

## **CRITICAL ANALYSIS OF INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON CRIMES AGAINST HUMANITY**

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### **Abstract**

International community of states has adopted specific conventions to prevent genocide and war crimes in 1949 itself. However, a universal convention to prevent and punish crimes against humanity is still pending. From 2014, the International Law Commission has started a serious work to formulate draft articles for a universal convention on crimes against humanity. After five years when the commission has come out with all draft articles for the proposed international convention on crimes against humanity, it is pertinent to critically analyse the same. Other than introduction and conclusion, this paper is divided in four parts. Introductory part has discussed the concept in brief and its development over the time from mere an idea to an international crime. First part of this paper is focussed on the desirability of this convention. Second part is exclusively dedicated to the definition of crimes against humanity as adopted by the commission. Third part presents a bird's eye view on all other draft articles along with critical perspective on them. Fourth part has critically discussed the response of Sixth committee, the legal arm of United Nations, to these draft articles. This part has discussed the viewpoints of representatives of various member States, and has tried to chalk out common objections and suggestions of the States. In conclusion, some practical suggestions are provided which can increase acceptability of these draft articles in the United Nations General Assembly.

### **I Introduction**

### **II Why an international convention is required**

### **III Definition of crimes against humanity in the draft convention**

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### **I Introduction**

CRIME AGAINST humanity as an international crime has two facets. First, these are so heinous crimes that they shock the collective consciousness of entire humankind.<sup>1</sup> Second, the crime is so

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<sup>1</sup>H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* 268 (Viking Press, 1965).

Hannah Arendt characterized the Holocaust as a “new crime, the “crime against humanity” in the sense of a crime ‘against human status,’ or against the very nature of mankind.”

terrible that it is an attack not just upon the immediate victims, but also against whole humanity, and hence the entire community of humanity has an interest in its punishment.<sup>2</sup> Although detailed definition will be analysed in third part of this paper; however in common parlance when crimes like murder, rape etc., are committed on a large scale or systematically, against any civilian population, pursuant to a State or organisational policy, then they become crimes against humanity. In August 2019, United Nations' International Law Commission (ILC) finished the second reading of draft articles on proposed international convention on crimes against humanity.<sup>3</sup> The process of drafting this proposed convention started in 2014, when the Commission appointed Sean D. Murphy as a special rapporteur for this purpose. Crimes against humanity is one of the three major international crimes, yet less prioritised, as compared to genocide and war crimes. Where, United Nations adopted genocide convention and four Geneva conventions on war crimes in 1949, international convention on crimes against humanity is still at the stage of draft articles.<sup>4</sup> Crimes against humanity, separate from war crimes, first emerged as an idea at international level during the World War I, when Ottoman Turkish Empire systematically killed, mass raped and forcibly transferred, more than 200000, of its own citizens who ethnically belonged to Armenian Christian community.<sup>6</sup> The commission of inquires after the First World War, relying on the preamble of Hague convention of 1899<sup>7</sup> and 1907,<sup>8</sup> famously known as *Marten's* clause, wanted to add provisions in the treaty of Versailles, for international

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<sup>2</sup> First Report of Special Rapporteur on crimes against humanity.

<sup>3</sup> United Nations International Law Commission, Report of the Seventy-first session (Apr. 29-June 7 and July 8-Aug. 9, 2019), Ch. VI. (A/74/10), available at: <http://legal.un.org/docs/?symbol=A/74/10>. (last visited on Dec.7, 2019).

<sup>4</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, United Nations, Treaty Series, vol. 78, at 277, available at: <https://www.refworld.org/docid/3ae6b3ac0.html>. (last visited on Dec.10, 2019).

<sup>5</sup> International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, Aug. 12 1949, 75 UNTS 31, available at: <https://www.refworld.org/docid/3ae6b3694.html>. (last visited on Dec.10, 2019); International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)* Aug. 12, 1949, 75 UNTS 85, available at: <https://www.refworld.org/docid/3ae6b37927.html>. (last visited on Dec.10, 2019); International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <https://www.refworld.org/docid/3ae6b36c8.html>. (last visited on Dec.10, 2019).

<sup>6</sup> Taner Akcam, *The Young Turks' crime against humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire*, 203 (Princeton University Press, 2012).

<sup>7</sup> First International Peace Conference, *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, July 29, 1899. (List of other treaties signed along Hague Convention 1899).

