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## Crimes against humanity

### Additional comments and observations received from Governments, international organizations and others

#### Addendum

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## I. Introduction

1. One additional written reply, containing comments and observations on the draft articles on crimes against humanity, adopted on first reading by the International Law Commission at its sixty-ninth session (2017), was received from the Netherlands (14 February 2019). The comments and observations are reproduced below, organized thematically as follows: general comments and observations; specific comments on the draft articles; and comments on the final form of the draft articles.

## II. Comments and observations received from Governments

### A. General comments and observations

#### The Netherlands

[Original: English]

The Netherlands remains committed to the fight against impunity. In this context, the policy of the Netherlands is aimed at strengthening the international legal framework for the prevention, detection, prosecution and adjudication of international crimes. The Netherlands believes that facilitating the cooperation of States with the International Criminal Court (ICC) and other international courts and tribunals as well as between States, in accordance with international standards, in both the legal and the practical sense, constitutes an essential element of this process. The Netherlands therefore welcomes the draft articles on crimes against humanity.

A general consideration to which the Netherlands attaches importance is that a new international set of rules concerning crimes against humanity should supplement and be complementary to existing treaty structures. Ensuring consistency with the Rome Statute<sup>1</sup> of the ICC in particular is key in ensuring the mutual reinforcement of both structures. The Netherlands therefore welcomes the choice underpinning the draft articles to incorporate the definitions of crimes of the Rome Statute.

The obligation to establish national jurisdiction over crimes against humanity in domestic legal systems follows from various treaties and from customary international law. In spite of this, there is no specific treaty concerning crimes against humanity, in contrast to the existing obligations concerning war crimes and genocide. This lack of specific and adequate international standards and norms hampers the effectiveness and speediness of the investigation, prosecution and adjudication of these crimes.

Therefore, an important gap needs to be filled in order to further shape the obligations of national jurisdictions, more specifically regarding issues arising in inter-State cooperation. In the view of the Netherlands, the gap is felt most acutely in the lack of a robust, efficient and modern model for cooperation between States facilitating the extradition and mutual legal assistance in combating crimes against humanity. As the primary responsibility to prevent crimes against humanity continues to lie with States themselves and as the jurisdiction of international criminal courts and tribunals continues to be of limited scope and capacity, such a model would be most beneficial in further implementing the principle of complementarity.

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<sup>1</sup> Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

The Netherlands furthermore refers to the advisory report of the Advisory Committee on Issues of Public International Law (CAVV), an independent advisory council instituted by law that advises the Government and parliament on international law issues, on the draft articles (contained in annex I to the present document).

## B. Specific comments on the draft articles

### 1. Draft article 2 – General obligation

#### The Netherlands

[Original: English]

One particular element of the draft articles on which the Netherlands would like to comment concerns the obligation to prevent crimes against humanity. According to the Commission's commentary, draft articles 2 and 4 on the obligation to prevent should be read in conjunction. The commentary states that "the content of this general obligation is addressed through the various more specific obligations set forth in the draft articles that follow, beginning with article 4." Because of this linkage, in our view, an independent meaning and application for draft article 2 seems to be denied in the current text. The Special Rapporteur, Sean Murphy, however, in his first report<sup>2</sup> differentiated more clearly between the different functions and scopes of the two prevention provisions. In that report, he connected draft article 2 to article 1 of the Genocide Convention<sup>3</sup> and thereby underscored the general and extraterritorial obligation to prevent following therefrom. The obligation to prevent for third States, as the International Court of Justice found in its judgment of 27 February 2007 on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*,<sup>4</sup> where it addressed the scope and application of article 1 of the Genocide Convention, depends on a State's "capacity to influence". In our view, the obligation to prevent contained in draft article 2 of the draft articles should have the same effect.

The Netherlands is accordingly of the view that draft article 4 is of a completely different nature to draft article 2. Contrary to draft article 2, which as stated has extraterritorial reach, draft article 4 is territorially and jurisdictionally limited. The obligations under draft article 4 are limited to the territory under the jurisdiction of a State.

Although related, the obligation to prevent and the obligation to penalize are two different obligations. Considering the fact that draft articles 2 and 4 differ in respect to their territorial and jurisdictional reach, it is important to clarify the interrelationship between the two provisions and particularly to underscore the independent and autonomous status of draft article 2. Accordingly, the Netherlands would request the Commission to address this issue in its commentary.

[See also comment under final form of the draft articles.]

<sup>2</sup> A/CN.4/680 and Corr.1.

<sup>3</sup> Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

<sup>4</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

**2. Draft article 3 – Definition of crimes against humanity****The Netherlands**

[Original: English]

[See comment under general comments.]

**3. Draft article 4 – Obligation of prevention****The Netherlands**

[Original: English]

[See comment on draft article 2.]

**4. Draft article 7 – Establishment of national jurisdiction****The Netherlands**

[Original: English]

[See comment under general comments.]

**C. Comments on the final form of the draft articles****The Netherlands**

[Original: English]

The Netherlands wishes to recall the joint initiative led together by Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia for a new treaty on mutual legal assistance and extradition, which would cover the crimes of genocide, war crimes as well as crimes against humanity (MLA initiative). While the Netherlands supports the Commission's work on the crimes against humanity topic and will continue to contribute to its examination and further consideration, the Netherlands recognizes particular merit in the MLA initiative in that it seeks to offer an effective mutual legal assistance and extradition framework for all three groups of most serious crimes under international law. The treaties addressing these international crimes – such as the Genocide Convention of 9 December 1948 and the Geneva Conventions of 12 August 1949<sup>5</sup> and the first Additional Protocol of 8 June 1977<sup>6</sup> – contain only limited and largely outdated provisions for mutual legal assistance and extradition, if any. Existing multilateral treaties that do provide for provisions on mutual legal assistance and extradition – such as the United Nations Convention against Transnational Organized Crime<sup>7</sup> and the Convention against Torture and Other Cruel,

<sup>5</sup> Geneva Conventions for the protection of war victims (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), *ibid.*, No. 970, pp. 31 *et seq.*; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, pp. 85 *et seq.*; Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949), *ibid.*, No. 972, pp. 135 *et seq.*; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid.*, No. 973, pp. 287 *et seq.*

<sup>6</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17512, p. 3.

<sup>7</sup> United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2225, No. 39574, p. 209.

Inhuman or Degrading Treatment or Punishment<sup>8</sup> – only apply to the crimes covered by those specific treaties, hence rendering them ineffective for the investigation, prosecution and adjudication of the gravest international crimes.

Although there are convergent qualities between the MLA initiative and the crimes against humanity topic, there are also important differences. In contrast to the draft articles, the MLA initiative seeks to rapidly set up a new and operational framework for efficient inter-State cooperation regarding all three core crimes. The MLA initiative is distinct and independent from the draft articles and sets out a detailed set of rules regarding various forms of mutual legal assistance and extradition. With over 60 co-sponsoring States supporting the initiative and many more States having expressed a strong interest in contributing to the initiative and with the second preparatory conference taking place in the Netherlands in March 2019, it is important to maintain the momentum towards the negotiation and adoption of an effective treaty instrument. During this second preparatory conference, co-sponsoring States will have the opportunity to advise on and take part in discussions on the draft treaty (contained in annex II to the present document) and the draft rules of procedure of the diplomatic conference to be convened in the near future.

As already stressed in previous paragraphs, alleged perpetrators, victims, witnesses, as well as evidence and financial proceeds from crime are usually spread over multiple jurisdictions. International cooperation in criminal matters is paramount if domestic prosecutions of mass atrocities are to be effective. The MLA initiative aims to provide the legal and regulatory framework required to strengthen domestic systems – and also for updating MLA provisions on genocide and war crimes.

The Netherlands is of the view that the MLA initiative and the draft articles pursue the same goal and are mutually supportive while proceeding along different trajectories. If both initiatives were to be realized, not all States may sign up to and ratify both. The Netherlands therefore considers that the two initiatives offer complementary frameworks, which not only could coexist but mutually reinforce each other and could be further developed side by side. The co-sponsoring States therefore maintain close contact with the Special Rapporteur, Sean Murphy, and the United Nations.

