competent authorities for the purpose of prosecution', as well as from the commentary thereto, which explains at para 3 that '[a]lthough regularly termed the obligation to extradite or "prosecute", the obligation is to "submit the case to its competent authorities for the purpose of prosecution", meaning to submit the matter to prosecutorial authorities, which may or may not decide to prosecute'. *Ibid*, 83–84.

22 Draft Article 6(8); 2017 ILC Report, pp 60, 76.

23 Draft Article 3; 2017 ILC Report, p 28.

24 2017 ILC Report, p 76.

25 See 2017 ILC Report, p 74.

26 *In the case against Akhbar Beirut SAL et al* (Public Redacted Version of the Judgment) STL-14-06/T/CJ (15 July 2016); see also *In the case against Akhbar Beirut SAL et al* (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings) STL-14-06/PT/AP/AR126.1 (23 January 2015).

Draft Article 8: investigation

The Committee commends the use of language in draft Article 8 obliging each state to conduct a prompt and impartial investigation whenever there is reasonable ground to believe that crimes against humanity have been or are being committed under its jurisdiction, one of the most essential obligations set forth in the draft articles. The obligation to investigate, which is of course distinct from conducting the preliminary inquiry discussed in draft Article 9, requires each state to promptly investigate acts that may constitute crimes against humanity under its jurisdiction; particularly when taken in conjunction with each state's obligation to prevent pursuant to draft Article 4, this provision lays the groundwork for early intervention into potential atrocity crimes. As noted in the commentary to draft Article 8 at paragraph 1, such an investigation can 'lay the foundation not only for identifying alleged offenders and their location, but also for helping to prevent the continuance of ongoing crimes or their recurrence by identifying their source'. The Committee particularly supports the inclusion of the phrase 'are being committed' with respect to acts potentially constituting crimes against humanity, as it requires states to take action while atrocity crimes are still underway.

The preventative aspect of this text could be further strengthened by adding an additional clause to the draft article, setting forth that the obligation to investigate exists whenever there is reasonable ground to believe that acts constituting crimes against humanity have been committed, are being committed, or are highly likely to be committed in the near future in any territory under its jurisdiction.[27]

In paragraph 4 of the commentary to this draft article, the Commission cites a recommendation by the Committee against Torture that investigation of offences be 'under the direct supervision of independent members of the judiciary'.[28] The Committee notes that this reference may imply that investigations carried out by entities other than members of the judiciary, such as a truth commission, might not comply with the duty to investigate. To afford states discretion to investigate potential crimes against humanity by entities other than the judiciary itself, and considering that the draft article already ensures that the obligation must be carried out impartially by 'competent authorities', it may be of value to remove the reference to the Committee against Torture's recommendation on this particular point. Doing so would more expressly leave open the possibility of having a non-judicial body conduct an investigation. Subject to legitimacy determinations, an investigation by a non-judicial body may achieve quicker and greater accountability in an impacted society.

Draft Article 10: *aut dedere aut judicare*

With regard to the obligation to extradite or prosecute set forth in draft Article 10, the Committee recommends that the Commission consider imposing a timeliness requirement into the text in relation to the submission of the case for prosecution. For example, while the current language obliges the state to 'submit the case to its competent authorities for the purpose of prosecution,

27 One need recall only the example of weapons stockpiling in the days ahead of the Rwandan genocide to appreciate the importance of ensuring that the obligation to investigate extends to acts likely to occur in the future, as well as those already underway. See, eg, Romeo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Carroll & Graf 2004) 144 (recalling an informant's warnings of four separate arms caches in Rwanda, and explaining that '[T]he leadership was about to make a decision to distribute the arms caches to every Interahamwe cell in Kigali. If that happened, he said, there would be no way to stop the slaughter').

