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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS-
ISSUES RELATING TO CRIMES AGAINST HUMANITY**

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I. INTRODUCTION

A. General Background

1. For much of its history, international law lacked strong and effective means to hold individuals accountable for serious atrocity crimes. Following World War II, the victorious allied powers established the first international criminal tribunals to try high level political and military functionaries for war crimes and other atrocities. This led to the establishment of the International Military Tribunal (IMT) in Nuremberg which presided over the trial of various Nazi political and military leaders. On similar lines, the International Military Tribunal for the Far East was created in Tokyo, Japan for similar purposes in the eastern frontier of the war. These experiments lead to the emergence of modern international criminal law with its focus to hold individuals accountable for the most egregious violations of the laws and customs of war.

2. However, despite these efforts, National Courts in most cases, were often unable or unwilling to act, especially when states were involved in crimes. To address the growing impunity, the international community established ad hoc tribunals under the leadership of the United Nations Security Council,¹ such as those for Rwanda and Yugoslavia. However, these tribunals had limitations, including limited scope and reliance on political will. The need for a permanent solution led to the creation of the International Criminal Court (ICC) through the Rome Statute in 1998, which came into force in 2002.

3. The ICC, supported by 124 State Parties, is the first permanent, treaty-based international court to prosecute individuals for serious crimes. The ICC complements national criminal justice systems by addressing impunity gaps, but it does not replace them. It prosecutes cases only where domestic justice systems are either unable or unwilling to carry out genuine criminal prosecutions. This is known as the principle of complementarity and is one of the foundational principles of international criminal law

¹ Article 41 of the UN Charter.

4. The ICC's role is crucial in providing justice and deterring future crimes. The Court is headquartered in The Hague, The Netherlands and the most serious crimes of concern to the international community are dealt with by the ICC, namely genocide, Crimes Against Humanity and war crimes committed after 1 July 2002, as well as the crime of aggression (as of 17 July 2018).² The first hearing of the ICC started in 2006 when charges were brought against Thomas Lubanga Dyilo for the war crime of recruiting child soldiers and using them to actively participate in hostilities. The trial started in January 2009 with the Court finding him guilty in March 2012 and imposing a 14-year prison sentence.³ As of August 2024, there have been thirty-two cases before the court.⁴

B. AALCO's Work on the International Criminal Court

5. The Asian-African Legal Consultative Organization (AALCO) has monitored developments related to the International Criminal Court (ICC) since its Thirty-Fifth Session in Manila in 1996. Initial discussions on establishing the ICC took place during special meetings at the Thirty-Fifth and Thirty-Sixth Annual Sessions. During the negotiation phase of the Rome Statute, AALCO was a participant in the process that led to the adoption of the Statute on 17 July 1998. In February 2008, AALCO and the ICC signed a Memorandum of Understanding, boosting efforts on this agenda.

6. The topic 'International Criminal Court: Recent Developments' has since been regularly discussed at many Annual Sessions, the most recent in Nairobi, Kenya, in 2017. AALCO has held several seminars and workshops on specific ICC-related themes. In 2009, a seminar on "International Criminal Court: Emerging Issues and Challenges" was successfully organised with Japan's support. In 2010, before the Kampala Review Conference, AALCO, along with Malaysia and Japan, hosted a Round Table Meeting of Legal Experts to consolidate Member States'

² The Rome Statute.

³ Lubanga Case, The International Criminal Court, <<https://www.icc-cpi.int/drc/lubanga>> accessed 9 August 2024.

⁴ *International Criminal Court*, "About the Court", www.icc-cpi.int/about/the-court#:~:text=Headquarters%3A%20The%20Hague%2C%20the%20Netherlands.&text=There%20have%20thus%20far%20been,have%20issued%2049%20arrest%20warrants, accessed 7 August 2024.

positions. Reports from these meetings were published and shared with Member States. Subsequently, reviewing the outcome of the Kampala Review Conference formed a key part of AALCO's Work Programme.

