

Re: Comments Regarding the Persecutory Grounds in the Draft Crimes Against Humanity Convention

30 November 2018

To the Distinguished Members of the International Law Commission:

We have the honour to address you in our capacities as Special Rapporteur on extrajudicial, summary or arbitrary **executions**; Working Group of Experts on People of **African Descent**; Independent Expert on the enjoyment of human rights by persons with **albinism**; Special Rapporteur on the situation of human rights in **Cambodia**; Special Rapporteur on the rights of persons with **disabilities**; Special Rapporteur on the right to **food**; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of **hazardous substances** and wastes; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health**; Special Rapporteur on the rights of **indigenous** peoples; Special Rapporteur on the elimination of discrimination against persons affected by **leprosy** and their family members; Working Group on the use of **mercenaries** as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; Special Rapporteur on the human rights of **migrants**; Special Rapporteur on the situation of human rights in **Myanmar**; Special Rapporteur on the situation of human rights in the **Palestinian** territories occupied since 1967; Special Rapporteur on contemporary forms of **racism**, racial discrimination, xenophobia and related intolerance; Independent Expert on protection against violence and discrimination based on **sexual orientation and gender identity**; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering **terrorism**; Special Rapporteur on **torture** and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on the promotion of **truth**, justice, reparation and guarantees of non-recurrence; Working Group on the issue of discrimination against **women** in law and in practice, pursuant to Human Rights Council resolutions 35/15, 36/23, 28/6, 36/32, 35/6, 32/8, 36/15, 33/9, 33/12, 35/9, 33/4, 34/21, 1993/2A, 37/32, 34/35, 32/2, 31/3, 34/19, 36/7 and 32/4.

We write to you regarding the persecutory grounds in the draft crimes against humanity (CAH) convention that is currently pending with the International Law Commission. We thank you for your work on this draft convention and recognize its invaluable contribution to deter and prevent the worst human rights violations, address impunity and hold perpetrators of heinous crimes accountable.

International Law Commission Members
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Among the great achievements of the International Law Commission has been the progressive expansion of persecutory grounds spanning over the last 70 years. During the 1950s and again in the 1990s the Commission broadened the categories, in line with evolving international law. In its last iteration of this succession, the Commission substantially deepened the understanding of persecution when it significantly increased categories under the Rome Statute.

It is our expert opinion that such a time has come again. In the last quarter century there has been great recognition by the international community of additional grounds driving perpetrators' intent to commit heinous crimes against vulnerable groups. Persecution is one of the world's greatest sources of human rights violations and crimes against humanity, and as such there is an obligation for this draft convention to reflect that evolving law and jurisprudence. States should prosecute all crimes, especially the most serious ones and provide justice to the victims, including vulnerable groups that are targeted by perpetrators because of their particular status.

For this reason, we recommend that the following grounds be added to the list of persecutory categories when such discrimination amounts to crimes of persecution: language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics, indigenous, refugee, statelessness and migratory status. We also recommend the deletion of the reference to paragraph 3 in the definition of gender¹, as per our submission to you on the definition of gender.

Article 3 on Definition of Crimes against Humanity, under paragraph 1(h), will thus read as follows:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 2, language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics, indigenous, refugee, statelessness and migration status, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

In our expert opinion, there is wide recognition of these impermissible grounds under international law upon which persecution can be based.

Language, Social Origin, and Age Status

Language and social origin statuses appear frequently in human rights documents, harking back to the Universal Declaration of Human Rights.³ Social origin refers to 'class', 'caste' or 'socio-occupational category', and to factors that a person may adopt or receive from community, family or society, such as how one socializes, lives and

¹ See joint submission by several Special Procedure mandate holders concerning the definition of gender in the draft crimes against humanity convention.

² See submission by Special Rapporteurs concerning the definition of gender in the draft crimes against humanity convention.

³ Universal Declaration of Human Rights, Article 2, 10 December 1948, UNGA Res 217A.

works, the parents' or guardians' status of children, place of birth, or income⁴. Age appears less frequently in human rights instruments but it has been widely acknowledged as a consistent basis of discrimination and consequently should be noted in the persecutory categories.

Disability Status

The Convention on the Rights of Persons with Disabilities recognizes the intricate link between discrimination on grounds of disability and the increased risk of becoming a victim of most serious human rights violations, including violence, abuse and threats to life. Harmful practices based on discrimination, often amounting to torture or cruel, inhuman or degrading treatment or punishment, continue to be promoted through national laws, policies and practices that conflict with the provisions of international human rights instruments.

Furthermore, evidence indicates that States fail to live up to their international commitments to investigate abusive practices commonly perpetrated against persons with disabilities and bring those responsible to justice. Discrimination plays a prominent role in condoning systematic violations of sexual and reproductive rights of girls and women with disabilities⁵, and threats, attacks and killings of persons with albinism⁶ and other specific groups.

Under Article 1(2) of the Convention, persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments, which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. Article 5(2) affirms that, "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds." In the particular context of humanitarian emergencies, armed conflicts and other situations of risk, Article 11 affirms that States shall take all necessary measures, in accordance with their obligations under international law, including international humanitarian law and international human rights law, to ensure the protection and safety of persons with disabilities. Particular attention should be accorded to the protection those persons with disabilities who require more intensive support, since they are often at greater risk of severe human rights violations.

Health Status

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has consistently called attention to the challenges for the realization of the right to physical and mental health from

⁴ ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation

⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Gender-sensitive approach to arbitrary killings), A/HRC/35/23, para. 55 (6 June 2017).