<sup>8</sup> Second International Peace Conference, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, The Hague, Oct. 18, 1907.

prosecutions of the officers responsible for this.<sup>9</sup> Although this idea could not fructify, but the seeds were sown, which grew up in next two decades. Therefore, after World War II, Nuremberg tribunal prosecuted many German officials for committing large-scale heinous crimes against Jews, Gypsies, Communist and homosexuals in Germany and other parts of the Europe.<sup>10</sup> The Nuremberg charter codified such atrocities in its section 6 as ‘crimes against humanity’.<sup>11</sup> Thereafter, crimes against humanity was always a part of all statutes of international criminal tribunals as well as hybrid tribunals and extraordinary national tribunals. However, there was no serious effort to draft a dedicated convention on prohibition and prevention of crimes against humanity. Current initiative of the ILC is a much-awaited step in right direction. It is important to analyse whether these draft articles have a potential to prohibit and prevent crimes against humanity, substantively as well as procedurally; whether it can serve the purpose for which it is desirable.

## **II Why an international convention is required**

International convention to prevent crimes against humanity is desirable for making it obligatory on the States to prevent crimes against humanity in their national systems by creating a national legislation. Almost all the international criminal tribunals, hybrid tribunals and extraordinary national tribunals were governed with ex-post facto laws, resulted from knee jerk reaction to the incidents of crimes against humanity as and when they occurred. Only Rome Statute of international criminal court has prospective jurisdiction to punish such crimes.<sup>12</sup> However, principle of complementarity mandates that the ICC can assume jurisdiction only in such condition when national jurisdiction is unable or unwilling to investigate or prosecute in a situation of crimes against humanity. This provision calls for the adoption of laws to prevent crimes against humanity in all national jurisdictions, because even for the principle of complementarity there should be some national laws. States with no national laws on crimes

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<sup>9</sup>Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties 20 (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), reprinted in 14 *Am. J. Int'l L.* 95 (1920), as mentioned in M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* 90 (Cambridge University Press, New York, 2011).

<sup>10</sup>Willem A. Wagenaar and JopGroeneweg, “The Memory of Concentration Camp Survivors” (4) *ACP* 77-87 (1990).

<sup>11</sup>Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, (1945).

<sup>12</sup>The Rome Statute of International Criminal Court, 1998.

against humanity have to be considered as unable to investigate and prosecute the perpetrators of crimes against humanity.<sup>13</sup> A study conducted in George Washington University has found most of the States do not have laws to prevent crimes against humanity. Among those States who have some sort of law to prevent crimes against humanity, only a few states have adopted verbatim definition of crimes against humanity, as found in the Rome Statute.<sup>14</sup> Such inappropriate definitions cannot complement the jurisdiction of the international criminal court at national levels. Moreover, with dissimilar definitions states cannot cooperate with each other in the matters of extradition and mutual legal assistance, as most of the States cooperate only when the ‘act’ is a criminal act, in both the jurisdictions; a principle known as doctrine of dual criminality. Even principle of *aut dedere aut judicare* i.e., ‘prosecute or extradite’ also requires similar criminality in both extraditing and receiving States. Hence, in order to improve mutual legal assistance and performance of extradition obligations also legal parity in various national jurisdictions, as to the definition of crimes against humanity is necessary. The ILC special rapporteur has decided to adopt the definition of crimes against humanity from the Rome Statute with minor modifications. From Nuremberg Charter to Rome Statute definition of crimes against humanity has continuously developed, nonetheless the commission has chosen not to introduce further changes while adopting the definition for the proposed convention. Prof. Murphy opines that 124 States have ratified the Rome Statute, hence adopting substantially different definition of crimes against humanity in national jurisdiction will create unnecessary confusion and further principle of complementarity will not be satisfied with different definitions in international and national legal regimes.<sup>15</sup> For understanding, the substantive effectiveness of draft articles of the proposed convention next part of this paper will analyse the definition of crimes against humanity as adopted by the ILC from the Rome Statute with minor changes.

### III Definition of crimes against humanity in the draft convention

International law commission has published its final report in the 71<sup>st</sup> session, on September 16, 2019, where in chapter IV contains entire set of draft articles on crimes against humanity. Draft

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<sup>13</sup>*Ibid.* Section 17.

<sup>14</sup>Arturo J. Carrillo and Annalise K. Nelson, Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction, 46 *GWILR* 481 (2014).