28 2017 ILC Report, p 81.

unless it extradites or surrenders', the text could be strengthened by stating that each state 'shall, within a reasonable time, submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders'. The inclusion of such language would assist in preventing a scenario whereby a state fails to prosecute or extradite, but can shield itself from a determination that it is out of compliance with the text by arguing that it had simply not yet submitted the case for prosecution. Further, by placing language regarding timeliness after the term 'shall' (as opposed to after the word 'submit'), the 'reasonable time' requirement would likewise apply to a state's obligation to extradite or surrender if that is its preferred avenue of compliance.

As a separate matter, the commentary to this draft article suggests that the language used may be in conflict with a state's ability to implement an amnesty. There were differing opinions within the Committee regarding whether the draft articles should more expressly address non-judicial processes such as amnesties and truth commissions, either in the text or commentary thereto. While some members urged that a blanket prohibition on amnesties for crimes of this gravity be made explicit in the text, others considered that controversy exists around the desirability of non-judicial mechanisms, particularly in relation to negotiated settlements ending armed conflict.[29] Ultimately, the Committee supports the approach taken by the Commission, and notes that the *aut dedere aut judicare* obligation set forth in the draft articles is both appropriate and consistent with existing international law.

Draft Article 12: victims

The Committee echoes the recommendation made by REDRESS and Amnesty International that the Commission consider including a definition of the term 'victim' so as not to leave the application of the important protections set forth in draft Article 12 entirely to states' discretion.[30] There has been considerable evolution in international law in regard to victims' rights, and there are a number of examples from international tribunals and courts from which the Commission could pull in drafting a definition. For example, Rule 85 of the ICC's Rules of Evidence and Procedure defines victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.[31] Draft Article 12 could provide a similar baseline definition for victims, while permitting states to extend broader protection beyond this definition if they so choose. Importantly, such a definition would serve to prevent states from abusing the undefined term to

29 See Sarah MH Nouwen, 'Is There Something Missing in the Proposed Convention on Crimes Against Humanity? A Political Question for States and a Doctrinal One for the International Law Commission' (August 2018) University of Cambridge Legal Studies Research Paper Series 52/2018 https://ssrn.com/abstract=3236905 accessed 28 November 2018 (noting that the 'question arises whether it is desirable or even possible to resolve this issue now [of whether there should be an exception to the duty to prosecute for situations of negotiated settlements] for all possible future scenarios' and further noting that '[a]nother fundamental question is which society (the local, national, regional or international, that of victims or survivors) should have a say, or the final say'?); David Crane, 'The Bright Red Thread: The Politics of International Criminal Law – Do We Want Peace or Justice? The West African Experience' in Leila Nadya Sadat (ed) *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 59–77 (noting that, during the last quarter of a century, countries including Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, South Africa, Togo and Uruguay have granted amnesty for war crimes in connection with peace agreements). But, see n 3 above, at 17–18 (submitting that international law 'seems to have crystallized the prohibition *against* amnesties for crimes against humanity' and urging that the language be strengthened to 'include a carefully drafted provision prohibiting states parties to the convention from granting amnesties for crimes against humanity in the draft articles'); Amnesty International, *17-Point Program for a Convention on Crimes Against Humanity* (2018) www.amnesty.org/download/Documents/IOR5179142018ENGLISH.pdf accessed 28 November 2018, p 2 ('Amnesties and other similar measures of impunity must be explicitly prohibited in the Convention, codifying a rule under customary international law').

30 REDRESS, *Fostering Victims' Rights in the Proposed Crimes Against Humanity Convention: Comments to the International Law Commission* (March 2018) https://redress.org/wp-content/uploads/2018/04/CAH-Convention-and-Victims-Rights.pdf accessed 14 January 2019 ('REDRESS comments'), paras 25–26; Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes Against Humanity* (7 April 2017) www.amnesty.org/en/documents/ior40/5817/2017/en accessed 28 November 2018 ('Amnesty International comments'), p 19.