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The Netherlands remains committed to strengthening the international legal framework for the prevention, investigation, prosecution and adjudication of international crimes. Further shaping and improving cooperation in this regard, with respect to the ICC and other international courts and tribunals as well as in inter-State relations, is key. On this basis, the Netherlands supports the Commission's draft articles as well as the MLA Initiative. The Netherlands considers that the two initiatives offer complementary frameworks, which could not only coexist but mutually reinforce each other and could be further developed side by side. More specifically in respect of the draft articles, the Netherlands attaches importance to the further elaboration, in the commentary, of the content and scope of the obligation to prevent crimes against humanity as laid down in article 2 of the draft articles.

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<sup>8</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85.

## Annexes

### **Annex I to the comments and observations submitted by the Netherlands (advisory report of the Advisory Committee on Issues of Public International Law)**

#### **1. Introduction**

In a letter of 6 February 2018, the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (Commissie van advies inzake volkenrechtelijke vraagstukken, CAVV) to prepare an advisory report on the draft articles of the International Law Commission (ILC) on crimes against humanity. The minister expressly requested that the CAVV comment on the relationship between the ILC draft articles and the initiative, supported by The Netherlands, towards a multilateral treaty on mutual legal assistance for the core crimes of genocide, crimes against humanity and war crimes (MLA-treaty for core crimes). The minister's request for an advisory report followed the invitation by the UN Secretary-General to States, international organisations and civil society to submit comments and observations to the draft articles by 1 December 2018. In his letter, the Minister of Foreign Affairs indicated that the CAVV advisory report may be of considerable added value for the formulation of a formal reaction by the Netherlands to the draft articles on Crimes against Humanity. With a view to facilitating the government in this endeavour and given the existing deadline for submitting comments to the UN Secretary-General, this advisory report has – exceptionally – been drafted in English.

A draft advisory report was prepared by prof. dr. L.J. van den Herik. The draft advisory report was discussed and completed by the CAVV in a collective email setting. The advisory report was adopted on 31 August 2018.

In this advisory report, some reflections and comments are offered on (i) the gap-filling nature of the ILC draft articles aiming at a specialized convention, (ii) the relationship with other treaty-regimes, especially the Rome Statute of the International Criminal Court and the proposed new multilateral treaty on mutual legal assistance and extradition for the domestic prosecution of the most serious international crimes (MLA-treaty)<sup>9</sup>, (iii) the provisions on prevention (draft articles 2 and 4), (iv) the need for reflection on a monitoring mechanism, (v) the question of statutory limitations for victims in civil litigation.

#### **2. The gap filling function of the draft articles on crimes against humanity**

The topic “crimes against humanity” was included in the ILC’s programme in 2013 and a special rapporteur, Sean D. Murphy, was appointed in 2014. The inclusion of this topic in the agenda of the ILC corresponds with calls by scholars who for long have been advocating a specialized crimes against humanity treaty, especially the late professor Cherif Bassiouni and professor Leila Sadat.<sup>10</sup> A specialized global convention on crimes against humanity will complement the treaty regimes that exist for the other two (categories of) crimes, viz. genocide and war crimes. It will not only codify existing rules under customary international law, such as the obligation to prevent, but it will also serve a gap filling purpose more widely.

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<sup>9</sup> Joint Statement on International Initiative for Opening Negotiations on a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes, see [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf).

<sup>10</sup> M.C. Bassiouni, ‘Crimes against Humanity: The Need for a Specialized Convention’, 31 *Columbia Journal of Transnational Law* (1994), 457–494 and L.N. Sadat, *Forging a Convention for Crimes against Humanity*, Cambridge University Press, 2011.

For instance, draft article 15 aims to fill a gap in the context of enforcing State responsibility particularly by providing clauses on dispute settlement and a basis for jurisdiction of the International Court of Justice (ICJ). This provision will complement article IX of the Genocide Convention and ensure that disputes submitted to the ICJ would not need to be framed in terms of genocide in order to assert jurisdiction. As such, the provision and a specialized convention on crimes against humanity more widely may reduce the over-focus on genocide and its legal regime.

Many other proposed draft articles purport to fill gaps in the context of individual criminal responsibility, especially regarding enforcement at the national level. They do so by requiring States to adopt national legislation, including an obligation to extradite or prosecute (*aut dedere aut judicare*), and particularly also by offering the legal regime necessary to enable and facilitate mutual legal assistance (MLA) and extradition. The detailed MLA-provisions offer a robust and much needed model for State cooperation, which is arguably the most important gap to be filled.

While the CAVV sympathizes with calls that more clear-cut provisions are also needed on questions of amnesty and immunity of State officials, it appreciates that these questions are of such nature that they might become insurmountable obstacles to the adoption of a specialized treaty. It thus understands the policy choice that these matters are left to find a place elsewhere, either in the context of a separate treaty-regime or under customary international law. The CAVV does highlight the reference to the *jus cogens* nature of the prohibition on crimes against humanity in the preamble and it finds this reference very relevant for future discussions on amnesty and immunity of State officials in relation to crimes against humanity.

### 3. Relationship with other treaty-regimes

The draft articles on crimes against humanity complement existing treaty regimes in international criminal law regarding other core crimes and regarding the creation of international jurisdiction, especially for the International Criminal Court (ICC). It also has synergies with the MLA-treaty for core crimes, which would update the existing treaty-regimes for genocide and war crimes, and which introduces a new regime for crimes against humanities. This section discusses the relationship between the draft articles and other treaty regimes, with a focus on the Rome Statute and the MLA-treaty for core crimes, which is currently being negotiated.

#### 3.1 *The Rome Statute of the International Criminal Court*

The Rome Statute is a treaty with multiple functions and dimensions. It establishes the International Criminal Court and offers the procedural framework that guides the ICC's operation. It enacts crime definitions and modes of liability and, in addition, Chapter IX of the ICC Statute regulates *vertical* State cooperation between States and the ICC. The draft articles complement this regime as they regulate *horizontal* State cooperation, i.e., cooperation between States. The draft articles thus offer supporting structures that correspond with the idea that the ICC is complementary to national criminal jurisdictions. By offering mutual legal assistance and extradition provisions, the draft articles effectively assist States in living up to their responsibilities for domestic prosecutions of crimes against humanity. In light of a shared interest to combat impunity through rule of law structures, the CAVV observes that even States and State parties that may have come to display a certain ambivalence towards the ICC do retain an independent, perhaps even increased, interest in a global crimes against humanity convention as this encourages and facilitates domestic prosecutions.

The relationship between the Rome Statute and the draft articles is thus generally a mutually beneficial one. Nonetheless, States have expressed concerns

about potential conflicts between the two documents, mainly also regarding possible definitional divergences. Pursuant to these concerns and with a view to fostering legal certainty and stability of the definition, the draft articles have adopted the ICC definition without any change. The CAVV fully supports this choice and agrees that even minor changes would open a Pandora's box. Given the need for legal certainty and the wish to avoid fragmentation, it is imperative that the draft articles as well as the MLA-treaty for core crimes, which is currently being negotiated, adhere to the ICC definition and take this as a starting point.

This being said, the CAVV does appreciate the inclusion of draft article 3(4), which allows for future definitional evolution.<sup>11</sup> In this regard, the CAVV wishes to draw particular attention to shortcomings of the ICC definition from a gender perspective. These shortcomings regard the limited list of gender crimes in Article 3(1)(g) and particularly the definition of gender in Article 7 (3)<sup>12</sup> which seems to equate "gender" with "sex", thus ignoring the understanding that "gender" is a social construct. It is also unclear whether sexual orientation is properly covered. In its commentary, Amnesty International has also proposed changes as regards the definition of enforced disappearance and persecution.<sup>13</sup> Again, the CAVV understands the policy choice not to renegotiate the definition of crimes against humanity at this point in time and regards such proposed changes as avenues for possible future evolution.

### 3.2 *The MLA-treaty for core crimes*

The Netherlands is one of the States promoting the initiative towards an MLA-treaty for core crimes, which would update the regime as laid down in the Genocide Convention and the Geneva Conventions, and also create a legal basis for inter-State cooperation and mutual legal assistance for the investigation and prosecution of crimes against humanity. As regards the interrelationship between this initiative and the draft articles, the CAVV holds the opinion that the two initiatives are not competing or mutually exclusive in character, and that they can very usefully co-exist.

Concrete provisions in the draft articles lay the basis for such a mutually reinforcing relationship, such as draft article 14(5).<sup>14</sup> Moreover, even if both initiatives materialize and are effectively turned into treaties, not all States may sign and ratify both treaties. Therefore, the mutual legal assistance provisions (including those regarding extradition) of the crimes against humanity-articles should be as detailed as possible so that they can serve on a stand-alone basis to facilitate inter-state cooperation.

