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PREVENTION

ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

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SCOPE, GENERAL OBLIGATIONS, AND OBLIGATION OF PREVENTION

Proposed Revised Text for Articles 1, 3, and 4 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 1 Scope

This Convention applies ~~The present draft articles apply to the prevention and punishment of crimes against humanity, which are crimes under international law whether or not committed in times of armed conflict.~~

Article 3 General obligations

1. **No State shall** ~~Each State has the obligation not to engage in acts or omissions that constitute crimes against humanity, whether directly or indirectly.~~
2. Each State **shall** ~~undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.~~
3. No exceptional circumstances whatsoever, such as **the existence or threat of** armed conflict, internal political instability, or other public emergency, may be invoked as a justification **for the commission** of crimes against humanity **or for a State's failure to discharge its obligations under this Article.**

Article 4 Obligation of prevention

Each State **shall** ~~undertakes to prevent~~ **and suppress** crimes against humanity, ~~in conformity with international law,~~ through:

- (a). effective legislative, administrative, judicial, **diplomatic**, or other appropriate ~~preventative~~ measures **with respect to any person or group under its jurisdiction, control, direction, or influence in any territory under its jurisdiction;** and
- (b). cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

Explanatory Notes

1. This proposal for **Article 1** supplements the ILC Draft by relocating from Draft Article 3(2) the affirmation that crimes against humanity are “crimes under international law, whether or not committed in times of armed conflict”. Including this at the outset will allow States to affirm the status of crimes against humanity in international law, and thereby to frame the Convention accordingly, before turning to the definition of crimes against humanity in Article 2. A similar approach can be found in the Genocide Convention, where the corresponding clauses likewise appear in Article I.¹
2. The proposal for **Article 3(1)** seeks to clarify two aspects of Draft Article 3(1). First, it spells out that no State is permitted to engage in acts or omissions that constitute crimes against humanity, in light of the well-established principles that State responsibility can arise through acts or omissions,² and that crimes against humanity can be committed or facilitated through acts or omissions.³ Second, it affirms that States may not engage in crimes against humanity either directly or indirectly, as State responsibility encompasses not only a State’s commission of an internationally wrongful act but also its direction, control, coercion, or aiding or assistance in the commission of such an act.⁴ This proposal reflects that State obligations in respect of *jus cogens* crimes can extend to non-State actors,⁵ who are often the direct perpetrators of crimes against humanity.

¹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art I (“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”).

² UNGA Res 56/83, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (12 December 2001) UN Doc A/Res/56/83, art 2 (“There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.”); Commentaries to the UNGA, ‘Report of the International Law Commission (53rd session), Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001), UN Doc A/56/10(supp), art 2, commentary para 4 (“Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two.”).

³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 15(1)-(2) (recognizing that a crime may be committed through an “act or omission”); *Nahimana et al v Prosecutor* (Appeal Judgement) ICTR-99-52-A (28 November 2007) para 478 (recalling that commission of a crime includes not only physical perpetration but also a culpable omission of an act that is mandated by a legal duty); *Prosecutor v Mrkšić and Šljivančanin* (Appeal Judgement) IT-95-13/1-A (5 May 2009) paras 49, 103 (entering a conviction for aiding and abetting murder by omission); *Prosecutor v Nyiramasuhuko et al* (Appeal Judgement) ICTR-98-42-A (14 December 2015) paras 2189, 2213, 2258, 3539 (affirming a conviction for aiding and abetting by omission extermination as a crime against humanity and other international crimes).

⁴ UNGA, ‘Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto’ (20 August 2019) UN Doc A/74/10 [hereinafter “ILC Draft Articles”] art 3, commentary paras 5-6, referring to Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 2) arts 16-18.

⁵ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, paras 430 (assessing a State’s responsibility to prevent genocide based, in part, on the links “between the authorities of that State and the main actors in the events”), 432 (a State cannot be deemed complicit in genocide