⁶ Report of the Independent Expert on the enjoyment of human rights by persons with albinism: a preliminary survey on the root causes of attacks and discrimination against persons with albinism, A/71/255 (29 July 2016).

discrimination, intolerance and a selective approach to human rights undermines the full and effective realization of the right to physical and mental health for everyone.⁷

Additionally, the Special Rapporteur on the Elimination of Discrimination against Persons Affected by Leprosy and their Family Members has consistently called attention to the plight of persons affected by leprosy. Both persons affected by leprosy and their family members face numerous forms of discrimination and widespread barriers to their participation as equal members of society, including isolation, discrimination and violations of their human rights. The Special Rapporteur has called for the intensification of efforts to eliminate all forms of prejudice and discrimination against persons affected by leprosy and their family members and to promote policies that facilitate their inclusion and participation.⁸

Congruent to this, General Comment 14 of the Committee on Economic, Social and Cultural Rights proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.⁹

Sexual Orientation, Gender Identity, Sex Characteristics Status

Sexual orientation and gender identity are largely subsumed under the category of gender. Their status under international law warrants, however, their recognition in their own right. The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has concluded that in the last 20 years since the passage of the Rome Statute, “an array of international human rights instruments helps to entrench calls for non-violence and the principle of non-discrimination in international law, with due respect for sexual orientation and gender identity”.¹⁰

There are now nine core international human rights treaties, complemented by various protocols. All of them interrelate with the issue of sexual orientation and gender identity, to a lesser or greater extent.¹¹ This is in addition to the recognition of sexual orientation and gender identity under the European Convention on Human Rights¹², the

⁷ Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/73/216, para. 1 (27 July 2018).

⁸ Report of the Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members, A/HRC/38/42, para. 1 (25 May 2018).

⁹ Committee on Economic, Social and Cultural Rights, General Comment 14, E/C.12/2000/4 para. 18 (11 August 2000).

¹⁰ The Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/35/36, para. 20.

¹¹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/35/36, paras. 20-28.

¹² Id. citing, European Convention on Human Rights, Art. 14. Council of Europe, 1950; European Court of Human Rights, *Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999.

European Union¹³ and the inter-American system, which also appointed a regional rapporteur specifically to cover these issues.¹⁴ The General Assembly of the Organization of American States also approved two treaties that refer to sexual orientation and gender identity directly as grounds on which discrimination must be prohibited.¹⁵ “Complementing the measures outlined above, resolution 275 of the African Commission on Human and Peoples’ Rights, on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity of 2014.”¹⁶

Sex characteristics, each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty are also a significant ground for persecution. As noted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “children who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without their informed consent, or that of their parents, ‘in an attempt to fix their sex’, leaving them with permanent, irreversible infertility and causing severe mental suffering”¹⁷.

Apart from its merit under international human rights law, autonomous recognition of these grounds is required to adequately address the root causes of violence and discrimination and ensure accountability. In effect, proper identification of motive is an essential component of investigation and prosecution, and the design of reparation measures. In this connection, the Independent Expert has concluded that negation hinders proper collection of evidence and data and diligent exploration of all lines of investigation, and fosters a climate where hate speech, violence and discrimination are condoned and perpetrated with impunity.

Indigenous Status

In accordance with the mandate, the Special Rapporteur on the rights of indigenous peoples has continuously raised concerns in her country reports, communications to governments, press releases and other public statements about indigenous leaders and members of indigenous communities, and those who seek to defend their rights, being subject to undue criminal prosecution and other acts, including

¹³ Id. citing, Charter of Fundamental Rights of the European Union, Art. 21(1). European Union, 2000.

¹⁴ Id. citing, Resolution AG/RES. 2435 (XXXVIII-O/08) Human Rights, Sexual Orientation and Gender Identity, approved at the fourth plenary session, held on June 3, 2008.; Rapporteurship on the Rights of LGBTI Persons.

¹⁵ Id. citing, Inter-American Convention against All Forms of Discrimination and Intolerance, OAS Treaty A-69, Art. 1.; Inter-Am. Convention on Protecting the Human Rights of Older Persons, OAS Treaty A-70, Arts. 5 & 9.

¹⁶ Id. citing, Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity. Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights in Luanda, Angola, April 28 to May 12, 2014.

¹⁷ Report of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, para. 77 (1 February 2013).

direct attacks, killings, threats, intimidation, harassment and other forms of violence.¹⁸ The Special Rapporteur also reflects on available prevention and protection measures and calls for improved measures to prevent violations and improve protection.¹⁹ Recognizing indigenous peoples' status as a protected ground from persecution is one such protective measure.

Refugee, Statelessness and Migration status

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families affirms that “the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection”²⁰ and that “States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention [...]”²¹

The 1951 Convention Relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons both highlight the vulnerability of refugees and stateless persons to discrimination and persecution.

The Special Rapporteur on extrajudicial, summary or arbitrary executions has described the killings of refugees and migrants as a “human rights crisis characterized by mass casualties globally, a regime of impunity for its perpetrators and an overall tolerance for its fatalities”²². She has described the mass killings as “an international crime whose very banality in the eyes of so many makes its tragedy particularly grave and disturbing.”

We therefore recommend that the grounds for persecution be expanded to include these additional categories and protect the ways in which groups are intentionally and severely deprived of fundamental human rights contrary to international law.

We thank you for taking the time to consider this letter alongside the many other inputs you are receiving. We would like to also inform you that this communication will be made available to the public on the website of the Office of the High Commissioner for Human Rights, on the Special Procedures mandates webpages.

We commend you for your commitment to promoting the progressive development of international law and its codification, especially through this important work in drafting the crimes against humanity convention.

Sincerely,

¹⁸ Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/39/17, para. 6 (10 August 2018).

¹⁹ Id. at paras. 79-88.

²⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, preamble, Adopted by General Assembly resolution 45/158 of 18 December 1990.

²¹ Id. at Article 7.

²² Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, A/72/335, para. 1 (15 August 2017).

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