From this perspective, some observations are made here for further reflection and fine-tuning. As a general observation, it is noted that meticulous and detailed provisions providing an explicit legal basis for a specific request are preferred over vague and abstract provisions, as specificity increases the chances that the request is granted. It is in this vein that the following detailed suggestions are made with respect

<sup>11</sup> Draft article 3(4) reads "This draft article is without prejudice to any broader definition provided for in any international instrument or national law."

<sup>12</sup> Article 7(3) of the ICC Statute reads, "For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above. Draft article 3(3) is copied from this provision.

<sup>13</sup> Amnesty International, 17-Point Program for a Convention on Crimes against Humanity, point 1, <https://www.amnesty.org/download/Documents/IOR5179142018ENGLISH.pdf>.

<sup>14</sup> Draft article 14(5) reads, "States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article."



to the MLA provisions of the draft articles on crimes against humanity, inspired also by provisions of EU and Council of Europe conventions:

- Article 12(2) should also explicitly protect against secondary and repeated victimization of victims, as well as protect the victim against the risk of emotional or psychological damage, and protect her or his dignity during interrogation or hearings, as also provided in Article 18 of the EU Victims Directive.<sup>15</sup>
- A provision similar to Article 13(8) could be included regarding extradition of nationals for prosecution purposes, encouraging States to extradite their own nationals while relying on the proviso that they shall be allowed to return to their home country to serve their foreign sentence.<sup>16</sup>
- To underline our previous observation that specific, detailed provisions are to be preferred over more general ones, Article 14(3)(b) regarding the taking of evidence by videoconference may be further detailed and patterned upon Article 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters<sup>17</sup> as well as upon Article 10 of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union.<sup>18</sup>
- Article 14(3)(e) could be made more specific and lay the basis for examining *and observing* objects and *public* sites.
- Mutual legal assistance with a view to obtaining forensic evidence, as now included in Article 14(3)(e), would be better placed in a separate subparagraph.
- The word “voluntary” restricts Article 14(3)(i) as it excludes a legal basis for forced appearance in a requesting State, whereas this might be needed in given cases.

The above observations serve to further solidify the proposed regime, while underscoring that the regime is already very diligent and detailed in character. As indicated, the CAVV deems the extradition and mutual legal assistance regime that the proposed articles put in place of paramount importance, filling the largest currently existing gap; a gap which seriously undermines possibilities for domestic prosecution and accountability. It thus welcomes this part of the draft articles in particular as a crucial next step in the fight against impunity.

#### 4. The obligation to prevent

The Genocide Convention has often been criticized for paying mere lip service to the notion of “prevention”, despite the fact that that term features prominently in the Convention’s title.<sup>19</sup> For long the legal value of article I of the Genocide Convention remained uncertain and the scope and content of the obligation to prevent genocide were considered nebulous too. In its *Bosnia Genocide* Judgement of 2007, the ICJ addressed the lack of clarity and unequivocally stated that article I constitutes

<sup>15</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14 November 2012.

<sup>16</sup> Cf. the suggestion by H. van der Wilt, ‘The Draft Convention on Crimes against Humanity: Extradition and Mutual Legal Assistance’, in *Journal of International Criminal Justice* (forthcoming).

<sup>17</sup> Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Council of Europe, European Treaty Series, No. 183, 8 November 2001.

<sup>18</sup> Annex to the Council Act of 29 May 2000, OJ C 197/1, 12 July 2000.

<sup>19</sup> The full title of the Convention reads “Convention on the Prevention and Punishment of the Crime of Genocide.”

a legally binding provision,<sup>20</sup> with extraterritorial reach, and thus also articulating an autonomous obligation for third States to prevent genocide.<sup>21</sup> The ICJ founded this obligation on States' "capacity to influence" and it formulated an obligation that exists independently of the responsibilities of the United Nations and the Security Council in particular. As also stated in an earlier CAVV advisory report, this obligation does not entail a unilateral and unauthorized right or duty to use force.<sup>22</sup>

As for crimes against humanity, the obligation to prevent features, in addition to the preamble, in two separate provisions, draft articles 2 and 4. With a view to reinforcing the preventive dimensions of a future crimes against humanity-convention, it is important to clarify the interrelationship between the two provisions and particularly to underscore draft article 2's independent and autonomous status.

Draft article 2 offers a general preventive obligation and reads,

"Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish."

This provision is patterned upon Article 1 of the Genocide Convention.<sup>23</sup>

Draft article 4 is entitled "obligation of prevention" and reads,

"1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity."

Presenting a more concrete obligation to take specific legislative, administrative, judicial or other preventive measures, this provision is copied from human rights treaties and transnational criminal law treaties. In contrast to draft article 2, draft article 4(1) is territorially and jurisdictionally limited. Draft article 4 also introduces an obligation to cooperate with other States and international organizations for preventive purposes in paragraph 2, which may be said to have some synergies with article 41 of the draft Articles on State Responsibility.

The commentary to draft article 2 states that, "the content of this general obligation will be addressed through the various more specific obligations set forth in the draft articles that follow, beginning with article 4." Such a statement links the two provisions and seems to deny independent meaning and application for draft article 2. In his first report, the Special Rapporteur instead differentiated more clearly between the different function and scope of the two prevention provisions, and

<sup>20</sup> ICJ, *Bosnia Genocide* case, paras. 162–165.

<sup>21</sup> *Ibid.*, para. 430.

<sup>22</sup> CAVV, *The use of the term 'genocide' by politicians*, Advisory report number 28, March 2017, p. 10. See also the report by the Advisory Council on International Affairs (AIV), *The Netherlands and the Responsibility to Protect: The Responsibility to Protect People from Mass Atrocities*, Advisory report number 70, June 2010.

<sup>23</sup> Article I of the Genocide Convention reads "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."

connected the general prevention provision of draft article 2 expressly to its counterpart in the Genocide Convention.<sup>24</sup> The general and extraterritorial obligation to prevent in draft article 2 is effectively an obligation to rescue with extraterritorial reach, just like article I of the Genocide Convention, keeping in mind again that any action taken must be “in conformity with international law”. These are emergency obligations when atrocity crimes are on the verge of being committed or to prevent further escalation when they are already ongoing. Draft article 4, instead, is more truly preventive in nature as it obliges States to take measures in their own territory ensuring that the conditions in which crimes against humanity can be committed do not arise. Given the different territorial scope and function of the two provisions, it is important to underscore the autonomous status of draft article 2, which is not only an opening provision but has as much independent legal value as the ICJ attributed to article I of the Genocide Convention.

The CAVV sees article I of the Genocide Convention and draft article 2 on crimes against humanity effectively as twin-provisions. The argument that these two provisions should be regarded as paired, not only in terms of having autonomous legal standing but also as regards contents, also flows from the CAVV’s earlier advisory report that differentiation between genocide and crimes against humanity serves no purpose in the prevention phase,<sup>25</sup> a proposal with which the Dutch government agreed.<sup>26</sup> The linking of the two provisions also corresponds with their shared origins, and with the practice that the two crimes are consistently coupled in R2P-settings.<sup>27</sup> It is also consistent with the need to avoid overuse of the genocide-label.

## 5. Monitoring mechanism

Special Rapporteur Murphy has consciously refrained from making proposals regarding a monitoring mechanism, as he considered that the selection of a mechanism depended on factors other than legal reasoning.<sup>28</sup> The CAVV advises the government to advance concrete suggestions in this regard, as it agrees with professor Sadat’s observation that “a convention without a monitoring mechanism is likely to be an ‘orphan’”.<sup>29</sup> Recognizing the need to avoid duplication of mechanisms as well as unnecessary bureaucracy, the CAVV suggests that the mandate and functions of a mechanism remain limited and well-defined. It sees two distinct functions that a mechanism could take on:

- (a) Monitoring the implementation of required legislation;
- (b) Offering a discursive space, i.e., a platform on which States with capacity to influence are invited to explain their specific conduct vis-à-vis a given situation in light of their obligation to prevent genocide and crimes against humanity. Without going into institutional details, the existence of such a platform linked to the Genocide and (future) Crimes against Humanity Convention would gradually clarify the notion of “capacity to influence” while also recording the decision-making of States in response to a certain situation while taking account of their overarching obligations to prevent genocide and crimes against humanity.

