

Written comments by the European Union

on the International Law Commission's Draft articles on Prevention and punishment of Crimes Against Humanity

I. Introduction

Alongside the crime of genocide and war crimes, crimes against humanity are amongst the gravest offences known to humankind. They include, *inter alia*, any acts of murder, sexual violence, torture, apartheid, deportations or forcible transfer of population, and persecution, when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.

While both the crime of genocide and war crimes are outlawed by specific conventions, crimes against humanity still remain the only core international crime without a dedicated treaty. There is therefore a gap in the international treaty framework that needs to be filled.

The European Union commends the work of the International Law Commission (ILC), which at its 71st Session (2019) adopted the Draft articles on Prevention and Punishment of Crimes Against Humanity (hereinafter referred to as 'Draft articles'). It believes that the ILC Draft articles are an excellent basis for the elaboration of a Convention on the Prevention and Punishment of Crimes against Humanity.

II. Introductory provisions (preamble and Article 1)

Preamble

The preamble foreshadows the Draft articles and records the underlying motivation of the Parties. In accordance with Article 31(2) of the Vienna Convention on the Law of the Treaties, the preamble provides relevant context of interpretation. Referring to the preamble is an accepted method of treaty interpretation, as stressed by the International Court of Justice for example in the Whaling case.¹ As such, the preambular paragraphs will help to clarify the intention of the parties when entering a convention and to resolve possible questions of interpretation resulting from ambiguities in its provisions. However, the preamble cannot be relied upon as a ground for derogating from the actual provisions of a convention.

The **preambular paragraphs 5 and 6** refer to the obligation to prevent crimes against humanity, and link up the objective of prevention with the one of punishment, as the two main

¹ *Australia v. Japan (New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226, at p. 215, para. 56 (referring to the preamble of the International Convention on the Regulation of Whaling to discern its object and purpose).

objectives of the Draft articles. The European Union agrees that the **primary responsibility** to protect civilian population by preventing and punishing crimes against humanity **lies with each individual State** (as laid down in preambular paragraph 8).

The **preambular paragraph 7** clarifies that the definition contained in **Article 7 of the Rome Statute** served as a useful model for the definition retained in these Draft articles. This reflects the general approach of the ILC to retain largely the definition of crimes against humanity contained in the Rome Statute.

While the Rome Statute lays down a definition of a ‘crime against humanity’, the scope of the Rome Statute jurisdiction of the International Criminal Court (ICC) is limited to the individual criminal responsibility and is complementary to national criminal jurisdictions. The Rome Statute addresses the vertical relations between the ICC and the States Parties to the ICC and not the horizontal relations between States.

While the preamble points to the existence of a definition contained in a treaty that deals with the most serious crimes of concern to the international community as a whole, notably the Rome Statute, the Draft articles have no direct connection with the Rome Statute. Therefore, being a State Party to the Rome Statute would not be a pre-condition for adhering to a Convention on crimes against humanity.

The European Union welcomes the reference in **the 9th preambular paragraph** to the **rights of victims**, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment.

Article 1 Scope

The ILC recommended the elaboration of a convention on the basis of the Draft articles addressing both the punishment and prevention of crimes against humanity². The proposed Convention would take a holistic approach that strengthens the abilities of States to prosecute and punish crimes against humanity, while also obliging States to take action to prevent their commission.

During the resumed session of the Sixth Committee, some delegations considered that an article on the scope of the convention would not be necessary. The European Union considers nevertheless that such a provision would bring legal clarity and certainty on the scope of the convention.

² Report of the International Law Commission on the work of its seventy-first session, A/74/10, 2019, chap. IV, para. 42.

Should this provision be retained, the European Union recommends that the term ‘prohibition’ be included therein so as the Draft articles apply to the **prevention, punishment and prohibition** of crimes against humanity.