<sup>15</sup>Sean D. Murphy, *First Report of the Special Rapporteur on Crimes against Humanity*, 58 United Nations International Law Commission, 2013. A/CN.4/680, available at: <http://legal.un.org/docs/?symbol=A/CN.4/680>. (last visited on Dec. 7, 2019).

article 2 therein defines the offence of crimes against humanity.<sup>16</sup> According to chapeau of draft article 2, a ‘widespread or systematic’ attack with the knowledge of the attack is an act of crimes against humanity when the attack is primarily focused against any civilian population. Here two threshold limits are widespread and systematic are disjunctive requirements i.e. separated by ‘or’. However, many States in the Rome conference contended with the use of disjunctive clause even separate but spontaneous incidents can be considered as systematic. To strike a balance in sub article 2 of article 7 of the Rome Statute, attack was defined as ‘multiple commission of the prohibited acts pursuant to State or organisational policy’. This policy requirement in clause 2 has almost neutralised the impact of disjunctive provision of clause 1, since a policy driven widespread attack, is anyhow a systematic attack. The definition has covered ‘any’ civilian population. It means, a civilian population might be passive to attack or there might be some defending members. Even presence of some non-civilian person among civilian population does not deprive the population from its civilian character.<sup>17</sup>The definition considered presence of knowledge of attack as a sufficient *mens rea* for the culpability. With such threshold requirements mentioned in chapeau, if any of the acts listed in draft article 2 is committed then it’s a crime against humanity. This list consists murder, rape, enslavement, extermination, deportation, torture, enforced disappearance, other sexual or inhuman crimes, apartheid and

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<sup>16</sup>United Nations International Law Commission, Report of the 71<sup>st</sup> session (Apr. 29-June 7 and July 8- Aug. 9, 2019), Ch. IV. (A/74/10), available at: <http://legal.un.org/docs/?symbol=A/74/10>. (last visited on Dec.7, 2019). Art. 2

Definition of crimes against humanity

1. For the purpose of the present draft articles, “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, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;
- (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.

<sup>17</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50(3), June 8, 1977, 1125 U.N.T.S. 3.

persecution on political, racial, national, ethnic, cultural, religious, gender based grounds. This list is much lengthy as compared to the contents of crimes against humanity in the Nuremberg and Tokyo charters. Due to the increased 'rights' consciousness, in second half of twentieth century, torture and enforced disappearance, apartheid and other sexual and inhuman crimes have also got place in the prohibited acts, in the Rome Statute definition of crimes against humanity, which has been adopted by the commission also in draft article 2. One significant change, over the Rome Statute definition, which ILC has introduced in draft article 2 is meaning of gender. Third clause of article 7 of the Rome Statute 2002 had explanations related to the meaning of various crimes listed the definition, where gender was explained as consisting of only two sexes *i.e.*, male and female. Whereas draft article 2 of proposed, convention in its third clause has not made gender limited to male and female only. Therefore, any persecution against the third gender and transgender people is also prohibited under definition of crimes against humanity in the draft article 2 of the proposed convention.

Although a progressive definition has been adopted but the commission has missed the opportunity to further develop the definition by adding some more offences in prohibited acts. From the charters of Nuremberg<sup>18</sup> and Tokyo<sup>19</sup> to the Rome Statute 2002 of international criminal court, definition of crime against humanity has continually developed to address the needs of rapidly changing world. In Nuremberg and Tokyo, connection with war was a threshold requirement. In the Statute of Yugoslavian tribunal due to civil war context, connection with war was not required, only a situation of armed conflict, international or non-international, was sufficient.<sup>20</sup> Definition of crimes against humanity was further modified in Statute of Rwanda tribunal due to a different situation where even civil war was absent.<sup>21</sup> In Rwanda the government-supported Hutu militia was attacking Tutsi community and moderated members of Hutu community, hence, connection with armed conflict was also removed and only an attack against any civilian population was held sufficient. As discussed, the Rome Statute further

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<sup>18</sup>International Military Tribunal (Nuremberg), 1945, *available at*: <https://history.State.gov/milestones/1945-1952/nuremberg>. (last visited on Dec. 7, 2019).

<sup>19</sup>International Military Tribunal for the Far East, 1946, *available at*: <http://lib.law.virginia.edu/imtfe/tribunal>. (last visited on Dec. 7, 2019).

<sup>20</sup>International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (1994).

