



**Statement on behalf of the European Union and its Member States  
by Ms. Simona Popan, Counsellor, Delegation of the European Union to the United  
Nations**

**at the Resumed Sixth Committee Session**

**"Crimes against humanity"**

**Agenda Item 78**

**Cluster III**

**United Nations, New York**

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**– CHECK AGAINST DELIVERY –**

Thank you, Mr./Madam Chair,

I have the honour to speak on behalf of the European Union and its Member States.

The Candidate Countries North Macedonia\*, Albania\*, Ukraine, the Republic of Moldova and Bosnia and Herzegovina\*, the potential candidate country Georgia, and the EFTA country Liechtenstein, member of the European Economic Area, align themselves with this statement.

Mr./Madam Chair,

#### [Article 6 Criminalization under national law]

Draft Article 6 covers a broad range of issues. We will focus our intervention on three main issues:

*First*, while many States have already criminalized crimes against humanity in their domestic law, others have not yet done so. This draft Article is key as it creates obligations for States to take measures to ensure that crimes against humanity constitutes offenses under national criminal law, thus closing a lacuna that may prevent prosecution and punishment of such crimes.

*Second*, we welcome the clarification that the official position of the person committing the offence does not exclude criminal responsibility. We note however that this paragraph has no effect on any procedural immunity that a

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\* North Macedonia, Albania and Bosnia and Herzegovina continue to be part of the Stabilisation and Association Process.

foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary law. We equally note that Article 7 of the ILC draft articles on immunity of State officials from foreign criminal jurisdiction states that immunity *ratione materiae* shall not apply in respect of crimes against humanity.

*Third*, with regard to ‘appropriate penalties’, we recall that the EU and its Member States oppose capital punishment in all cases and under any circumstances. The States Parties to the Rome Statute dealt with this issue by providing for imprisonment for a number of years not exceeding 30 years or a term of life imprisonment when that is justified by the extreme gravity of the crime and the individual circumstances of the convicted person. This reflects the fact that the large majority of States have abolished the death penalty or no longer practice it.

#### **[Article 7 Establishment of national jurisdiction]**

Draft Article 7 establishes jurisdictional bases under national law to ensure that there is no safe haven for crimes against humanity offenders. These are territorial jurisdiction, nationality or active personality jurisdiction, and passive personality jurisdiction. We welcome that the draft Article provides for a relatively wide range of jurisdictional bases that will allow, as far as possible, to close gaps in the prosecution of crimes against humanity. This article does not exclude the exercise of a broader jurisdictional basis, if such a basis is provided for under relevant national law. In fact, we encourage States to effectively close the gap as impunity for these heinous crimes must not be allowed.

#### **[Article 8 Investigation]**

The investigation of crimes against humanity is key for their effective prosecution and punishment. Although not specifically referred to in draft Article 8, we believe such investigations must be conducted in good faith. This means that sham, unduly delayed, misleading investigations or investigations that are carried out to cover and shield the individual concerned from criminal responsibility do not qualify as good faith investigations.

Investigations must be prompt, thorough and impartial. They must start whenever there is 'reasonable ground' to believe that acts constituting crimes against humanity have been or are being committed in any territory under the State's jurisdiction. The ILC commentaries note that the duty to investigate activates when the threshold of 'reasonable ground' is met. This threshold is not entirely new, as it has been used for other types of crimes. For instance, the Committee against torture has indicated that States' authorities must proceed automatically to an investigation whenever there are reasonable grounds to believe that an act of torture has been committed. We note that this does not necessarily require victims filing complaints.

#### **[Article 9 Preliminary measures when an alleged offender is present]**

Draft Article 9 concerns preliminary measures that are to be taken when an alleged offender is in a State's territory. These include taking the person into custody or taking other legal measures to ensure his or her presence; a preliminary inquiry into the facts; and the immediate notification of concerned States.

It is our understanding that all these preliminary measures are to be carried out in accordance with international human rights law and fair trial standards. For

instance, persons in police custody enjoy both the right not to incriminate themselves and to remain silent and the right to be assisted by a lawyer whenever they are questioned.

Some States, in their submissions to the ILC, expressed concerns regarding the obligation to ‘immediately notify’. The commentaries themselves recognize that sometimes the situation requires more flexibility and it is not straightforward. Therefore, this obligation needs to be understood against this background.

**[Article 10 *Aut dedere aut judicare*]**

Under the rule *aut dedere aut judicare*, a State in the territory under whose jurisdiction an alleged offender is present, is obliged either to exercise jurisdiction or to extradite an alleged offender to another State that is able and willing to do so. This principle has been included in a number of treaties, and it is based in the so-called ‘Hague formula’ pursuant to the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. Its main purpose is to avoid that States provide a safe haven for a person suspected of committing crimes against humanity. We therefore welcome it.

As international courts and tribunals play a significant role in the fight against impunity, we welcome that draft Article 10 includes a reference to ‘surrender’ to a competent court or tribunal. In our view, the term ‘tribunal’ is to be understood as also including hybrid courts. We believe that surrender is only possible where: (i) the international criminal court or tribunal has jurisdiction over the offence and the offender; (ii) and the State concerned has recognized its jurisdiction.

With regard to the issue of amnesties, which comes into play when discussing this draft article, we note that the Rome Statute, similar to the draft articles, does not include such a provision. However, the ICC Pre-Trial Chamber found that ‘granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights’.<sup>1</sup>

I thank you.

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<sup>1</sup> Prosecutor v. Saif al-Islam Gaddafi, case no. ICC-01/11-01/11, para. 77.