The European Union considers that – in accordance with the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) - the prohibition of crimes against humanity, like the prohibition of genocide, is a peremptory norm of international law, from which no derogation is permitted, and which is applicable to all States.

III. Definition and general obligations (Articles 2, 3 and 4)

Article 2 Definition of crimes against humanity

The definition of crimes against humanity in the Draft articles reproduces Article 7 of the Rome Statute, however with two notable differences. Draft article 2 does not retain the wording ‘any crime within the jurisdiction of the Court’ (for self-evident reasons), and removes the definition of gender contained in Article 7(3) the Rome Statute.³ The definition of gender is therefore left at the discretion of national legislators. The European Union notes that several national legislations implementing the Rome Statute have omitted such definition in the provision related to crimes against humanity.

The European Union considers that the definition of crimes against humanity contained in Article 7 of the Rome Statute enjoys broad support going beyond the 123 States Parties to the Rome Statute, and is reflective of customary international law. It thus offers the much needed legal stability and certainty and contributes to the harmonization of national laws globally.

However, should there be a broad support in favour of **amending the definition** proposed by the ILC, the European Union would consider it important to clarify the definitions of the underlying offences of ‘enforced disappearance’ and ‘persecution’.

First, the definition of ‘**enforced disappearance**’ should take into account the most recent definition contained in the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).⁴ The European Union notes that the time requirement (‘for

³ Article 7(3) of the Rome Statute states that ‘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.’

⁴ International Convention for the Protection of All Persons from Enforced Disappearance was adopted in New York on 20 December 2006, and entered into force on 23 December 2010. Article 2 of the Convention defines ‘enforced disappearance’ as ‘[...]the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.’

a prolonged period of time' in paragraph 2 (i)) is not contained in the definition of enforced disappearance of CPED. The European Union believes that further consideration is needed on this matter.

The definition of '**persecution**' includes a limitation in that it makes persecution a crime only if committed in connection with another crime ('in connection with any act referred to in this paragraph' paragraph 1(h)). That limitation is anchored in the Nuremberg Statute and recalled in Article 7(1)(h) of the Rome Statute. The European Union believes that further consideration is needed on this matter.

With regard to the requirement of a '**widespread or systematic**' attack (paragraph 1), the European Union agrees that these requirements are disjunctive, not conjunctive. The conjunction 'or' must be understood within its disjunctive meaning, as 'either/or', and not as implying two cumulative requirements, notably widespread and systematic. This is in line with well-established practice of international tribunals such as the ICC, ICTY and ICTR.

The European Union underscores that offenders of crimes against humanity are **not limited to State officials or State agents** (paragraph 2 a). Attacks may also be committed by organizations or groups with the capacity and resources to plan and carry out a widespread or systematic attack, as part of an organizational policy.

Lastly, with regard to the '**without prejudice clause**' contained in paragraph 3, the European Union welcomes the fact that States may provide in their national legislations a definition that goes beyond the definition contained in the Draft articles. The definition is equally without prejudice to broader definitions contained in other international instruments or in customary international law. This allows for flexibility if national legislation is more ambitious.

Article 3 General obligations

Paragraph 1 of Draft article 3 imposes a **two-fold obligation**: (i) an obligation for States not to engage in acts that constitute crimes against humanity through own organs; (ii) and obligation not to commit such acts through persons over whom they have such a firm control that their conduct is attributable to State. Furthermore, the phrasing '**acts that constitute**' recognizes that crimes are not committed by States, but that the 'acts' may be attributable to States under the rules of State responsibility. The European Union supports such approach.

Concerning **paragraph 2**, the European Union would like to stress that, the term '**undertake to**' imposes a clear obligation to prevent and punish crimes against humanity. These are two distinct but connected obligations.

Regarding the wording '**which are crimes under international law**', as underlined by a number of States in their contribution to the ILC, the European Union takes the view that crimes

against humanity are crimes regardless of whether or not they are criminalized under national law. This means that they can be investigated under international law and prosecuted even when they are not explicitly provided for in national law.