<sup>24</sup> *UN Doc. A/CN.4/680*, 17 February 2017, paras. 112–113.

<sup>25</sup> CAVV, The use of the term ‘genocide’ by politicians, advisory report of March 2017, p. 14.

<sup>26</sup> Government response to advisory report no. 28 on the use of the term ‘genocide’ by politicians, Parliamentary Records (2017–2018) 34 775 V, no. 44, p. 4.

<sup>27</sup> CAVV, The use of the term ‘genocide’ by politicians, advisory report of March 2017, p. 10.

<sup>28</sup> *UN Doc. A/CN.4/704*, 23 January 2017, paras. 222–238.

<sup>29</sup> Leila Sadat, ‘A Contextual and Historical Analysis of the International Law Commission’s 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity’, *Journal of International Criminal Justice* (forthcoming).

## 6. Statutory limitations in civil litigation

Draft article 6(6) states that, “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.” The provision does not concern the applicability of statutory limitations in civil proceedings, nor is this expressly addressed in draft article 12(3), which governs victims’ right to reparation. The CAVV notes the recommendations of Amnesty International regarding the non-applicability of statutory limitations to civil tort suits.<sup>30</sup> It also recalls recent case law from Dutch courts, in which it was held that, in certain very special circumstances, it is unreasonable for the State to invoke statutory limitations in civil litigation.<sup>31</sup> Given these developments and also acknowledging the *jus cogens* nature of the crimes concerned, the CAVV considers that there is merit in placing the question of non-applicability of statutory limitations in tort proceedings on the agenda.<sup>32</sup> The CAVV fully recognizes the important function that statutory limitations can fulfil in tort law. Having this in mind, it might be suitable to include a provision in the draft articles encouraging States to consider restricting the invocation of statutory limitations in certain clearly specified circumstances. As civil litigation concerning acts that may amount to international crimes is likely to increase in the years to come, such provision could serve as useful guidance.

## 7. Conclusion

By way of conclusion, the key elements of this advisory report are summarized:

- **The CAVV welcomes the ILC draft articles on crimes against humanity and holds that a specialized global convention on crimes against humanity would complement the treaty regimes that exist for the other two core crimes, genocide and war crimes.**
- **The draft articles aim to codify existing rules under customary international law, such as the obligation to prevent, and they also serve a gap filling purpose more widely, for instance by providing a dispute settlement clause and a basis for jurisdiction of the International Court of Justice. This may reduce over-focus on genocide and its legal regime.**
- **The draft articles offer a robust and much needed model for State cooperation. By so doing, they fill a striking gap and offer a legal regime to enable and facilitate mutual legal assistance and a legal basis for extradition for crimes against humanity.**
- **The relationship between the draft articles and the Rome Statute of the ICC is mutually beneficial. Specifically the segment of the draft articles that concerns mutual legal assistance and extradition can effectively assist States in living up to their responsibilities for domestic prosecutions of crimes against humanity. The draft articles thus offer support structures**

<sup>30</sup> Amnesty International, 17-Point Program for a Convention on Crimes against Humanity.

<sup>31</sup> *Rechtbank's-Gravenhage* (Hague Court of First Instance), trial judgement, ECLI: NL: RBSGR: 2011: BS8793, 14 September 2011. See for an analysis of this case and subsequent case law, L. van den Herik, ‘Addressing “Colonial Crimes” Through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia’, 10 *Journal of International Criminal Justice* 963-705 (2012) and L. van den Herik, ‘Reparation for Decolonisation Violence: A Short Overview of Recent Dutch Litigation’, *Heidelberg Journal of International Law*, 2018/2.

<sup>32</sup> See for a more elaborate treatment of the issue and the arguments supporting non-applicability of statutory limitations to civil tort suits, L. Zegveld, *Civielrechtelijke verjaring van internationale misdrijven*, inaugural address, University of Amsterdam, delivered on 13 November 2015.

that correspond with the idea that the ICC is complementary to national criminal jurisdictions.

- **Despite certain inadequacies of the Rome Statute definition of crimes against humanity, as for instance regarding its gender-dimensions, the CAVV fully supports the choice to adopt the Rome Statute definition of crimes against humanity without any change for reasons of legal certainty.**
- **While overlapping to some extent, the draft articles on crimes against humanity and the MLA-treaty for core crimes are mutually supportive and do not compete.**
- **Even if both initiatives materialize and are effectively turned into treaties, not all States may sign up to and ratify both. Therefore the mutual legal assistance provisions (including those regarding extradition) of the draft articles on crimes against humanity should be as detailed as possible so that they can serve on a stand-alone basis to facilitate inter-State cooperation. While underscoring that the proposed regime in the draft articles is already very diligent and detailed, the CAVV advisory report offers several concrete suggestions for further reflection.**
- **It is important to clarify the interrelationship between the two draft articles on prevention, draft articles 2 and 4. Specifically, the CAVV wishes to underscore draft article 2's independent and autonomous meaning.**
- **In conformity with its earlier advisory report on the use of the term "genocide" by politicians, the CAVV highlights that article I of the Genocide Convention and draft article 2 on crimes against humanity should be seen as twin-provisions in terms of content and scope.**
- **Building on the view that "a convention without a monitoring mechanism is likely to be an 'orphan'", the CAVV advises the government to advance suggestions for a monitoring mechanism, and it offers some concrete views on the mandate and tasks of such mechanism.**
- **While underscoring the important function that statutory limitations can fulfil in tort law, the CAVV considers that there is merit in placing the question of non-applicability of statutory limitations in tort proceedings for victims on the agenda.**

## **Annex II to the comments and observations submitted by the Netherlands (draft treaty)**

### **Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes**

#### **Preamble**

The States Parties to this Convention,

Recalling that the crime of genocide, crimes against humanity and war crimes are among the most serious crimes of concern to the international community as a whole,

Emphasizing that fighting impunity for these crimes is essential for peace, stability and the rule of law in the States concerned,

Noting that their effective prosecution must be ensured by taking measures at the national level enhancing international cooperation,

Recognizing that States have primary responsibility for the prosecution of perpetrators of the crime of genocide, crimes against humanity and war crimes,

Observing that prosecuting these crimes often involves suspects, witnesses, evidence or assets located outside the territory of the State that is conducting the investigation or prosecution,

Recognizing that international cooperation in criminal matters in accordance with international obligations and domestic law is a cornerstone of continued efforts by States to fight against impunity, and encouraging the continuation and reinforcement of such activities at all levels,

Taking note with appreciation of existing multilateral instruments to fight against impunity for the crime of genocide, crimes against humanity and war crimes, including, *inter alia*, the Geneva Conventions and Additional Protocols and the Convention on the Prevention and Punishment of the Crime of Genocide,

Determined to investigate and prosecute in a more effective manner the crime of genocide, crimes against humanity and war crimes and recognizing the need to strengthen the legal framework for mutual legal assistance and extradition in cases of genocide, crimes against humanity and war crimes,

Have agreed as follows:

#### **Part I**

##### **General provisions**

##### **Article 1**

###### **Purpose and scope**

1. The purpose of this Convention is to facilitate international cooperation in criminal matters with a view to strengthening the fight against impunity for the crime of genocide, crimes against humanity and war crimes. *[NEW]*

2. For the purpose of this Convention, the crimes mentioned in paragraph 1 shall not be considered political crimes. [based on *inter alia* article 7 Genocide Convention]

## Article 2

### Crimes covered by this Convention

1. This Convention shall apply to the crime of genocide, crimes against humanity and war crimes. [based on *inter alia* article 5 Rome Statute]

2. For the purpose of this Convention, “crime of genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group. [*Rome Statute article 6*]

3. For the purpose of this Convention, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 5, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the International Criminal Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. [*Rome Statute article 7, par 1*]

4. For the purpose of paragraph 3:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 3 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 3, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. [*Rome Statute article 7, par 2*]

5. For the purpose of this Convention, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above. [*Rome Statute article 7, par 3*]

6. For the purpose of this Convention, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;



(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Rome Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123 of the Rome Statute;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in paragraph 4 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against 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:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 3(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in paragraph 4 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 6 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. [*Rome Statute article 8*]

7. States Parties may also apply this Convention to other crimes insofar as they qualify as a crime of genocide, a crime against humanity, or a war crime under international or domestic law, and are qualified as a criminal act according to the law of the requesting State Party as well as the law of the requested State Party. *[NEW]*

**Article 3**  
**Protection of sovereignty**

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law. *[UNTOC and UNCAC article 4]*

**Article 4**  
**Criminalization**

1. Each State Party shall take the necessary measures to ensure that the crimes, mentioned in article 2, paragraph 2 to 6, constitute a crime under its criminal law.

