

## **Recommendations from the Latin America Regional Workshop on the Draft Articles of a Convention on Crimes Against Humanity**

*On 28 September October 2018, representatives of civil society, international and regional organizations and governments from across the Americas met in Lima, Peru, with the Special Rapporteur of the International Law Commission, Prof. Sean Murphy, for the Regional Workshop on the Draft Articles of a Convention on Crimes Against Humanity, organized by Washington University in St. Louis, the Institute of Democracy and Human Rights of the Pontifical Catholic University of Peru and the Coalition for the International Criminal Court.*

*Following the workshop, the undersigned would like to respectfully submit the following comments and recommendations for the consideration of the members of the International Law Commission. Please note that, unless noted, these are signed in the individuals' personal capacity:*

- We congratulated the work of the International Law Commission reflected in the draft articles of a Convention on Crimes Against Humanity and its commentaries, as well as the opportunity provided to Latin American experts and civil society representatives to contribute to this important process.
- We believe that the recognition of the *ius cogens* nature of the prohibition of crimes against humanity in the Preamble of the Draft Articles is a key component of this draft treaty.
- We welcome the inclusion of the principle *aut dedere aut iudicare* in article 10, as well as the inclusion of the *non-refoulement* principle in Article 5 of the draft articles.
- We would also like to recognize the inclusion of an obligation of prevention in article 4, and the express obligation to adopt domestic provisions on crimes against humanity, pursuant to article 6 of the draft articles.

In addition to highlighting the aforementioned provisions, we would like to take the opportunity to respectfully submit the following recommendations:

1. On the Preamble we recommend the inclusion of an express reference to the *Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity*, as well as to the international criminal tribunals which contain relevant provisions on crimes against humanity;
2. On Article 3 paragraph 2(i) we strongly suggest to:
  - a. Remove the expression “prolonged period of time”. While such a requirement is a jurisdictional threshold contained in the Rome Statute, it is not contained in the definition of enforced disappearance of the Declaration on the Protection of All Persons from Enforced Disappearance; of the International Convention for the Protection of All Persons from Enforced Disappearance; nor of the Inter-American Convention on Forced Disappearance of Persons. We therefore consider that a treaty

of this nature which codifies customary international law should not include the specific requirement of prolonged period of time.

3. On Article 3 paragraph 1(h), with regards to the crime of persecution, we recommend the removal of the expression “in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes”, following the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the text of Draft Codes (54) and (96);
4. In addition, we strongly suggest the removal of paragraph 3 on Article 3, since there has been an extensive development on the definition of “gender” to include gender identity within the framework of international human rights law, and we consider that including this paragraph will once again open the debate on this topic;
5. On Article 6 paragraph 2 we suggest including the incitement of crimes against humanity as a form of liability, following the standards set by the International Military Tribunal at Nuremberg;
6. In regards to Article 6 paragraph 3(b), we recommend to equate this standard with the standard set out in Article 6 paragraph 3(a), since the expression “consciously disregarded information” requires a higher standard of proof, opening the door to impunity, and we consider that customary international law does not make this distinction;
7. On Article 7, we recommend including the following paragraph: “Each State shall remove any obstacles hampering the prosecution and trial of persons accused of having committed crimes against humanity”;
8. On Article 8 we propose:
  - a. Replacing the expression “a prompt and impartial investigation” with the expression “a prompt, exhaustive and impartial investigation with due diligence”, following human rights law standards,
  - b. Replacing the expression “whenever there is a reasonable ground to believe” with the expression “whenever there is a crime reported”, in accordance with the regional standard which determines that the obligation of a State to investigate initiates immediately after a crime has been reported, and
  - c. Including the following obligation: “Each State shall take the necessary measures to ensure that they have sufficient technical and financial capacity as well as sufficient human resources to investigate and prosecute crimes against humanity”;
9. On the commentary to Article 10 we strongly recommend the removal of the reference to a power to grant amnesties for crimes against humanity, which we consider is prohibited under international customary law, notwithstanding the possibility of adjusting the sanctions taking into consideration the seriousness of the crime;
10. On Article 11, we suggest including an express reference to the guarantee of an impartial and independent judge, in order to prevent prosecutions before military tribunals;
11. On Article 12 paragraph 1(b) we recommend:

- a. Distinguishing victims' rights from the rights of other persons participating in the process,
  - b. Including also judges and expert witnesses, whose well-being might be threatened or affected in the midst of the process, and
  - c. Widening the protection by replacing the expression "shall be protected against ill-treatment or intimidation" with the expression "shall be protected against any threat to their lives or personal integrity, including any form of ill-treatment or intimidation";
12. On Article 12 paragraph 3 we recommend:
- a. Eliminating the expression "material and moral" in regards to the damages, following the standards on reparation enshrined in Article 75 of the Rome Statute and established by the jurisprudence of the Inter-American Court of Human Rights,
  - b. Including among the forms of reparations the notion of "transformative reparation", developed by the Inter-American Court of Human Rights and the Constitutional Court of Colombia, and
  - c. Clarifying that guarantees of non-repetition not only constitute a form of reparation but also a form of prevention, in order to avoid future crimes against humanity in contexts where a State has already faced the commission of these crimes;
13. We strongly suggest the addition of a new article regarding the prohibition of amnesties and pardons.
14. We also recommend including a reference to the use of a differentiated approach when the commission of crimes against humanity involves persons or groups in situation of vulnerability, such as women, children, indigenous peoples, afro-descendant peoples, persons with disabilities, among others.

**Adopted in Lima, Peru, in September 2018**

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