31 ICC Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr1, 3–10 September 2002 (First Session of the ASP) part II.A (adopted and entered into force 9 September 2002), Rule 85.

avoid extending protections to those clearly deserving of it, and it would also assist in ensuring that individuals receive the same protection across borders, rather than being treated as victims in one jurisdiction and not in another.[32]

Draft Article 13: extradition

The Committee notes that the recommended language in draft Article 10, the *aut dedere aut judicare* provision, would also serve to ensure that a state acts within a reasonable timeframe in relation to extradition. In addition, in draft Article 13(4)(a), the Committee recommends that the terms 'promptly' or 'within a reasonable time' be included in relation to a state's obligation to inform the Secretary-General whether it will use the draft articles as the legal basis for cooperation on extradition.

Draft Article 14: mutual legal assistance

The Committee offers its strong support for the mutual legal assistance framework set forth in draft Article 14, as well as the annex, the importance of which is critical to the effective prosecution of international crimes.[33] In light of the horizontal application of the draft articles, as well as the principle of complementarity, mutual legal assistance provisions to enhance interstate cooperation would substantially enhance the existing global framework for prosecuting crimes against humanity.

Draft annex

In relation to the annex, the Committee notes that, pursuant to paragraph 8(b), a requested state may refuse to provide mutual legal assistance if it 'considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests'. While recognising that this language has been adopted from a number of other conventions and treaties, it nonetheless appears to significantly weaken a state's obligation to provide mutual legal assistance pursuant to this provision.[34] Noting again the importance of mutual legal assistance in relation to the effective global prosecution of the crime, the Committee would recommend that the Commission consider narrowing the language to avoid the potential for abuse.

Further, the Committee recommends that, at paragraph 10, the Commission considers imposing a timeliness phrase in relation to the length of time during which a state can postpone mutual legal assistance on the grounds that it interferes with an ongoing investigation or prosecution. For example, the inclusion of the phrase 'for a reasonable time' would assist in avoiding a scenario under which a state can indefinitely postpone its mutual legal assistance obligations under these provisions.

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32 As noted by REDRESS, this is particularly important in light of transnational proceedings involving multiple states, and for purposes of reparation programmes. REDRESS comments, para 26. See also Amnesty International comments, p 19 (urging the Commission to reconsider its decision to give states latitude in determining who qualifies as a victim and noting that, in the organisation's 50+ years of experience, it has 'consistently documented flawed national efforts to address such crimes, which have excluded many victims').

33 See Harmen van der Wilt, 'Extradition and Mutual Legal Assistance in the Draft Convention on Crimes Against Humanity' (advance article, 2018) Journal of International Criminal Justice ('Mutual legal assistance in criminal matters is a vital aspect of criminal law enforcement in respect of international and transnational crimes, as evidence, witnesses, judicial records – elements that are indispensable for a successful completion of a criminal procedure – are usually scattered over several jurisdictions').

34 *Ibid* at p 15 (in which the author 'wonders whether some provisions could not have been more dauntless, for instance, by further reducing the scope for refusal of legal assistance'); Amnesty International comments, p 15 (noting that '[s]ince improper grounds for refusal of assistance are one of the main problems with the current legal framework, the Convention on crimes against humanity should limit grounds for refusal to the narrowest list possible').

Concluding thoughts

In closing, the Committee would like to express its sincere appreciation to the members of the Commission, and in particular to Special Rapporteur Sean Murphy, for their tireless work on these draft articles. In an era where international cooperation is often seen as waning, the importance of a project aimed at strengthening our ability, as well as our communal responsibility, to address atrocity crimes cannot be overstated. The Committee expresses its strong support for the draft articles, and its vested interest in assisting the Commission in relation to this project. Should there be any opportunity or need for further dialogue, the Committee would welcome the opportunity to engage further on these issues. In case any clarifications might be needed and for the purpose of all future correspondence, please do not hesitate to contact the Committee's Special Rapporteur, Shannon Raj Singh, at shannonraj@gmail.com.

Yours faithfully,

Shannon Raj Singh
Special Rapporteur

Federica D'Alessandra
Co-Chair

On behalf of the War Crimes Committee of the International Bar Association