The European Union strongly rejects the requirement for any **nexus to armed conflict**. Crimes against humanity do not need to be linked to an armed conflict and can also occur in peacetime. The European Union therefore welcomes the wording '**whether or not committed in time of armed conflict**' as a necessary clarification.

Finally, the European Union welcomes the clarification contained in **paragraph 3** that no exceptional circumstances whatsoever may be invoked as a justification of crimes against humanity.

Article 4 Obligation of prevention

One of the main objective of a future convention on crimes against humanity is to prevent the commission of such crimes, which continue to be perpetrated worldwide. In this light, the European Union welcomes a Draft article on the obligation of prevention, which is aimed at achieving such objective. The European Union also notes that obligations of prevention have been included in a number of conventions,⁵ and that the obligation to prevent is distinct from the obligation to punish.

The European Union acknowledges that some delegations in their contributions to the ILC work considered that the scope of the obligation to prevent is unclear as it is not very specific. In the view of the European Union, such concerns are addressed by the jurisprudence of the ICJ, which clarified that when engaging in measures of prevention, 'every State may only act within the limits permitted by international law.'⁶ The reference to '**in conformity with international law**' reflects the ICJ jurisprudence.

IV. National measures (Articles 6, 7, 8, 9, and 10)

Article 6 Criminalization under national law

The European Union considers that **paragraph 1** of Draft article 6 contains a positive obligation to take the necessary measures to ensure crimes against humanity are criminalized in domestic law. That is particularly important as many States have not yet criminalized crimes

⁵ Notably, Articles I and XIII of the 1948 Genocide Convention, Article 2, 11 and 16 of the 1984 Anti-Torture Convention, and Articles 1, 3 and 9 of the 2000 Transnational Organized Crime Convention.

⁶ *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro*, judgment of 26 February 2007, I.C.J. Reports 2007, p. 221.

against humanity in their national legislation thus closing a lacuna that may prevent the prosecution and punishment of such crimes.

The European Union welcomes **paragraph 3** of Draft article 6. Concerning the **criminal responsibility of superiors**, the so-called command responsibility, the European Union recalls that international tribunals such as ICTY has already clarified that a formal superior-subordinate relationship is not required for criminal responsibility.⁷

With regard to the standard ‘**had reason to know**’, the European Union recalls that the Appeals Chamber in the *Celebici* case of the ICTY upheld the Trial Chamber’s finding that a superior may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute; or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.⁸

The European Union welcomes **paragraph 4** according to which the **order of superior** is not a ground for excluding criminal responsibility of a subordinate.

The European Union equally welcomes that **paragraph 5** provides that the **official position** of the alleged perpetrator does not exclude substantive criminal responsibility. The European Union notes that this paragraph has no effect on any **procedural immunity** that a foreign State official may enjoy before a national criminal jurisdiction. This issue continues to be governed by conventional and customary international law. In that context, the European Union notes 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.

Regarding the **non-applicability of statutory limitations in paragraph 6**, the European Union shares the proposal of the ILC that crimes against humanity shall not be subject to any statute of limitations.

With regard to ‘**appropriate penalties**’ in **paragraph 7**, the European Union recalls that a large majority of States have abolished the **death penalty** or no longer practice it. In light of

⁷ *Halilovic Sefer*, ICTY, appeal judgement IT-01-48-A of 16 October 2007, para. 59: ‘the Appeals Chamber recalls that the concept of effective control over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute. The Appeals Chamber recalls that the necessity of proving that the perpetrator was the ‘subordinate’ of the accused (against whom charges have been brought under Article 7(3) of the Statute) does not require direct or formal subordination. Rather, the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator.’

⁸ *Mucić et al.*, ICTY, appeal judgement IT-96-21-A of 20 February 2001, paragraphs 223 and 241.

that, and of the well-known position of the European Union opposing capital punishment in all cases and under any circumstances, the European Union reiterates that death penalty is not an ‘appropriate penalty’. It is recalled that Article 77 of the Rome Statute provides 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.