<sup>21</sup>Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 Jan. 1994 and 31 Dec. 1994.

modified the definition and added some new prohibited acts such as torture etc. Every time the definition modified and further developed to meet the challenges faced by humanity. As forms of crimes against humankind were changing, the definition was also changing. Nevertheless, the commission did not modify further the definition and ignored the challenges, which have appeared in last twenty years. For example, the world has seen a mammoth increase in the terrorist activities after 1998, when the Rome Statute 2002 was passed, but commission did not consider including terrorist activities in the prohibited acts in definition of crimes against humanity. Terrorist activities qualify all chapeau requirements, as these are always in the nature of systematic attacks on a civilian population, with the knowledge, in pursuant to organisational policy of any terrorist group. One common reason cited for not including terrorist activities, is the absence of a universally accepted definition of terrorism. However, this is the weakest argument, as definitions of murder and rape are also not same in all jurisdictions. In some jurisdictions, marital rape is also part of the crime, whereas in others it is not. In some jurisdictions, rape is gender neutral both *qua* victim and *qua* perpetrators, whereas in other jurisdictions rape can be only against the women. Even then, rape is part of the prohibited acts in the definition of the crimes against humanity. On the other hand, we have several U.N. resolutions and many global as well as regional treaties calling for prohibition of various terrorist activities. Therefore, ILC should have added terrorist activities in the definition of crimes against humanity. Although the commission has not utilised the opportunity for further improving the law regarding prevention of crimes against humanity at substantive level; however, at procedural level the commission has tried to eliminate any kind of impunity for the perpetrators of crimes against humanity, which is discussed in the next part of this paper.

#### IV An overview of remaining draft articles

The draft articles have reasonably tried to plug all the avenues of impunity. Entire set of draft articles consists of a preamble and 15 draft articles. The preamble, *inter alia*, has expressly declared prohibition of crimes against humanity as a peremptory norm of international law *i.e.*, *Jus Cogens*.<sup>22</sup> However, draft article 1 explains the scope and declares that the draft articles will

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<sup>22</sup>United Nations International Law Commission, Report of the Seventy-first session (Apr. 29-June 7 and July 8-Aug. 9, 2019), Ch. VI. (A/74/10), available at: <http://legal.un.org/docs/?symbol=A/74/10>. (last visited on Dec.7, 2019).

*Preamble of draft convention on crimes against humanity*

.....Recalling also that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),..... .

apply to prevention and punishment of crimes against humanity.<sup>23</sup> Draft article 2 has been discussed in detail in previous part of this paper. Draft article 3 is in the form of a general obligation that states will not engage in the acts of crimes against humanity. Even in the situations of armed conflict, internal political instability or other public emergencies States will not resort to crimes against humanity. Rather States are under obligation to prevent crimes against humanity in all circumstances including emergencies. While draft article 4 is in the form of specific obligation that states will take all legislative, executive, administrative and judicial measures to prevent crimes against humanity; and States will cooperate with all relevant international and national organisations to prevent crimes against humanity. Draft article 5 lays down the principle of non-refoulement *i.e.*, states will not extradite any person to such a territory where he could be subjected to the crimes against humanity. Here draft article 6 is very important, which mandates that States will criminalise every act of crimes against humanity in their national laws. This draft article mandates non-exclusion of any person on the grounds of official capacity etc. Even superior orders, civil or military, shall not be a ground to exclude criminal liability of any person. It means no officers and no politicians holding any government office shall be immune from the criminal liability for the act of crimes against humanity. There shall be no grounds for any kind of impunity. Draft articles 7 and 8 mandate a state to exercise its jurisdiction for investigation and prosecution when there are reasonable grounds to believe that crimes against humanity have been committed or are being committed in the territory under its control. However, draft articles 9 and 10 needs to be read along with draft article 7, because these draft articles indirectly indicate that a State can exercise even universal jurisdiction, if its national law allows *i.e.* exercising jurisdictions against such non-nationals who committed crimes against humanity against other non-national in the territory of any foreign State. In such cases, a State proclaiming universal jurisdiction can exercise its jurisdiction only, when such non-national offender is present within its territory. Here draft article 9 provides that when a suspect offender of crimes against humanity is present with in the territory of the member state, then the state will apprehend him for the reasonable period required for a quick preliminary investigation. If the state finds there are grounds to believe that a proper prosecution is necessary then the state will immediately inform such other state where the offender has committed crimes against humanity. In addition to this, the investigating state will indicate whether it intends to