7. A Review Conference of the Rome Statute took place from 31 May to 11 June 2010, in Kampala, Uganda, to consider amendments to the Rome Statute of the International Criminal Court. An AALCO delegation led by the then Secretary-General, H.E. Dr. Rahmat Mohamad, participated in the Review Conference. On the sidelines of the Review Conference, on 2 June 2010, the Secretary-General hosted an informal Networking Meeting for AALCO. The “Report of the Round Table Meeting of Legal Experts on the Review Conference of the Rome Statute of the ICC” was launched at this well-attended meeting, which included high-level representatives from Member States, non-Member States, and civil society organisations. In 2011, AALCO, with Malaysia and the ICC, organised a two-day meeting of legal experts on “Rome Statute of the International Criminal Court: Issues and Challenges.”

8. In 2017, a half-day Special Meeting on the topic took place during the Fifty-Sixth Annual Session in Nairobi. On 12th and 13th January 2019, AALCO, in collaboration with the Delhi Judicial Academy (DJA), organised a seminar in New Delhi on ‘Operational Functioning of the International Criminal Court and International Judicial Education: Emerging Paradigms’. The seminar focused on the operational functioning of the ICC and International Judicial Education.

9. Since the signing of the Memorandum of Understanding, the Secretaries General of AALCO are invited to participate as Observers to the ICC’s Assembly of State Parties. H.E. Dr Kamalinne Pinitpuvadol, the Secretary General of AALCO, had delivered a statement at the Twenty-First Session of the Assembly of State Parties held in The Hague from 5 to 10 December 2022.

C. Topics for Focussed Deliberations at the Sixty-Second Annual Session of AALCO

10. Pursuant to the proposal received from the Government of Sierra Leone (Note Verbale No. UN/LEGAL/6TH/314 dated 31 July 2024) to include a sub-agenda item on ‘Crimes Against Humanity’ under the topic ‘International Criminal Court: Recent Developments on the agenda for the Sixty-Second Annual Session, the AALCO Secretariat has prepared this Secretariat Report for the consideration of the Sixty-Second Annual Session. It is proposed that the deliberations at the Sixty-Second Annual Session focus on the **Draft Articles on Prevention and Punishment of Crimes Against Humanity** currently under the purview and consideration of the United Nations General Assembly.

II. DRAFT ARTICLES ON PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY: AN OVERVIEW

11. The Draft Articles on Prevention and Punishment of Crimes Against Humanity (CAH), consisting of 15 articles were adopted by the International Law Commission (ILC) at its Seventy-First Session in 2019.⁵ The project announced in 2014 was based on the assumption that CAH remains the only ‘core crime’ which does not have a treaty mechanism requiring its prevention and punishment, unlike war crimes or genocide.

12. Among the main highlights of the draft articles is the assertion (in the Preamble) that the prohibition of CAH is a peremptory norm of general international law (*jus cogens*). It also draws reference to Article 7 of the Rome Statute (which defines CAH) as the definitional basis of the crime in the draft articles.

13. Article 2 of the draft articles defines CAH and constitutes one of the most important articles listing 11 crimes which may constitute CAH. Under Article 3 every State is under an obligation not to engage in acts that constitute CAH. Interestingly, the article also specifies that CAH may be committed during an armed conflicts or during peace times and every State is under an obligation

⁵ ILC, Report of the Seventy-First Session, A/74/10.

to prevent and punish such crimes. Under Article 4, States are required to prevent the commission of CAH through effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction and cooperate as well with other States and relevant intergovernmental organizations for this purpose.

14. Under Article 5, States are under an obligation not to expel, return, surrender or extradite a person to another State where there are substantial grounds for believing that a person may be in danger of being subjected to a crime against humanity. Article 6 requires States to criminalise CAH under its national laws. As regards the jurisdiction of States over CAH, Article 7 stipulates that States shall exercise jurisdiction over offences committed in its territory or by a national of that State or where the victim is a national of the concerned State.

15. Article 8 obliges States to conduct a prompt, thorough and impartial investigation against such crimes whereas, Article 9 pertains to the obligation to take preliminary measures when an alleged offender is present under its jurisdiction.

16. The obligation to extradite or surrender (*Aut dedere aut judicare*) is provided in Article 10. States are under an obligation to treat alleged offenders fairly under Article 11 and the same shall be guaranteed at all stages of the proceedings. Article 12 protects victims, witnesses who complain to competent authorities about the commission of such crimes. Articles 13, 14 and 15 deal with extradition, mutual legal assistance and settlement of disputes respectively.