Article 7 Establishment of national jurisdiction

The European Union welcomes that **paragraph 1** of the Draft article provides for a wide range of **jurisdictional bases** - territorial jurisdiction, nationality or active personality jurisdiction, and (optionally) passive personality jurisdiction - that will allow, as far as possible, to close gaps in the prosecution of crimes against humanity.

Paragraph 2 establishes the foundation for draft Article 10 ‘*Aut dedere aut judicare*’. This paragraph is essential for fighting impunity and for deterring an alleged offender from seeking refuge in a State that otherwise has no connection with the offence. This paragraph only applies when the offender is present in the territory under the State’s jurisdiction and the State does not extradite or surrender the person, each State having the possibility to determine the scope of this paragraph.

Paragraph 3 does not exclude the exercise of a broader jurisdictional basis, if such a basis is provided for under relevant national law. In the view of the European Union, this paragraph reserves the right to establish jurisdiction beyond the scope provided in Draft article 7, including **universal jurisdiction**.

Article 8 Investigation

Investigations of crimes against humanity are key for their effective prosecution and punishment. Investigations must be conducted in **good faith**. 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. In accordance with Article 8 investigations must be **prompt, thorough and impartial**.

This Article stipulates that investigations 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. This threshold is not entirely new, as it has been used for other types of crimes. For instance, Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that ‘[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory

under its jurisdiction.’ Reasonable grounds could be triggered when relevant information is being presented or available and does not necessarily require victims filing complaints.

While investigations may be carried out by law enforcement agencies or judicial authorities, they can equally be done by quasi-judicial investigations or other impartial entities such as an independent commission of inquiry, a truth and reconciliation commission or a national human rights institution.

Article 9 Preliminary measures when an alleged offender is present

The European Union takes the view that preliminary measures taken when an alleged offender is present in a State’s territory must be carried out in accordance with international human rights law and fair trial standards to protect against abusive State custody.

As to the obligation of States to ‘**immediately notify**’ the concerned States, contained in **paragraph 3**, it is noted that some States in their submissions to the ILC expressed concerns regarding the language ‘immediately notify’. The commentaries themselves recognize that sometimes the situation requires more flexibility and it is not straightforward. Therefore, the immediate notification obligation needs to be understood against this background. In any case good faith must be observed in the implementation of this obligation.

Article 10 Aut dedere aut judicare

The EU welcomes that the Draft articles include a provision on the principle ‘*aut dedere aut judicare*’, which obliges the State in the territory under whose jurisdiction an alleged offender is present to either exercise jurisdiction or to extradite an alleged offender to another State that is able and willing to do so. The main purpose of this rule – which has been included in a number of treaties - is to avoid that States provide a safe haven for a person suspected of committing crimes against humanity.

The EU also welcomes the reference in this Draft article to ‘**surrender**’, given the role of international courts or tribunals in the fight against impunity. In this regard, the term ‘tribunal’ should be understood as including also hybrid courts. Surrender should only be 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**, 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.’⁹ Consideration should be given to the possibility of codifying this in the Convention.

⁹ *Prosecutor v. Saif al-Islam Gaddafi*, ICC, case no. ICC-01/11-01/11, paragraph 77.

V. International measures (Articles 13, 14, and 15)

Article 13 Extradition

Extradition aims to combat the impunity of a person who is present in a territory other than that in which he has allegedly committed an offence. The European Union therefore welcomes the inclusion of a Draft article on this matter, as it sees extradition as an important element of interstate cooperation in the punishment of crimes against humanity.

The European Union notes that the Draft article 13 contains **no obligation to extradite** the alleged offender, but to submit the case to prosecution, unless the offender is extradited or surrendered. Extradition remains an option as long as the State submits the matter to its own prosecutorial authorities.