2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature. *[based on UNCAT article 4]*

**Article 5**  
**Jurisdiction**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes mentioned in article 2, paragraph 2 to 6, in the following cases:

(a) When the crimes are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such crimes in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him to any of the States mentioned in paragraph 1.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law. *[UNCAT article 5]*

**Article 6**  
**Preliminary inquiry**

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any crime mentioned in article 2, paragraph 2 to 6, is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State Party but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State Party shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States Parties referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State Party which makes the preliminary inquiry contemplated in paragraph 2 shall promptly report its findings to the said States Parties and shall indicate whether it intends to exercise jurisdiction. *[UNCAT article 6]*

#### **Article 7**

##### ***Aut dedere, aut judicare***

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any crime mentioned in article 2, paragraph 2 to 6, is found shall in the cases contemplated in article 4, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the crimes mentioned in article 2, paragraph 2 to 6, shall be guaranteed fair treatment at all stages of the proceedings. *[UNCAT article 7]*

#### **Article 8**

##### **Liability of legal persons**

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the crimes covered by this Convention. *[UNCAC article 26 and article 10 UNTOC, par 1]*

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. *[UNCAC article 26 and article 10 UNTOC, par 2]*

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the crimes. *[UNCAC article 26 and article 10 UNTOC, par 3]*

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. *[UNCAC article 26 and article 10 UNTOC, par 4]*

#### **Article 9**

##### **Confidentiality**

The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party. *[UNTOC article 18, par 20]*

## **Article 10**

### **Data protection**

1. The requesting Party shall disclose or use transmitted information or evidentiary materials, including documents, objects or records, solely for the investigation and proceedings to which the request relates and in accordance with conditions that have been imposed in a particular case on the use of such information or materials.
2. Where the central authority of the requested Party has imposed special conditions on the use of the provided information or evidentiary materials as referred to in paragraph 1 of this Article, the central authority of the requested Party shall upon request from the central authority of the requesting Party provide information on the use that has been made from the information or evidentiary materials.
3. Disclosure or use for any other purpose by the requesting Party of the information and evidentiary materials referred to in paragraph 1 of this Article is prohibited, unless the requested Party has given its express consent upon a request made by the central authority of the requesting Party.
4. Where, following disclosure to the requesting Party, the requested Party becomes aware of circumstances that may cause it to seek an additional condition in a particular case, the central authority of the requested Party may consult with the central authority of the requesting Party to determine the extent to which the evidence and information can be protected.
5. The central authority of the requested Party shall be obliged to ensure the accuracy of the personal data to be transmitted. If it appears that data have been transmitted which are incorrect or that should not have been transmitted, the data recipient shall immediately be notified to this effect. The requested Party shall be obliged to correct or delete the data without delay.
6. Upon request, the person concerned shall be informed about any transmitted information relating to him or her and about the purpose of its intended use. However, this information may be withheld or postponed in order to avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences.
7. If the national law applicable to the central authority of the requested Party envisages special time limits regarding the deletion of transmitted personal data, the central authority of the requested Party shall notify the recipient to this effect. Irrespective of such time limits, the transmitted personal data shall be deleted [in accordance with the national law of the requesting Party] as soon as they are no longer required for the purpose for which they have been transmitted. *[NEW]*

## **Article 11**

### **Costs**

The ordinary costs of executing a request pursuant to this Convention shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne. *[UNTOC article 18, par 28]*

## **Part II**

### **Central authorities and communication**

#### **Article 12**

##### **Central authority**

1. Each State Party shall designate a central authority at the time of ratification, acceptance, approval or accession to this Convention. The central authority shall be responsible for issuing and receiving requests made in accordance with the provisions of this Convention. *[NEW]*
2. Where a State Party has a special region or territory with a separate system, it may designate a distinct central authority that shall have the same function for that region or territory. *[UNTOC article 18, par 13]*
3. Without prejudice to paragraph 1 and 2, each State Party shall identify a single point of contact within its competent law enforcement authorities. Under the authority of their respective central authorities these single points of contact may liaise with each other on practical matters regarding the execution of requests made in accordance with this Convention. *[NEW]*
4. The depositary shall be notified of the designated central authority and the single points of contact of each State Party at the time it deposits its instrument of ratification, acceptance, approval of or accession to this Convention. A list of designated central authorities and single points of contact shall be shared and updated annually. *[based on UNTOC article 18, par 13]*

#### **Article 13**

##### **Channel of communication**

1. Requests made in accordance with this Convention and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. *[UNTOC article 18, par 13]*
2. The requirement in paragraph 1 shall be without prejudice to the right of a State Party to require that the requests and communications shall be addressed to it through diplomatic channels, and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization. *[UNTOC article 18, par 13]*
3. The transmission of requests, information or communication based on this Convention may be done by electronic means. *[NEW]*

#### **Article 14**

##### **Language**

Requests made in accordance with this Convention and any communication related thereto shall be made in a language acceptable to the requested State Party, or accompanied by a translation into English. *[NEW]*

## **Part III**

### **Mutual legal assistance**

#### **Article 15**

##### **Scope**

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions or judicial proceedings in relation to the crimes covered by this Convention. *[UNTOC article 18, par 1]*

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party in respect of investigations, prosecutions and judicial proceedings in relation to the crimes for which a legal person may be held liable in accordance with article 8 in the requesting State Party. *[UNTOC article 18, par 2]*

## **Article 16**

### **Purpose of the request**

Mutual legal assistance to be afforded in accordance with the provisions of this Convention shall include, but not be limited to:

- (a) Taking evidence or statements, including by video conference, from persons; *[based on UNTOC article 18, par 3]*
- (b) Effecting service of judicial documents; *[UNTOC article 18, par 3]*
- (c) Executing searches and seizures, freezing and confiscation; *[UNTOC article 18, par 3]*
- (d) Examining objects and sites; *[UNTOC article 18, par 3]*
- (e) Providing information, evidentiary items and expert evaluations; *[UNTOC article 18, par 3]*
- (f) Providing originals or certified copies of relevant documents, records and digital information, including government, bank, financial, corporate or business records; *[based on UNTOC article 18, par 3]*
- (g) The use of special investigative techniques; *[NEW]*
- (h) The establishment of joint investigation teams. *[NEW]*
- (i) Identifying, freezing or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; *[UNTOC article 18, par 3]*
- (j) Facilitating the voluntary appearance of persons in the requesting State Party; *[UNTOC article 18, par 3]*
- (k) The recovery of assets; *[based on UNCAC article 46, par 3, sub k]*
- (l) Any other type of assistance that is not contrary to the domestic law of the requested State Party; *[UNTOC article 18, par 3]*

## **Article 17**

### **Request and supporting documents**

1. A request for mutual legal assistance shall be made in writing under conditions allowing States Parties to establish authenticity. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith. *[based on UNTOC article 18, par 14]*

2. A request for mutual legal assistance shall contain or be accompanied by the following:

- (a) The identity of the authority making the request; *[UNTOC article 18, par 15]*
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding; *[UNTOC article 18, par 15]*



(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents and a statement of the relevant law, accompanied by the reference texts; *[based on UNTOC article 18, par 15]*

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed; *[based on UNTOC article 18, par 15]*

(e) Where possible, the identity, location and nationality of any person concerned; *[UNTOC article 18, par 15]*

(f) The purpose for which the evidence, information or action is sought; *[UNTOC article 18, par 15]*

(g) Where appropriate, the time limit within which the assistance should be provided. *[NEW]*

### **Article 18** **Additional information**

If the requested State Party considers that the information provided in support of a request for mutual legal assistance is not sufficient to enable the request to be dealt with, it may request that additional information be furnished within such reasonable time as it specifies. *[based on UNTOC article 18, par 16]*

### **Article 19** **Grounds for refusal**

1. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this Convention; *[UNTOC article 18, par 21]*

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests; *[UNTOC article 18, par 21]*

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar crime, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction; *[UNTOC article 18, par 21]*

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted; *[UNTOC article 18, par 21]*