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<sup>23</sup>*Ibid.*



extradite such offender or not. Whereas draft article 10 has incorporated the legal maxim of *Aut dedere aut judicare*, which means ‘either extradite or prosecute’. Therefore, draft articles 9 and 10 are two sides of the same coin. Draft article 9 provides that after investigation, the State should indicate its intention regarding extradition, and under draft article 10, the State is under an obligation to prosecute if it is not extraditing the offender. However, there is a serious lacuna in the last part of draft article 10, where it provides that if a state decides to prosecute the alleged offender then the authorities in the state shall take their decisions in the same manner as they decide in other matters of prosecution according to their national laws. It is a well-known fact that in many States there are unguided discretions for withdrawal of prosecution. For example, in India, section 321 of Cr PC always remains in controversy for the alleged political misuse of State’s power to withdrawal of prosecution. This provision of draft article 10 might be misused by the States to initiate a sham prosecution, and then withdraw from prosecution. In this way, a rough State can extend an indirect impunity to an alleged offender, and consequently the main aim of the proposed convention, the end of all kinds of impunities, would be defeated. Here the commission should add one proviso that such national laws should not be in contradiction with the ethos of international law. A similar example can be taken from article 21 of the Rome Statute that provides, to fill any gaps in the law, international criminal court can use any national law also, but such national law should be in conformity with international law. A similar provision can be added in draft article 10 also. Another important aspect of the conventions is protection of the rights of accused as well as victims and witnesses.<sup>24</sup>

Draft article 11 makes it mandatory that the accused or alleged offender should be given a fair trial. At the same time draft article 12 is about protection of victims and witnesses *etc.* Draft article 13 has a detailed provision regarding the process of extradition. This article declares that the states can use pre-existing bilateral or multi-lateral extradition treaty, if any, or they can derive their obligation to extradite from the article 13 of the convention. Draft article 14 is a detailed provision regarding mutual legal assistance. States are under obligation to provide legal assistance to each other in investigation and prosecution of crimes against humanity. Clause (3) of draft article 14 gives an inclusive list of matters of legal assistance, which is as under:

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<sup>24</sup>*Ibid.*

- (3). Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:
- (a) Identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;
  - (b) Taking evidence or statements from persons, including by video conference;
  - (c) Effecting service of judicial documents;
  - (d) Executing searches and seizures;
  - (e) Examining objects and sites, including obtaining forensic evidence;
  - (f) Providing information, evidentiary items and expert evaluations;
  - (g) Providing originals or certified copies of relevant documents and records;
  - (h) Identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;
  - (i) Facilitating the voluntary appearance of persons in the requesting State; or
  - (j) Any other type of assistance that is not contrary to the national law of the requested State.<sup>25</sup>

The draft article further provides, *inter alia*, that the states cannot refuse to render legal assistance on the pretext of bank secrecy. Here it is pertinent to mention that when first version of draft articles was sent to the States for comments, then in reply Netherlands suggested there should be a separate international convention on mutual legal assistance dedicated for the cases of three international crimes including genocide and war crimes, along with crimes against humanity. Along with this suggestion, Netherlands sent a complete draft of proposed “Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes”. The last draft article 15 is about the process of settlement of the disputes, which suggests invoking jurisdiction of international court of justice.

### **Overall analysis of draft articles**

Discussion on all draft articles shows that the special rapporteur and the drafting committee of the commission have done a good work to minimise the avenues of impunity for the perpetrators of crimes against humanity. States have been put under an obligation for not indulging in crimes against humanity even during emergencies like civil wars etc. States have

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<sup>25</sup>*Supra* note 22, art. 14 (3).

been put under obligation to adopt all legislative, executive, administrative and judicial measures to prohibit, prevent and punish crimes against humanity. Draft articles have mandated states to cooperate with all relevant international and national agencies for this purpose. Mutual legal assistance in investigation, prosecution and extradition is a duty of all States according to these draft articles. States have to prosecute or extradite any alleged offender. However, provision for prosecuting according to national laws can be misused by rogue states, but the principle of *Aut dedere aut judicare* is otherwise an effective provision for those states who work in good faith. Bearers of all high government offices have also been made liable for their actions if they commit crimes against humanity. Subordinate employees have been made responsible for their actions, because superior orders are no grounds for defence. If these draft articles are implemented in letter and spirit then these might be effective in preventing and punishing crimes against humanity.