3. In **Articles 3(1) and 3(2)**, this proposal uses “shall” in place of “has the obligation” and “undertakes” from the Draft Articles for three reasons. First, these terms have equivalent meanings, as seen for instance in the recognition by the ICJ and the ILC that “undertakes” is “not merely hortatory or purposive” but is “intended to express the same kind of legally binding obligation upon States”,⁶ entailing that a State “take all measures within its power” to fulfil its obligation.⁷ Second, the word “shall” is more readily understandable and can be easily construed without reference to legal jurisprudence, unlike the other terms for which clarification may be needed based on a contextual reading.⁸ Third, this will align these two paragraphs with the remainder of the text, which uses “shall” in nearly every article, including when addressing State obligations.⁹
4. The proposed text for **Article 3(2)** is otherwise identical to the text of Draft Article 3(2), except for the clauses relocated to Article 1.
5. In **Article 3(3)**, the proposal reflects two changes from Draft Article 3(3). First, the proposal incorporates the fact that a threat of an armed conflict cannot justify crimes against humanity, mirroring a similar provision in the Convention Against Torture,¹⁰ while placing this term in the paragraph to clarify that the threat of other exceptional circumstances would likewise provide no justification for crimes against humanity. Second, this text refers to “a State’s failure to discharge its obligations under this Article” to avoid any ambiguity as to whether this paragraph addresses “the obligations of States as set forth in [both] paragraphs 1 and 2”, as was the intention.¹¹
6. This proposal seeks to enhance **Article 4** in important but limited ways. First, it uses “shall” rather than “undertakes”, for the reasons explained above in relation to

unless it becomes aware of the crime’s impending or ongoing commission, and afterwards aids or assists “the perpetrators of the criminal acts”). For the *jus cogens* nature of crimes against humanity, see ILC Draft Articles (n 4) preamble, commentary para 5.

⁶ ILC Draft Articles (n 4) art 3, commentary para 8, referring to *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 5) para 162 (“The ordinary meaning of the word ‘undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation.”).

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) [2020] ICJ Rep 3, para 79; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (Provisional Measures) [2023] ICJ Rep 587, para 79. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 5) para 430 (“A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of ‘due diligence’, which calls for an assessment *in concreto*, is of critical importance.”).

⁸ See n 6.

⁹ See ILC Draft Articles (n 4) arts 5-15.

¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

¹¹ ILC Draft Articles (n 4) art 3, commentary para 22.

Articles 3(1) and 3(2), namely equivalence of meaning, clarity, and alignment with the remainder of the text. Second, it adds a reference to States' obligation to "suppress" crimes against humanity, which is framed as a companion to the duty to prevent crimes in a number of relevant conventions, such as those pertaining to genocide, apartheid, and human trafficking.¹² This change more robustly reflects States' obligation to take *all* measures reasonably within their power to intervene in the face of ongoing or impending crimes against humanity. Third, this proposal removes "in conformity with international law", as it is duplicative of the Preamble,¹³ and additional emphasis here and not in other articles may give the wrong impression that international law could potentially override a State's obligation under Article 4.

7. With respect to **Article 4(a)**, this proposal first removes the limitation "preventative" in "other appropriate measures", which is doubly warranted if there are appropriate suppressive measures that States may take as well. Second, it adds "diplomatic" to the list of appropriate measures that could be implemented by a State in an effort to discharge its obligations. Third, it removes the territorial limitation so that – just as for the Genocide Convention – the substantive obligations "apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question" without being constrained by territorial jurisdiction.¹⁴ Fourth, and relatedly, it recognizes that such measures may be with respect to "any person or group" under the State's jurisdiction, "control, direction, or influence", which incorporates ICJ pronouncements in relation to State obligations under the Genocide Convention and the Torture Convention.¹⁵

¹² Genocide Convention (n 1) art VIII (Contracting Parties may call upon UN organs to take action "for the prevention and suppression" of genocide or other punishable acts); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, arts VI (undertaking to carry out UN Security Council decisions "aimed at the prevention, suppression and punishment of the crime of apartheid"), VIII; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, preamble para 5 (referring to the need for "an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, [which] will be useful in preventing and combating that crime").

¹³ ILC Draft Articles (n 4) preamble para 5 ("Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law").

¹⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 5) para 183 ("The substantive obligations arising from Articles I and III are not on their face limited by territory.").

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (n 7) paras 79-80 ("Bearing in mind Myanmar's duty to comply with its obligations under the Genocide Convention, the Court considers that [...] Myanmar must [...] ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit acts of genocide"); *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (n 7) para 79 ("Syria must, in accordance with its obligations under the Convention against Torture, take all measures within its power to prevent acts of torture [...] and ensure that its officials, as well as any organizations or persons which may be subject to its control, direction or influence, do not commit any acts of torture").