17. The draft articles constitute a significant milestone for the development of international criminal law, irrespective of whether the same are finally adopted or not. They provide a textual basis for negotiating a treaty in future imposing strong obligations on States to prevent and punish CAH. It is noteworthy that the efforts of the Special Rapporteur in this regard since 2014 have advanced humanity's understanding of CAH and it is hoped that States will come together to arrive at a consensus on its future.

A. Deliberations at AALCO Annual Sessions on the topic of Crimes Against Humanity

18. The deliberations on CAH at the AALCO Fifty-Seventh and Fifty-Eight Annual Sessions (2018 and 2019, respectively) can be divided into the following commonalities⁶:

- a. *Concerns about duplication*: There was a recurring concern about the potential for a new convention to duplicate efforts already undertaken by existing international mechanisms. Many Member States stressed the importance of carefully examining the necessity of a new convention on CAH, questioning whether a new convention is needed. This was in consideration of existing legal frameworks like the Rome Statute and national legislations emphasising on the adequacy of the Rome Statute in addressing Crimes Against Humanity. A few Member States wanted assurance that a distinction should be made between the codification of existing norms and the creation of new norms.
- b. *Support for Strengthening Legal Frameworks*: Some delegations expressed support for detailed legal provisions, particularly in areas like extradition and mutual legal assistance. These delegations believe that a new convention could strengthen international cooperation and the overall legal framework. However, the importance of bilateral agreements on extradition was stressed as it would be essential for a multilateral agreement on CAH to work.
- c. *Alignment with Existing Legal Instruments*: There is a general preference among Member States for any new legal instrument on CAH to align with existing international agreements, particularly the Rome Statute, to ensure coherence and stability in the international legal order.

⁶ Extracted from statements of the Republic of Indonesia at the Fifty-Seventh Annual Session and the Republic of Korea, Japan, the Islamic Republic of Iran, the People's Republic of China, the Republic of India, the Socialist Republic of Vietnam and the Arab Republic of Egypt at the Fifty-Eight Annual Session.

B. State Practice on Crime Against Humanity through tribunals and Special Court

Forced Marriage as a Crime Against Humanity

19. Forced marriage as ‘Other inhumane acts’ has been successfully prosecuted at the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the International Criminal Court (ICC)⁷. In those cases, forced marriage was classified under the category of ‘other inhumane acts’ because it was not explicitly listed in the statutes of any of those tribunals⁸.

20. In 2009, in *Prosecutor v. Sesay et al.*, the SCSL Trial Chamber convicted the defendants of forced marriage, and this finding was upheld by the Appeals Chamber⁹. This judgment was historic as it was the first conviction for forced marriage as an ‘other inhumane act’ crime against humanity under international criminal law¹⁰. In 2018, the ECCC Trial Chamber convicted defendants for forced marriage as the crime against humanity of ‘other inhumane acts’ and the crime against humanity of rape within the forced marriage context¹¹. The verdict was confirmed by the ECCC Supreme Court Chamber in 2022¹². In 2021, in *Prosecutor v. Ongwen*, the Trial Chamber rendered the ICC’s first conviction for forced marriage, and this was confirmed on appeal in 2022¹³. Over the last 14 years, international courts have consistently concluded that forced marriage constitutes the crime against humanity of ‘other inhumane acts’¹⁴.

⁷ Global Justice Centre, the Draft Crimes Against Humanity Convention and Forced Marriage, <<https://www.globaljusticecenter.net/the-draft-crimes-against-humanity-convention-and-forced-marriage/>> accessed on 12 August 2024.

⁸ *Global Justice Centre* (n 1).

⁹ *Global Justice Centre* (n 1).

¹⁰ *Global Justice Centre* (n 1).

¹¹ *Global Justice Centre* (n 1).

¹² *Global Justice Centre* (n 1).

¹³ *Global Justice Centre* (n 1).

¹⁴ *Global Justice Centre* (n 1).

III. UNITED NATIONS GENERAL ASSEMBLY SIXTH COMMITTEE (LEGAL) DELIBERATIONS ON CRIMES AGAINST HUMANITY

21. After the adoption of the ILC draft articles on Crimes Against Humanity (CAH), the ILC recommended the draft articles to the UN General Assembly (UNGA). The UNGA then included CAH in the agenda of the Sixth Committee.¹⁵ The UNGA requested written comments from States by the end of 2023, which would be compiled and circulated before the 2024 session. During the seventy-eighth session, the Assembly allocated the item to the Sixth Committee, which heard statements from 83 delegations and will further review the matter in 2024.¹⁶ The draft articles have been divided into clusters for ease of discussion.