(e) If there are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting or punishing a person by reason of that person's race, sex, religion, nationality, ethnic origin or political opinions or that that person's position may be prejudiced for any of these reasons; *[NEW]*

(f) If the request is made with regard to an offence punishable by the death penalty under the law of the requesting State Party, unless the requesting State Party gives sufficient guarantees that the death penalty sentence shall not be passed on or, if it is passed on, that it shall not be carried out. *[NEW]*

2. States Parties may not refuse a request for mutual legal assistance on the sole ground that the crime is also considered to involve fiscal matters, nor on the ground of bank secrecy. *[UNTOC article 18, par 8 and 23]*

3. Reasons shall be given for any refusal or postponement of mutual legal assistance, including, if the case arises, the conditions under and timeframe in which the execution could take place. *[based on UNTOC article 18, par 23]*

## **Article 20**

### **Execution of the requests**

1. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request. *[UNTOC article 18, par 17]*

2. The requested State Party shall execute the request as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. *[UNTOC article 18, par 24]*

3. On the express request of the requesting State Party, the requested State Party shall state the date and place of execution of the request for mutual assistance. The requesting State Party may request the presence of officials and other persons. Such presence shall be subject to the approval of the requested State Party. *[NEW]*

4. The execution of the request may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding. *[UNTOC article 18, par 25]*

5. Before refusing a request pursuant article 19 or postponing its execution pursuant to paragraph 4, the central authority of the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions. *[UNTOC article 18, par 26]*

## **Article 21**

### **Confiscation**

1. A State Party that has received a request made in accordance with article 15 for the purpose of confiscation of proceeds of crime, property, equipment or other instrumentalities in or destined for use in the crimes covered by this Convention, situated in its territory shall, to the greatest extent possible within its domestic legal system: *[UNTOC article 13, par 1]*

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or *[UNTOC article 13, par 1]*

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party, insofar as it relates to proceeds of crime, property, equipment or other instrumentalities in or destined for use in the crimes covered by this Convention, situated in the territory of the requested State Party. *[UNTOC article 13, par 1]*

2. Following a request made by another State Party having jurisdiction over a crime covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities in or destined for use in the crimes covered by this Convention, for the purpose of eventual confiscation to be ordered either by the requesting State Party

or, pursuant to a request under paragraph 1, by the requested State Party. [UNTOC article 13, par 2]

3. The provisions of article 17 are applicable, mutatis mutandis, to this article. In addition to the information specified in article 17 requests made in accordance with this article shall contain: [UNTOC article 13, par 3]

(a) In the case of a request pertaining to paragraph 1 (a), a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law; [UNTOC article 13, par 3]

(b) In the case of a request pertaining to paragraph 1 (b), a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested; [UNTOC article 13, par 3]

(c) In the case of a request pertaining to paragraph 2, a statement of the facts relied upon by the requesting State Party and a description of the actions requested. [UNTOC article 13, par 3]

4. The decisions or actions provided for in paragraphs 1 and 2 shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral Convention, agreement or arrangement to which it may be bound in relation to the requesting State Party. [UNTOC article 13, par 4]

5. Each State Party shall furnish copies of its domestic law and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the depositary. [UNTOC article 13, par 5]

6. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties. [UNTOC article 13, par 8]

7. In applying article 20 the requested State Party may waive the return of articles either before or after handing them over to the requesting State Party if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected. [NEW]

## **Article 22**

### **Proceeds of crime**

1. The requested State Party shall, upon request, endeavor to ascertain whether any proceeds of a crime against the law of the requesting State Party are located within its jurisdiction and shall notify the requesting State Party of the results of its inquiries. In making the request, the requesting State Party shall notify the requested State Party of the basis of its belief that such proceeds may be located in its jurisdiction.

2. If pursuant to paragraph 1 suspected proceeds of crime are found, the requested State Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the requesting State Party.

3. If a request is made for assistance in securing the confiscation of proceeds of crime, such request shall be executed pursuant to the laws of the requested State Party.

4. Proceeds of crime confiscated pursuant to this Convention shall be retained by the requested State Party unless otherwise agreed upon between the States Parties.

5. Pursuant to this article, the proceeds of crime include the proceeds of the possible sale of the assets coming from these crimes.

6. In the application of this article, the rights of a bona fide third party shall be respected under the law of the requested State Party. *[NEW]*

### **Article 23**

#### **Temporary transfer of detainees**

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to the crimes covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate. *[UNTOC article 18, par 10]*

2. For the purposes of paragraph 1:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred; *[UNTOC article 18, par 11]*

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties; *[UNTOC article 18, par 11]*

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person; *[UNTOC article 18, par 11]*

(d) The person transferred shall receive credit for service of the sentence being served in the State Party from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred. *[UNTOC article 18, par 11]*

### **Article 24**

#### **Safe conduct**

A witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will. *[UNCAC, article 46, par 27]*

### **Article 25**

#### **Testimony by video conference**

Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may,

at the request of the other, permit the hearing to take place by video conference if it is in the interest of the efficiency of justice or it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. *[based on UNTOC article 18, par 18]*

## **Article 26**

### **Spontaneous exchange of information**

1. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to the crimes covered by this Convention to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party in accordance with this Convention. Spontaneous information shall be transmitted through the central authorities designated by the States Parties. *[based on UNTOC article 18, par 4]*
2. The providing State Party may, pursuant to its domestic law, impose conditions on the use of such information by the receiving State Party. *[NEW]*
3. The receiving State Party shall be bound by those conditions. *[NEW]*

## **Article 27**

### **Limitations on use of data**

1. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. *[UNTOC, article 18, par 19]*
2. Notwithstanding paragraph 1, the requesting State Party may disclose in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay. *[UNTOC, article 18, par 19]*

## **Article 28**

### **Copies of records**

The requested State Party:

- (a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public; *[UNTOC article 18, par 29]*
- (b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public. *[UNTOC article 18, par 29]*

## **Article 29**

### **Joint investigations**

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements

or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected. *[UNCAC article 49]*

### **Article 30** **Special investigative techniques**

1. Each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the crimes covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part. *[UNCAC article 50]*

## **Part IV** **Extradition**

### **Article 31** **Extradition**

1. This article shall apply to the crimes mentioned in article 2, paragraph 2 to 6, where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the crime for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party. *[UNCAC article 44, par 1]*

2. If the request for extradition includes several separate serious crimes, at least one of which is extraditable under this article and some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter crimes. *[based on UNCAC article 44, par 3]*

3. Each of the crimes to which this article applies shall be deemed to be included as an extraditable crime in any extradition treaty existing between States Parties. States Parties undertake to include such crimes as extraditable crimes in every extradition treaty to be concluded between them. *[UNTOC article 16, par 3]*

4. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons. *[UNTOC article 16, par 14]*

### **Article 32**

#### **Legal basis**

If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any crime to which this article applies. *[UNTOC article 16, par 4]*

### **Article 33**

#### **Grounds for refusal**

Extradition shall be refused if:

(a) The requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons. *[UNTOC article 16, par 14]*

(b) If the request is made with regard to an offence punishable by the death penalty under the law of the requesting State Party, unless the requesting State Party gives sufficient guarantees that the death penalty sentence shall not be passed on or, if it is passed on, that it shall not be carried out. *[NEW]*

(c) the requested State Party has already made a final judgment against the person to be extradited for the facts for which extradition is requested; *[NEW]*

(d) the person sought has been or would possibly be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the requesting Party. *[NEW]*

### **Article 34**

#### **Extradition of nationals**

1. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution. *[UNTOC article 16, par 10]*

### **Article 35**

#### **Conditional extradition**

Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this

option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in article 7. [UNTOC article 16, par 11]

**Article 36**  
**Extradition for purposes of enforcing a sentence**

If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof. [UNTOC, article 16, par 12]

**Article 37**  
**Execution of the request**

1. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party. [based on UNTOC, article 16, par 7]
2. If the requested State Party refuses the whole or any part of the request for extradition or in the event of postponement of the request, the reasons for refusal or postponement shall be notified to the requesting State Party. [NEW]