While a State is under no obligation to extradite, the requested State must give **due consideration** to a request. Additionally, before refusing extradition, the requested State must, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation. Such consultations are useful in that they allow the requesting States to clarify their request and, if necessary, to modify it in order to address the concerns of the requested State.

The EU welcomes the fact that crimes against humanity are extraditable and not to be regarded as '**political offences**'.

The EU firmly believes that no one should be prosecuted or punished on account of **gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group or political opinion**. Requests for extradition should not be used as tools for such purposes.

The European Union would like to recall that all its Member States use a simplified cross-border judicial surrender procedure for the purpose of prosecution or executing a custodial sentence or detention order, the so-called '**European arrest warrant**'.¹⁰ A European arrest warrant issued by a judicial authority of one of the EU Member States is valid in the entire

¹⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) as subsequently amended. See also Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes *OJ L 118, 14.5.2003, p. 12–14*, whose objective is to "increase cooperation between national units in order to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of persons who have committed or participated in the commission of genocide, crimes against humanity or war crimes as defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court of 17 July 1998."

territory of the European Union. Its aim is to ensure that open borders and free movement in the European Union are not exploited by those seeking to evade justice.

Decisions on European Arrest Warrants are made by judicial authorities alone, without political considerations. The judicial procedure also ensures that the rights of the person sought are protected. The European arrest warrant is a successful instrument of judicial cooperation in criminal matters in the European Union.

Article 14 Mutual legal assistance

The European Union supports the inclusion of the Draft article on mutual legal assistance, as it considers that inter-State cooperation is key for the investigation and prosecution of the crimes against humanity.

It is noted that Draft article 14 and the draft annex apply only in situations where there is no mutual legal assistance treaty in place. According to the ILC commentaries, where there is a mutual legal assistance treaty that treaty applies except if particular paragraphs of Draft article 14 require the provision of a higher level of assistance.

Draft article 14 does not include a **dual criminality** requirement. This is indeed not necessary as crimes against humanity must be criminalized under national law. Therefore, the dual criminality is satisfied in the case of a request for mutual legal assistance under the Draft articles.

The EU recalls that the Ljubljana-The Hague Mutual Legal Assistance and Extradition (**MLA**) **Convention**¹¹ was adopted at the 18th Plenary Session of the MLA Diplomatic Conference in Ljubljana on 26 May 2023. The objective of this landmark international treaty is to facilitate international cooperation in criminal matters between States Parties with a view to strengthening the fight against impunity for the crime of genocide, crimes against humanity, war crimes, and, where applicable, other international crimes. The European Union see both processes as complementing each other as the two initiatives substantially contribute to the fight against impunity at international level.

Article 15 Settlement of disputes

The European Union believes that a dispute settlement provision is particularly important as States are currently under no obligation to resolve disputes arising between them in relation to the prevention and punishment of crimes against humanity.

¹¹ Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes.

Paragraph 1 is an encouragement for the parties to settle their disputes through **negotiations**. The European Union notes that Draft article 15 does not provide for a **time limit** for concluding negotiations. The benefits of a time limit should be further discussed.

Paragraph 2 provides for a **compulsory dispute settlement mechanism**, once negotiations are exhausted. However, the Parties to the dispute have a choice to submit it to litigation before the International Court of Justice *or* arbitration. It is worth considering a more detailed provision with regard to the constitution of the arbitral tribunal.

Paragraph 3 includes an **opt-out clause**. The ILC rationale for the opt-out clause was to encourage a large number of ratifications. This paragraph seems to model language existing in other conventions.¹² The European Union notes that, absent an opt-out clause, States are nevertheless free to formulate reservations to Article 15. This was the solution for the Genocide Convention, whose Article IX does not contain any opt-out clause. As the two Conventions are similar, there is merit in the latter solution.

It is equally noted that the draft provision includes **no monitoring or enforcement mechanism**. This requires further reflection.