22. Delegations debated whether a gap in the international legal framework exists that a new convention could address. Many delegations supported the idea of a convention on CAH, arguing that it would fill a legal void, particularly since there are treaties for genocide and war crimes but not for CAH. They noted that existing laws are limited and that many States lack national legislation on these crimes.¹⁷ A convention could enhance accountability, legal clarity, and international cooperation.

23. However, some delegations disagreed, stating there is no gap since customary international law, existing instruments and tribunals sufficiently address CAH. They argued that a convention might fragment international law and that current legal tools should be strengthened instead. Despite differences, many delegations supported the International Law Commission's recommendation to negotiate a convention, viewing it as a starting point for discussions.¹⁸

24. Some delegations also advocated for the broader inclusion of crimes including slavery, slave trade and exploitation in all forms, to be made part of the draft definition of CAH as these crimes are missing within the definition of Crimes against in the Rome Statute.¹⁹ To this effect,

¹⁵ UNGA Resolution A/RES/77/249.

¹⁶ UNGA Official Records, Sixth Committee, A/C.6/78/SR.9.

¹⁷ UNGA, Sixth Committee, Seventy-eighth session, A/C.6/78/2.

¹⁸ UNGA, Sixth Committee, Seventy-eighth session, A/C.6/78/2.

¹⁹ UNGA Official Records, Sixth Committee, A/C.6/78/SR.9.

prohibitive acts of forced marriages, particularly the concept of “bush wives”, were requested to be brought within the ambit broader ambit of crime against humanity of slavery and slave trade.²⁰

25. Others also brought forward the fact that the draft articles did not address who would be given jurisdictional priority and how conflict of jurisdiction may be resolved.²¹

26. It is noteworthy that the importance of collective efforts, inclusivity, and political will was emphasised in the deliberations. Delegations stressed the need to build mutual trust and ensure the convention would not compromise State sovereignty. Although some delegations highlighted diverging views and concerns about the draft articles, others believed that these issues could be resolved through multilateral negotiations. They urged moving forward with the process of negotiations, citing past successful treaty negotiations as examples.²²

27. The deliberations on CAH will continue at the Seventy-Ninth Session of the Sixth Committee to be held from 2 October to 22 November 2024.

IV. COMMENTS AND OBSERVATIONS BY THE AALCO SECRETARIAT

28. The AALCO Secretariat welcomes the efforts of the ILC and the Special Rapporteur in the preparation of the Draft Articles on Prevention and Punishment of Crimes Against Humanity. It is noted that the current process is a culmination of efforts initiated in 2014 and reflects the will of the ILC to move to the next stage of the negotiating process of the proposed treaty.

29. There is still scope to expand on the definition of Crimes Against Humanity, particularly to include slavery, slave trade, and forced marriages which has historically affected the Asian and African States and still continues to affect Member States.

²⁰ Statement by Ambassador and Deputy Permanent Representative of Sierra Leone to the United Nations at the Seventy-Seventh Session of the UNGA Sixth Committee.

²¹ UNGA, Sixth Committee, Seventy-eighth session, A/C.6/78/2.

²² UNGA, Sixth Committee, Seventy-eighth session, A/C.6/78/2.

30. There is a need to strike a balance between existing international norms and the creation of new norms and to be cautious in deliberations at the UNGA Sixth Committee (Legal) in order to avoid duplicity. To this end, the AALCO Secretariat encourages Member States to put forward their views on a Convention on Crimes Against Humanity at the upcoming Seventy-Ninth Session of the Sixth Committee (Legal) of the UNGA. It is hoped that States will proceed for a discussion on the Draft Articles at the Committee with a clear understanding of the articles and their implications for international law.

31. The AALCO Secretariat acknowledges the need for capacity development, including with respect to due diligence, the adoption of laws penalising Crimes Against Humanity, investigation of credible allegations and the education of government officials. The AALCO Secretariat avails itself for assistance to the Member States in this regard.

32. A final decision on the Draft Articles must be consensual and acceptable to all Member States.

ANNEX -1

Draft Articles on Prevention and Punishment of Crimes Against Humanity

adopted by the International Law Commission

Article 1

Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 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.