**Article 38**  
**Request and supporting documents**

1. A request for extradition shall be made in writing under conditions allowing States Parties to establish authenticity.
2. A request for extradition shall contain or be accompanied by the following:
  - (a) As accurate a description as possible of the person sought, together with any other information that may help to establish that person's identity, nationality and location; [UN Model Treaty article 5, par 2, sub a, i]
  - (b) The text of the relevant provision of the law creating the crime or, where necessary, a statement of the law relevant to the crime and a statement of the penalty that can be imposed for the crime; [UN Model Treaty article 5, par 2, sub a, ii]
  - (c) If the person is accused of a crime, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the crime for which extradition is requested and a description of the acts or omissions constituting the alleged crime, including an indication of the time and place of its commission; [UN Model Treaty article 5, par 2, sub b]
  - (d) If the person has been convicted of a crime, by a statement of the crime for which extradition is requested and a description of the acts or omissions constituting the crime and by the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served; [UN Model Treaty article 5, par 2, sub c]
  - (e) If the person has been convicted of a crime in his or her absence, in addition to the documents set out in paragraph 2, by a statement as to the legal means available to the person to prepare his or her defense or to have the case retried in his or her presence; [UN Model Treaty article 5, par 2, sub d]
  - (f) If the person has been convicted of a crime but no sentence has been imposed, by a statement of the crime for which extradition is requested and a



description of the acts or omissions constituting the crime and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence. *[UN Model Treaty on Extradition, article 5, par 2, sub e]*

### **Article 39**

#### **Provisional arrest**

1. The requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings. *[UNTOC article 16, par 9]*
2. The request for provisional arrest shall contain the contents referred to in article 38, a statement of the existence of documents referred to in article 38 and a statement that a formal request for extradition of the person sought will follow. *[NEW]*
3. The requested State Party shall, without delay, inform the requesting State Party of the result of its handling of the request. *[NEW]*
4. Provisional arrest shall be terminated if, within a period of sixty days after the arrest of the person sought, the requested State Party has not received the formal request for extradition. The possibility of provisional release at any time is not excluded, but the requested State Party shall take any measures which it considers necessary to prevent the escape of the person sought. *[NEW]*
5. The termination of provisional arrest pursuant to paragraph 4 shall not prejudice the re-arrest and his subsequent extradition of the person sought if the requested State Party has subsequently received the formal request for extradition. *[NEW]*

### **Article 40**

#### **Simplified procedures**

States Parties shall, subject to their domestic law, endeavor to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any crime to which this article applies. *[UNTOC article 16, par 8]*

### **Article 41**

#### **Transit**

1. Where a person is to be extradited to a State Party from a third State through the territory of the other State Party, the State Party to which the person is to be extradited shall request the other State Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other State Party is scheduled. *[UN Model Treaty on Extradition, article 15, par 1]*
2. Upon receipt of such a request, which shall contain relevant information, the requested State Party shall deal with this request in accordance with procedures provided by its own law. The requested State Party shall grant the request expeditiously unless its essential interests would be prejudiced thereby. *[UN Model Treaty on Extradition, article 15, par 2]*
3. The State Party of transit shall ensure that legal provisions exist that would enable detaining the person in custody during transit. *[UN Model Treaty on Extradition, article 15, par 3]*
4. In the event of an unscheduled landing, the State Party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for [48]

hours, pending receipt of the transit request to be made in accordance with paragraph 1. *[UN Model Treaty on Extradition, article 15, par 4]*

## **Part V**

### **Transfer of sentenced persons**

#### **Article 42**

##### **Scope**

Wherever possible and consistent with fundamental principles of domestic law, a person sentenced in a State Party for a crime covered by this Convention may be transferred to another State Party in order to serve the sentence imposed on him. *[based on CoE Convention on the transfer of sentenced persons, article 2, par 2]*

#### **Article 43**

##### **Conditions for transfer**

1. Transfer may be requested by the sentencing State Party or the administering State Party. *[based on CoE Convention on the transfer of sentenced persons, article 2, par 3]*

2. A sentenced person may be transferred only on the following conditions: *[CoE Convention on the transfer of sentenced persons, article 3, par 1]*

(a) If that person is a national or a permanent resident of the administering State; *[CoE Convention on the transfer of sentenced persons, article 3, par 1, sub a]*

(b) If the judgment is final and enforceable; *[based on CoE Convention on the transfer of sentenced persons, article 3, par 1, sub b]*

(c) If, at the time of receipt of the request for transfer, the sentenced person still has at least one year of the sentence to serve or if the sentence is indeterminate; *[CoE Convention on the transfer of sentenced persons, article 3, par 1, sub c]*

(d) If the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States Parties consider it necessary, by the sentenced person's legal representative, except in the case mentioned in article 46; *[CoE Convention on the transfer of sentenced persons, article 3, par 1, sub d]*

(e) If the acts or omissions on account of which the sentence has been imposed constitute a crime according to the law of the administering State Party or would constitute a crime if committed on its territory; and *[based on CoE Convention on the transfer of sentenced persons, article 3, par 1, sub e]*

(f) If the sentencing and administering States Parties agree to the transfer. *[CoE Convention on the transfer of sentenced persons, article 3, par 1, sub f]*

3. If a State Party which makes the transfer of sentenced persons conditional on the existence of a treaty receives a request for the transfer of a sentenced person from another State Party with which it has no applicable treaty, it shall consider this Convention as the necessary legal basis for the transfer of sentenced persons in respect of the crimes covered by this Convention. *[NEW]*

#### **Article 44**

##### **Obligation to provide information**

1. Any sentenced person to whom this Convention may apply, shall be informed by the sentencing State Party of the substance of this Convention.

2. If the sentenced person has expressed an interest to the sentencing State Party in being transferred under this Convention, that State Party shall so inform the administering State Party as soon as practicable after the judgment becomes final.
3. The information shall include:
  - (a) The name, date and place of birth of the sentenced person;
  - (b) His address, if any, in the administering State;
  - (c) A statement of the facts upon which the sentence was based;
  - (d) The nature, duration and date of commencement of the sentence.
4. If the sentenced person has expressed to the administering State Party his interest in being transferred by virtue of this Convention, the sentencing State Party shall, on request, communicate to the administering State Party the information referred to in paragraph 3 above.
5. The sentenced person shall be informed, in writing, of any action taken by the sentencing State Party or by the administering State Party under the preceding paragraphs, as well as of any decision taken by either State Party on a request for transfer. [*CoE Convention on the transfer of sentenced persons, article 4*]

#### **Article 45**

##### **Requests and supporting documents**

1. Requests for transfer and replies shall be made in writing under conditions allowing States Parties to establish authenticity.
2. The requested State Party shall promptly inform the requesting State Party of its decision whether or not to agree to the requested transfer.
3. All communications between States Parties may be made directly from one central authority to the other.
4. The administering State Party, if requested by the sentencing State Party, shall furnish it with:
  - (a) A document or statement indicating that the sentenced person is a national of that State;
  - (b) A copy of the relevant law of the administering State Party which provides that the acts or omissions on account of which the sentence has been imposed in the sentencing State Party constitute a criminal offence according to the law of the administering State Party, or would constitute a criminal offence if committed on its territory;
5. If a transfer is requested, the sentencing State Party shall provide the following documents to the administering State Party, unless either State Party has already indicated that it will not agree to the transfer:
  - (a) A certified copy of the judgment and the law on which it is based;
  - (b) A statement indicating how much of the sentence has already been served, including information on any pre-trial detention, remission, and any other factor relevant to the enforcement of the sentence;
  - (c) Other than the case mentioned in article 47, a declaration containing the consent to the transfer as referred to in article 46 or, if appropriate, the documents mentioned in article 45;
  - (d) A report of the conduct of the sentenced person during his detention; and

(e) Whenever appropriate, any medical or social reports on the sentenced person, information about his treatment in the sentencing State Party, and any recommendation for his further treatment in the administering State Party.

6. Either State Party may ask to be provided with any of the documents or statements referred to in paragraphs 4 or 5 above before making a request for transfer or taking a decision on whether or not to agree to the transfer. [*CoE Convention on the transfer of sentenced persons, articles 5 and 6*]

#### **Article 46**

##### **Consent and its verification**

1. The sentencing State Party shall ensure that the person required to give consent to the transfer in accordance with article 43, paragraph 2(d), does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State Party.

2. The sentencing State Party shall afford an opportunity to the administering State Party to verify through a consul or other official agreed upon with the administering State Party, that the consent is given in accordance with the conditions set out in the paragraph above. [*CoE Convention on the transfer of sentenced persons, article 7*]

#### **Article 47**

##### **Persons escaping from the custody of the sentencing State Party**

1. When a national of one State Party attempts to evade the administration or continued administration of a final sentence passed against him in the territory of the other State Party, by taking refuge in the territory of the former before completing his sentence, the sentencing State Party may send the other State Party a request for it to administer the sentence.