#### **V Response of the states in the sixth committee to the draft articles**

Sixth committee of the United Nations is a legal committee, where expert representatives of the States discuss all drafts conventions, prepared by international law commission, on the behalf of United Nations General Assembly. ILC published final report of its 71<sup>st</sup> session on September 16, 2019, where chapter IV consisted of draft articles on crimes against humanity, as finalised by the commission after second reading. However, the Sixth committee has discussed these draft articles in its meeting held on October 29, 2019.<sup>26</sup> Although majority this meeting are discussed hereunder. Of the states did not express any view on these draft articles; however, some observations of states in

Austrian representative welcomed the draft articles and proposed a diplomatic conference in Vienna to formulate a convention based on these draft articles.<sup>27</sup> Australian representative Aitken welcomed ILC's adoption of the draft articles, and stressed on the need to start international negotiation based on these draft articles so that important gaps in current structure with regard to international crimes should be filled.<sup>28</sup>

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<sup>26</sup> United Nations Meeting Coverage and Press Releases, Sixth Committee Continues International Law Commission Review, Debating Need for Treaty on Crimes against Humanity, 18 OCTOBER 2019, GA/L/3601, *available at*: <https://www.un.org/press/en/2019/gal3601.doc.htm> (last visited on Dec. 10, 2019).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

Belarus's representative Metelitsa welcomed the definition of crimes against humanity in draft article 2, but he suggested adding trafficking of person as a separate offence under the crimes against humanity. He welcomed Austria's proposal to hold a diplomatic conference in Vienna, and UN Secretariat's proposal to constitute a working group of experts to manage the negotiation so that it should be compatible with the national laws.<sup>29</sup>

Brazilian representative George Rodrigo Bandeira Galindo, stressed that the measure to be adopted by the States to prevent and punish crimes against humanity should be in conformity with international law. There should be a general prohibition of use of force on the pretext of crimes against humanity. He added that the negotiations related to proposed convention, based on draft articles, should be held in General Assembly for wider support. He raised concerns for clarifying the relationship between universal jurisdiction and the jurisdiction of international criminal court. He wanted to add the safeguards so that the States should not abuse the principle of universality.<sup>30</sup>

India's response was conveyed by Uma Sekhar, Additional Secretary, Ministry of External Affairs. Overall response of India, to the draft articles as presented in 2019, can be termed as negative. Out of four paragraphs in first three paras, Indian envoy has just taken note of the progress of the work since beginning until date. Therefore, first three paras are neutral in nature. However, in last para India has raised doubts over the necessity of an exclusive convention on crimes against humanity. Indian emissary held the Rome Statute as a sufficient basis for the national legislations. Vocabulary used by India in fourth para, such as "necessity...needs to be examined", "the topic could lead to duplicating the efforts", is clearly negative, if not strongly negative or strong rejection.<sup>31</sup> According to a study conducted by Washington University in St. Louis, in 2018, Indian response, to separate convention on crimes against humanity, was neutral in 2013. In 2014, India did not express any opinion. In 2015,

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<sup>29</sup>*Ibid.*

<sup>30</sup>*Ibid.*

<sup>31</sup>Statement by India on "Report Of The International Law Commission On The Work Of Its Seventy-First Session", at the Sixth Committee of the 74<sup>th</sup> Session of the United Nations General Assembly, New York 29 October 2019, available at: <http://statements.unmeetings.org/media2/23328673/india.pdf> (last visited on Dec. 10, 2019).

In this regard, we reiterate our position that, considering the international mechanisms that are already dealing with the matter, including the International Criminal Court, necessity of having a Convention exclusively addressing crimes against humanity need to be examined. In our view, the Rome Statute provides sufficient legal basis for the domestic criminalization and prosecution of crimes against humanity. In addition, any work on this topic could lead to duplicating the efforts already undertaken in existing regimes.

Indian response was neutral, in 2016 and 2017 both years negative; in 2018 neutral.<sup>32</sup>In 2019, again it is negative. Hence, Indian response to this proposed convention has ranged from neutral to negative. It was never strongly negative, but at the same time, it was never a positive response. India is not a signatory to the Rome Statute, as Indian suggestions of adding terrorism as a separate offence in the Rome Statute or as a part of the crimes against humanity was not accepted. Therefore, the Commission's decision to adopt the Rome Statute's definition of crimes against humanity is clearly a duplication of the efforts, from Indian perspective. This definition does not address Indian concerns on terrorism. Although India did not say it clearly this time, but based on Indian opinion expressed during the formation of the Rome Statute, this might be the only reason for Indian opinion oscillating from neutral to negative. Perhaps there is nothing pragmatic in this definition from Indian point of view.