VI. Safeguards (Articles 5, 11 and 12)

Article 5 Non-refoulement

The European Union welcomes the inclusion of a provision on the principle of non-refoulement.

The principle of *non-refoulement* forms an essential protection under international human rights, refugee, humanitarian and customary international law¹³. This principle is hence not new or specific to the Draft articles on crimes against humanity.

According to Draft article 5, the non-refoulement obligation is triggered when there are **‘substantial grounds’ for believing** that the person would be in danger of being subjected to a crime against humanity.

¹² Article 30(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹³ Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 16(1) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED); Article 33(1) of the 1951 Convention relating to the Status of Refugees; Article 45 of the 1949 Fourth Geneva Convention.

At the level of the European Union, the principle of *non-refoulement* is embodied in Article 19(2) of the Charter of Fundamental Rights of the European Union, which reads ‘No one may be removed, expelled or extradited to a State where there is a **serious risk** that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

This formulation reflects the case law of the European Court of Human Rights concerning Article 3 ‘Prohibition of torture’ of the European Convention on Human Rights, according to which the State’s obligation is engaged when there is a ‘**serious risk**’¹⁴ of the person being subjected – in that particular case – to torture or inhuman or degrading treatment.

Given that the test ‘serious risk’ is more objective than ‘substantial grounds for believing’ - which seems to imply a subjective assessment (‘belief’) - the European Union suggests that the criterion ‘serious risk’ could instead be used in Draft article 5.

In any case, paragraph 2 of draft Article 5 provides some guidance in determining the existence of “substantial grounds” for the purposes of paragraph 1. The competent authorities are required to account for “all relevant considerations”, including, but not limited to, “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.”

In this regard, the European Union notes that the Committee Against Torture, in relation to the non-refoulement obligation in article 3 of the CAT, stated that “[e]ach case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal.”¹⁵

Article 11 Fair treatment of the alleged offender

The European Union attaches great importance to fair trial and due process rights, which are particularly relevant in the context of criminal proceedings and fully supports this draft article, in particular the clarification that the rights of the person concerned must be guaranteed ‘**at all stages of the proceedings**’.

In the European Union, the right of suspects and of accused persons to a fair trial is a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union the

¹⁴ *Ahmed v. Austria*, (25964/94) [1996] ECHR 63, judgment of 17 December 1996, paragraph 47: ‘It follows that the applicant’s deportation to Somalia would breach Article 3 of the Convention for as long as he faces a serious risk of being subjected there to torture or inhuman or degrading treatment’.

¹⁵ Committee against Torture, General Comment No. 4, para. 13.

European Convention of Human Rights, as well as general principles of law resulting from the constitutional traditions common to the Member States.

Article 47 ('Right to an effective remedy and to a fair trial') of the Charter of Fundamental Rights of the European Union provides:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'

'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

Article 6 (1) 'Right to a fair trial' of the European Convention of Human Rights provides:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - (b) to have adequate time and facilities for the preparation of his defence;*
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

These Articles have been extensively interpreted by the Court of Justice of the European Union and by the European Court of Human Rights, respectively, and have generated an entire body of due process rights that allow for the protection of suspect and accused at all stages of proceedings.

The European Union therefore believes that Draft article 11 could be further strengthened drawing from this jurisprudence. For instance, the Draft article could make a more precise distinction between the rights of suspects and the rights of accused during an investigation, but also during other stages of proceedings, so as to reflect the fair trial rights in accordance with the highest standards of international law. It could also set out the presumption of innocence.

In that context, the European Union notes that, the Rome Statute makes a more precise distinction between the rights of suspects and the rights of the accused (Article 55 'Rights of persons during an investigation' and Article 67 'Rights of the accused').

Article 12 Victims, witnesses and others

The European Union attaches high importance to the rights of victims and witnesses in criminal proceedings and therefore supports the inclusion of a draft article on this important matter.

