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NON-DISCRIMINATION PROVISION

ABILA STUDY GROUP **CRIMES AGAINST HUMANITY**

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NON-DISCRIMINATION PROVISION

*Proposed Article XX of the Draft Articles on Prevention and Punishment of Crimes
Against Humanity [ILC Draft]*

Article XX Application and Interpretation

The present Convention shall be interpreted and applied in a manner consistent with international law, including international human rights law, international humanitarian law, and international criminal law, without any adverse distinction founded on grounds such as race, colour, language, gender, age, disability, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Explanatory Notes

1. This proposed article is intended to affirm that the Convention on the Prevention and Punishment of Crimes against Humanity will be interpreted in accordance with States' pre-existing obligations. These include obligations contained in customary international law and international human rights and humanitarian law treaties.
2. For the purposes of this article, "adverse distinction", an international law norm,¹ is to be interpreted consistent with the definition of "discrimination" in the International Covenant on Civil and Political Rights: "any distinction, exclusion, restriction or preference which is based on any ground such as [those enumerated],² and which has

¹ The Convention's intended application covers attacks directed against a civilian population, which can arise in times of peace as well as periods of armed conflict. The international law norm to prevent and protect from adverse distinction, regarding civilians in armed conflict, is reflected in provisions such as Common Article 3 of the Geneva Conventions, Articles 13 and 27 of the Fourth Geneva Convention, and Article 4(1) of Additional Protocol II, as well as in Rule 88 of the International Committee of the Red Cross's synthesis of Customary International Humanitarian Law. See nn 9-11 below.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 26. For the complete list of enumerated grounds in the ICCPR, see n 8 below.

- the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.³
3. The proposed provision draws from Article 21(3) of the Rome Statute.⁴ With respect to the enumerated grounds, it is identical to Article 21(3) with two exceptions. First, it follows the ILC’s Draft Articles in omitting reference to a definition of the term “gender”.⁵ Second, it adds “disability” as an enumerated ground, in line with the Convention on the Rights of Persons with Disabilities, which was adopted subsequent to the Rome Statute and has since been widely ratified.⁶
4. The obligation to interpret and apply terms “consistent with” international legal obligations, particularly human rights and humanitarian law, can also be found in *The 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*, adopted without a vote by the General Assembly.⁷
5. Non-discrimination clauses are commonplace in human rights treaties applicable both in peacetime and in war.⁸ During armed conflict, Common Article 3 of the Geneva

³ Human Rights Committee, ‘General Comment No. 18: Non-discrimination’ (10 November 1989) <<https://www.legal-tools.org/doc/9883e4>> paras 6-7, referring to Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 1; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 1.

⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 21(3) (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”).

⁵ 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, art 2, commentary paras 41-42 (explaining that the definition of “gender” found in Article 7(3) of the Rome Statute “was not retained” by the ILC). See also ABILA Study Group Proposal on Gender Competency, Inclusivity, and Non-Discrimination (1 December 2025) <<https://www.ila-americanbranch.org/abila-study-group-on-crimes-against-humanity/>>.

⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) (193 Parties), arts 3(b), 4(1), 5 (providing, *inter alia*, that States Parties must prohibit discrimination on the basis of disability).

⁷ UNGA Res 60/147, ‘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’ (16 December 2005) UN Doc A/RES/60/147, paras 1-2, 25.

⁸ See e.g. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (196 Parties), art 2 (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); ICCPR (n 2) (175 Parties), art 26 (“[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); International

Conventions expressly prohibits adverse distinction among persons taking no active part in hostilities,⁹ which is spelled out further in the Third and Fourth Geneva Conventions as well as Additional Protocols I and II.¹⁰ The prohibition of such discrimination forms part of customary international law.¹¹ The proposed provision would clarify the continuing State obligation to apply and interpret the Convention in a non-discriminatory way, consistent with existing and developing obligations.

Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (173 Parties), art 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.”). See also CRPD (n 6) (193 Parties), arts 3(b), 4(1), 5 (States Parties shall, *inter alia*, prohibit discrimination on the basis of disability).

⁹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) art 3(1) (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) art 3(1) (same); Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) (Third Geneva Convention) art 3(1) (same); Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) (Fourth Geneva Convention) art 3(1) (same).

¹⁰ Third Geneva Convention (n 9) art 16 (“Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.”); Fourth Geneva Convention (n 9) arts 13 (“The provisions of Part II [General Protection of Populations Against Certain Consequences of War] cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.”), 27 (“Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) art 75(1) (“In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol [...] shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, birth or other status, or on any other similar criteria”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) art 4(1) (“All persons who do not take a direct part or who have ceased to take part in hostilities [...] shall in all circumstances be treated humanely, without any adverse distinction”).

¹¹ International Committee of the Red Cross, Jean-Marie Henckaerts, Louise Doswald-Beck ‘Customary International Humanitarian Law, Volume I: Rules’ (Cambridge University Press, 2005) Rule 88 <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule88>> (“Adverse discrimination in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.”).

6. The proposed addition would also facilitate the incorporation by national courts of developments in international law, including the ongoing crystallization of customary international law, the continuous work of State negotiation and adoption of new treaties, treaty bodies' comments and observations, and the jurisprudence of international courts.