The representative of Ireland, while extending his support to the draft articles, called for convening an international conference of plenipotentiaries for this purpose. He added that the initiatives for Mutual Legal Assistance and extradition should also be discussed with the proposed convention, as these are complementary to it.<sup>33</sup>

However, Israel's representative Sarah Weiss Maudi, wanted to add some more safeguards so that, States should not misuse or abuse the enforcement and jurisdiction mechanism, rather than employing them in appropriate circumstances. She added that the draft article 5 (*non-refoulement*), with a general reference to violation of other human rights in will have no effect on procedural impunity. She had an apprehension that this general reference can be misused by the States to refuse extradition requests, even in appropriate cases.<sup>34</sup>

Italian representative Andrea Tiriticco expressed his State's support to the draft articles, and held that this initiative will fill the gap of horizontal judicial cooperation among the States for preventing and punishing crimes against humanity.<sup>35</sup>

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<sup>32</sup>Washington University, Compilation of Government Reactions to the UN International Law Commission's Project on Crimes Against Humanity 68th Session (2013) – 73rd Session (2018) (Whitney R. Harris World Law Institute, St. Louis, Jan. 3, 2019), *available at*: [http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2019/04/6thCommitteeGovernmentalResponses2013-2018\\_-1.3.19.pdf](http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/wp-content/uploads/sites/21/2019/04/6thCommitteeGovernmentalResponses2013-2018_-1.3.19.pdf) (last visited on Dec. 26, 2019).

<sup>33</sup>*Supra* note 26.

<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.*

Liechtenstein's representative, Christian Wenaweser extended his state's support to the proposed draft article and called for an early adoption of universal convention on crimes against humanity. He highlighted the fact that the draft articles are based on the Rome Statute, of which no-reservation clause was a part, for three basic international crimes when it was adopted. However, the draft articles do not have no-reservation clause. Christian wanted to add a no-reservation clause in the draft articles; otherwise, if states adopt this concise convention with reservation then it will become ineffective. He added there should be an express mention of no immunities also.<sup>36</sup>

Rene Lefeber (Netherlands), extended support to the draft articles. At the same time, he explained the relationship between the proposed convention and Mutual Legal Assistance framework initiative. In last part of this paper, we have noted that the Netherlands sent a separate draft for the mutual legal assistance treaty with regard to all three international crimes. Therefore, the representative of Netherlands explained that these documents are mutually supportive, and seek to fill the gap.<sup>37</sup>

Here it is interesting to note that the representative of Singapore, Daphe Hong and the representative of Greece, Maria Telalian, both raised issues related to jurisdiction on nationals of non-State parties; however, their concerns were different. Singapore held that article 7 of the Rome Statute does not apply to the nationals of non-state parties. So it should be expressly mentioned in the draft articles of proposed convention also, that it will not apply to the nationals of non-state parties; whereas Greece wanted to add a specific mention that the provisions will apply to the national of non-state parties when they are present in the territory of a state party. It means Singapore wanted to exclude principle of universal jurisdiction; whereas, Greece wanted to add it with expressly.<sup>38</sup>

Sudan's representative Elsadig Ali Sayed Ahmed, held that the definition of various components and prohibited acts under draft articles should be clearer. It should be connected to the other treaties and conventions, which are related to various components of the definition.

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<sup>36</sup>*Ibid.*

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*

Probably he wanted to take definitions of torture and apartheid etc., from the specific international treaties on these topics.<sup>39</sup>

Thailand's representative Vilawan Mangklatanakul appreciated the draft article 4 that makes adoption of preventive measure and international cooperation obligatory for the states. She supported the principle of *aut dedere aut judicare* in draft article 10. She also supported draft articles 13 and 14 on extradition and mutual legal assistance.<sup>40</sup>

United States' representative Marik A. String, commented that his state has a long historical record of supporting justice for the victims of crimes against humanity; however, it is too early to start negotiations based on the draft articles, as draft articles lack clarity on key issues, which are necessary to formulate an effective convention. Draft articles should have been more flexible in implementation, so that interests of the diverse national systems, including signatories and non-signatories to the Rome Statute, could be taken care of.<sup>41</sup>