2. At the request of the sentencing State Party, the requested State Party may, before receiving the documents supporting the request, or pending the decision on this request, have the sentenced person arrested or take any other steps such as to ensure that he remains on its territory pending a decision regarding the request. Any such request shall be accompanied by the information mentioned in article 45. Arrest of the sentenced person under this heading shall not lead to an aggravation of his penal situation.

3. The transfer of the administration does not require the consent of the sentenced person. [*Additional Protocol to the CoE Convention on the Transfer of Sentenced Persons, article 2*]

#### **Article 48**

##### **Effect of transfer for the sentencing State Party**

1. The taking into charge of the sentenced person by the authorities of the administering State Party shall have the effect of suspending the enforcement of the sentence in the sentencing State.

2. The sentencing State Party may no longer enforce the sentence if the administering State Party considers enforcement of the sentence to have been completed. [*CoE Convention on the transfer of sentenced persons, article 8*]

#### **Article 49**

##### **Effect of transfer for the administering State Party**

1. The competent authorities of the administering State Party shall:

(a) Continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in article 50, or

(b) Convert the sentence, through a judicial or administrative procedure, into a decision of that State Party, thereby substituting for the sanction imposed in the sentencing State Party a sanction prescribed by the law of the administering State Party for the same offence, under the conditions set out in article 51.

2. The administering State Party, if requested, shall inform the sentencing State Party before the transfer of the sentenced person as to which of these procedures it will follow.

3. The enforcement of the sentence shall be governed by the law of the administering State Party and that State Party alone shall be competent to take all appropriate decisions.

4. Any State Party which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in the territory of another State Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration indicate the procedures it will follow in such cases. *[CoE Convention on the transfer of sentenced persons, article 9]*

#### **Article 50** **Continued enforcement**

1. In the case of continued enforcement, the administering State Party shall be bound by the legal nature and duration of the sentence as determined by the sentencing State Party.

2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State Party, or its law so requires, that State Party may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State Party, nor exceed the maximum prescribed by the law of the administering State Party. *[CoE Convention on the transfer of sentenced persons, article 10]*

#### **Article 51** **Conversion of sentence**

1. In the case of conversion of sentence, the procedures provided for by the law of the receiving State Party apply. When converting the sentence, the competent authority:

(a) Shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the transferring State Party;

(b) May not convert a sanction involving deprivation of liberty to a pecuniary sanction;

(c) Shall deduct the full period of deprivation of liberty served by the sentenced person;

(d) Shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the receiving State may provide for the crime or crimes committed.

2. If the conversion procedure takes place after the transfer of the sentenced person, the receiving State Party shall keep that person in custody or otherwise ensure his presence in the receiving State Party pending the outcome of that procedure. *[CoE Convention on the transfer of sentenced persons, article 11]*

**Article 52**  
**Pardon, Amnesty, Commutation**

Each State Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws. *[CoE Convention on the transfer of sentenced persons, article 12]*

**Article 53**  
**Review of judgment**

The sentencing State Party alone shall have the right to decide on any application for review of the judgment. *[CoE Convention on the transfer of sentenced persons, article 13]*

**Article 54**  
**Termination of enforcement**

The administering State Party shall terminate enforcement of the sentence as soon as it is informed by the sentencing State Party of any decision or measure as a result of which the sentence ceases to be enforceable. *[CoE Convention on the transfer of sentenced persons, article 14]*

**Article 55**  
**Information on enforcement**

The administering State Party shall provide information to the sentencing State Party concerning the enforcement of the sentence:

- (a) When it considers enforcement of the sentence to have been completed;
- (b) If the sentenced person has escaped from custody before enforcement of the sentence has been completed; or
- (c) If the sentencing State Party requests a special report. *[CoE Convention on the transfer of sentenced persons, article 15]*

**Part VI**  
**Witnesses and experts**

**Article 56**  
**Protection of witnesses and experts**

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning the crimes covered by this Convention and, as appropriate, for their relatives and other persons close to them. *[UNTOC, article 24, par 1]*

2. The measures envisaged in paragraph 1 may include, inter alia, without prejudice to the rights of the defendant, including the right to due process: *[UNTOC, article 24, par 2]*

- (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where

appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons; *[UNTOC, article 24, par 2, sub a]*

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means. *[UNTOC, article 24, par 2, sub b]*

3. States Parties shall consider entering into agreements or arrangements with other States Parties for the relocation of persons referred to in paragraph 1. *[UNTOC, article 24, par 3]*

4. The provisions of this article shall also apply to victims insofar as they are witnesses. *[UNTOC, article 24, par 4]*

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defense. *[UNCAC, article 32, par 5]*

#### **Article 57**

##### **Access to assistance for victims**

1. Each State Party shall establish appropriate procedures to provide access to compensation and restitution through the criminal proceedings for victims of the crimes covered by this Convention. *[based on UNTOC, article 25, par 2]*

2. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defense. *[UNTOC, article 25, par 3]*

## **Part VII**

### **Final provisions**

#### **Article 58**

##### **Relation with other Agreements**

If two or more States Parties have already concluded an agreement or treaty in respect of a subject dealt with in this Convention or have otherwise established their relations in respect of that subject, they may agree to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international cooperation. *[based on Agreement on Illicit Traffic by Sea, art. 30, par 3]*

#### **Article 59**

##### **Consultations among central authorities**

At the request of one or more States Parties, there could be consultations among central authorities on matters related to the application of this Convention. *[NEW]*

#### **Article 60**

##### **Settlement of disputes**

1. States Parties shall endeavor to settle disputes concerning the interpretation or application of this Convention through negotiation. *[UNTOC, article 35, par 1]*

2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a

reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court. *[UNTOC, article 35, par 2]*

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation. *[UNTOC, article 35, par 3]*

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the depositary. *[UNTOC, article 35, par 4]*

#### **Article 61**

##### **Signature, ratification, acceptance, approval and accession**

1. This Convention shall be open to all States for signature from [PM] to [PM] in [PM], and thereafter at [PM] until [PM]. *[UNTOC, article 36, par 1]*

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the depositary. *[based on UNTOC, article 36, par 3]*

3. This Convention is open for accession by any State. Instruments of accession shall be deposited with the depositary. *[based on UNTOC, article 36, par 4]*

#### **Article 62**

##### **Entry into force**

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. *[based UNTOC, article 38, par 1]*

2. For each State ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument. *[based UNTOC, article 38, par 2]*

3. This Convention shall apply to any request presented after its entry into force even if the relevant acts or omissions occurred before that date. *[NEW]*

#### **Article 63**

##### **Amendment**

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment to this Convention. Any proposal for an amendment shall be communicated to the depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the depositary no later than 30 days after its circulation that they support further consideration of the proposal, the depositary shall convene an Amendment Conference to which all States Parties shall be invited. *[based on Convention on Cluster Munition, article 13, par 1]*

2. Any amendment to this Convention shall be adopted by a majority of two thirds of the States Parties present and voting at the Amendment Conference. The depositary



shall communicate any amendment so adopted to the States Parties. *[Convention on Cluster Munition, article 13, par 4]*

3 An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance. *[Convention on Cluster Munition, article 13, par 5]*

#### **Article 64** **Denunciation**

A State Party may denounce this Convention by written notification to the depositary. Such denunciation shall become effective one year after the date of receipt of the notification by the depositary. *[UNTOC, article 40, par 1]*

#### **Article 65** **Conference of States Parties**

1. The States Parties shall meet regularly in order to consider any matter with regard to the implementation of this Convention, including the operation and status of this Convention and international cooperation and assistance in accordance with parts III, IV and V; *[based on the Convention on Cluster Munition, article 11, par 1]*

2. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure. *[Convention on Cluster Munition, article 11, par 2]*

3. The costs of the Conferences of States Parties and the Amendment Conferences shall be borne by the States Parties and States not party to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately. *[based on Convention on Cluster Munition, article 14, par 1]*

#### **Article 66** **Depositary and languages**

1. The [PM] is depositary of this Convention. *[UNTOC, article 41, par 1]*

2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary. *[UNTOC, article 41, par 2]*

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

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