Victims must be empowered so they can report crime, participate in criminal proceedings, claim compensation and ultimately recover – as much as possible – from consequences of crime. Therefore, participation of victims of crimes against humanity should be encouraged and considered at appropriate stages of criminal proceedings.

The European Union welcomes that, in accordance with paragraph 2, measures under Draft article 12 must be '**in accordance with national law**'. This reference leaves flexibility for States to decide how best to implement their obligations and to provide broader rights.

As provided in Draft article 12 **paragraph 3**, victims have the right to obtain adequate, effective and prompt **reparation for material and moral damages**. In the view of the European Union, that should include **physical harm** (harm to a person's body) **and psychological harm** (by which a person's mind has been affected by what the person has experienced or witnessed).

'Rehabilitation' is the third and broadest form of reparation after restitution and compensation. Since it may also encompass measures that may have a profoundly satisfactory value for the

victims, rehabilitation should be mentioned before satisfaction.¹⁶ The European Union notes that ‘**guarantees of non-repetition**’, referred in paragraph 3, can be a credible and meaningful form of reparation especially in situations in which the State of the alleged perpetrator of crimes against humanity has already ensured the cessation of the crimes against humanity in a given situation. However, the claiming of damages on a collective basis is incompatible with many legal systems in Member States and should therefore not be mentioned in the Convention.

The European Union believes that the Draft article on ‘Victims, witnesses and others’ must take into account **victims with specific needs**, or the most vulnerable victims, such as child victims, victims with disabilities or elderly victims or victims of sexual and gender-based violence. In that regard, the European Union believes that the scope of Draft article 12 could be more ambitious so as to include a separate provision on the **rights of the child**.

The Draft article could also be more explicit with regard to **victims of sexual and gender-based violence (SGBV)**. SGBV disproportionately affects women and girls. It is rooted in gender inequality, and it is often perpetrated based on a person’s sex, socially-assigned gender roles or perceived deviation from such norms. SGBV attacks the dignity and sexual integrity of those affected.

Sexual and gender-based crimes may be committed, *inter alia*, as a result of implicit or explicit orders or instructions to commit such crimes (e.g. during military operations directed against civilian population), or because of an omission (e.g., a failure to order subordinates to protect civilians, or failure to punish similar crimes).¹⁷ Sexual and gender-based crimes include acts such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, which may constitute crimes against humanity, provided the criteria set out in Draft Article 2 on the definition of crimes against humanity are met. As such, sexual and gender-based crimes falling under the scope of draft Article 2 do not need to be linked to an armed conflict to be considered crimes.

The European Union has underlined that responses to SGBV need to be victim- and survivor-centered and trauma sensitive, including by ensuring access to sexual and reproductive health care services, as well as mental health and psychological support. The European Union and its Member States are working on different fronts to end gender-based violence, protect the victims of this heinous crime and punish offenders.

¹⁶ See ‘UN Principles and Guidelines on Justice for Victims of Crime and Abuse of Power and to Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, UN Doc. GA Res. 60/147, 16 December 2005.

¹⁷ See the Policy Paper on Sexual and Gender-Based crimes by the Office of the Prosecutor of the International Criminal Court, [here](#).

VII. Conclusions

Crimes against humanity are amongst the gravest atrocities that deeply shock the conscience of humanity. The European Union is committed to do all it can to prevent them and ensure that when such crimes are committed, they do not remain unpunished. The EU see a new Convention on the Prevention and Punishment of Crimes against Humanity as an additional step in that direction, and as an integral part of our common efforts to strengthen accountability for grave violations of international law.

The European Union recalls that the ILC recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries based on the Draft Articles. The European Union reiterates its strong **support for the elaboration of a Convention on the basis of the Draft articles**, as recommended by the ILC, preferably by an international conference of plenipotentiaries.

The European Union expresses its readiness to continue to engage in fruitful discussions on the Draft articles leading to the elaboration of a Convention.