Finally, Sixth committee has sent its report to the UN General Assembly, indicating that the committee will continue to analyse these draft articles on crimes against humanity in its 17<sup>th</sup> session also in 2020.<sup>42</sup> However, comments of various states show that all the states are mindful of the need of an international convention to prevent and punish crimes against humanity. Small States are keener to start negotiations based on these draft articles. Whereas relatively large states are apprehensive of the draft articles on many points. One general concern of the States is the absence of an express safeguarding provision to prevent misuse and abuse of the implementation process and of principle of universal jurisdiction; the convention should not become a tool for use of force and external interventions. States want more clarity regarding issues of extradition and mutual legal assistance, with regard to the proposed convention on crimes against humanity. More than 60 States are already pursuing the matter of a separate treaty on mutual legal assistance for genocide, war crimes and crimes against humanity. Although, the commission has adopted the definition of crimes against humanity from the Rome Statute, still there is a need to work out a consensus on it. On one hand, a large state US is dissatisfied with

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<sup>39</sup>*Ibid.*

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*

<sup>42</sup>Seventy-fourth session Sixth Committee, Agenda item 79: Report of the International Law Commission on the work of its seventy-first session, 13 November 2019, available at: <https://undocs.org/en/A/C.6/74/L.21>. (last visited on Dec. 10, 2019).

the fact that interests of diverse national systems are not taken care of; on the other hand, a tiny State Lichtenstein wants an express no-reservation clause. It seems that large states who are in the position to influence the development of international law are inclined to adopt more flexibility, whereas states with relatively less influence want the convention to be more robust. However, important UN Security Council members like China and Russia have not shown much zeal for the convention.

## VI Conclusion and suggestions

ILC has a mandate, for the codification of international customary law and for the progressive development of international law. Preparation of draft convention on crimes against humanity stands in between the two; however, the special rapporteur has categorically accepted that the codification of customary international law is not the primary object of the draft articles; rather the aim is to develop widely acceptable and effective provisions.<sup>43</sup> For this, the language adopted in various draft articles is deliberately kept similar to the language used in other existing international treaties.<sup>44</sup> However, the chief principle of customary international law i.e. State sovereignty is de accelerating the progressive development. On the X-axis of codification of customary international law and progressive development of international law, larger States are putting wait on the side of codification; whereas smaller States are more comfortable with progressive development. The commission and the special rapporteur have provided a good base to the General Assembly for formulating a universal convention on crimes against humanity. UN General Assembly's views on draft articles are yet to come but views expressed in Sixth committee show that the way ahead is not so easy. Draft article will be overhauled in the actual conference of plenipotentiaries, if the proposed convention gets a go-ahead signal from the UN General Assembly.

### Suggestions

Although draft articles have already gone to the Sixth committee and U.N.G.A. from the ILC's end but if some of the suggestions of the States are accepted then the convention will become more widely acceptable.

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<sup>43</sup> United Nations International Law Commission, 4<sup>th</sup> Report on Crimes against Humanity, by Sean D. Murphy, Special Rapporteur, Seventy-first Session Geneva, (Apr. 29 –June 7 and July 8– Aug. 9, 2019). Para 19, ([A/CN.4/725](#)).

<sup>44</sup>*Ibid.*



i. In draft article 2, prevention of terrorist activities and human trafficking should be added to the definition of crimes against humanity, to make it comprehensive and appropriate for answering the current challenges to the humanity.

ii. Principle of non-refoulement as mentioned in draft article 5 should be modified. If an alleged offender of crimes against humanity is not extradited because of vague pretext of human rights violation, then it is detrimental for the convention as well as humanity. Especially, experience shows that crimes against humanity have happened mainly in African States, where legal system might not be as sophisticated as desired by international law. If such a State is seeking extradition of an alleged offender who has fled after committing crimes against humanity in its territory, and another State who has apprehended the offender refuses to extradite him on the general pretext of human rights violation, then it can be counterproductive. To ensure fair trial draft article 11 has specifically mentioned that the alleged offender will be given a fair trial. To address this issue draft article 5 should specifically mention if there is a doubt that the offender will be subjected to international crimes like genocide and crimes against humanity itself then the apprehending State might refuse to extradite.

iii. In draft article 7 there should be an express mention that the states shall use principle of universal jurisdiction only against the nationals of those states that are signatories to the convention.

iv. In draft article 10, while leaving scope for prosecution according to the national laws of apprehending State, a proviso should be added that such national laws should be in conformity with the international law. Article 21 of the Rome Statute has also provided a similar proviso while allowing ICC to apply national laws also, if required to fill any gap in the law laid down by the statute.