2. For the purpose of paragraph 1:

(a) “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

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

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

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

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

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

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

(h) “the crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

3. This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.

Article 3

General obligations

1. Each State has the obligation not to engage in acts that constitute crimes against humanity.

2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.

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

Article 4

Obligation of prevention

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

- (a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; and
- (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

Article 5

Non-refoulement

1. No State shall expel, return (refouler), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, 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.

Article 6

Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.
2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

- (a) committing a crime against humanity;
- (b) attempting to commit such a crime; and
- (c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that commanders and other superiors are criminally responsible for crimes against humanity committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

8. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Article 7

Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

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

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 8

Investigation

Each State shall ensure that its competent authorities proceed to a prompt, thorough and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Article 9

Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 10

Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 11

Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment,

including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law and international humanitarian law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Article 12

Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal

proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Article 13

Extradition

1. This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State.

2. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on grounds alone.

4. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

5. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

6. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

7. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

8. The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto.

9. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

12. A requested State shall give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred.

13. Before refusing extradition, the requested State shall consult, as appropriate, with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Article 14

Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.

2. In relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State, mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings.

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.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance between the States in question.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

9. States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity.

Article 15

Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.
2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.
3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.
4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a

State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. A request for mutual legal assistance shall contain:

- (a) the identity of the authority making the request;
- (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;
- (e) where possible, the identity, location and nationality of any person concerned; and
- (f) the purpose for which the evidence, information or action is sought.

5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

6. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

8. Mutual legal assistance may be refused:

- (a) if the request is not made in conformity with the provisions of this draft annex;
- (b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
- (c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- (d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

9. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

12. The requested State:

- (a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public;
- and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

14. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has

been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

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

- (a) the person freely gives his or her informed consent; and
- (b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

- (a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
- (b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

- (c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and
- (d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

20. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

ANNEX-2

Note Verbale from the Government of the Republic of Sierra Leone



Permanent Mission of the Republic of Sierra Leone to the United Nations


TEL: (212) 688 1656
FAX: (212) 688 4924

228 EAST 45TH STREET
NEW YORK, N.Y. 10017

Ref: UN/LEGAL/6TH/314

The Permanent Mission of the Republic of Sierra Leone to the United Nations in New York presents its compliments to the Asian-African Legal Consultative Organisation (AALCO) with its headquarters in New Delhi, India, and with reference to the 62nd Annual Summit Meeting of the Asian-African Legal Consultative Organisation that will take place from the 8 – 13 September 2024 in Bangkok, Thailand, and has the honor to inform of the decision of the Permanent Mission of the Republic of Sierra Leone to the United Nations, **to propose the inclusion of “Crimes Against Humanity” as a specific agenda item for discussion at the upcoming AALCO Annual Summit.**

Should there be any concerns or difficulties with this proposal, we respectfully request that this topic be incorporated under the existing agenda item titled “ICC: Recent Developments.” We appreciate your consideration of this important matter and look forward to your positive response.

The Permanent Mission of the Republic of Sierra Leone to the United Nations avails itself of this opportunity to renew to the Asian-African Legal Consultative Organisation the assurances of its highest consideration. *GSK* 

New York, 31 July 2024

**The Asian-African Legal Consultative
Organisation
New Delhi, India**



ANNEX-3

SECRETARIAT'S DRAFT
AALCO/RES/DFT/62/S11
13 SEPTEMBER 2024

The Asian-African Legal Consultative Organization at its Sixty-Second Session,

Having considered the Secretariat Document No. AALCO/62/BANGKOK/2024/SD/S11,

Welcoming with appreciation the initiative of the Government of the Republic of Sierra Leone to propose the sub-item “Crimes Against Humanity” under the topic “International Criminal Court: Recent Developments”,

Aware that countless children, women, and men have been victims of atrocities that profoundly shock the conscience of humanity throughout history,

Acknowledging that Crimes Against Humanity pose a grave threat to global peace, security, and well-being,

Emphasising that the prevention of Crimes Against Humanity, which is among the most serious crimes of concern to the international community, must be upheld in accordance with international law,

Reaffirming the principles of international cooperation to prevent and combat Crimes Against Humanity,

Resolving to eliminate impunity for perpetrators of Crimes Against Humanity, thereby contributing to their prevention,

Recognising that Crimes Against Humanity must not go unpunished and that their effective prosecution requires national measures and strengthened international cooperation, particularly in the areas of extradition and mutual legal assistance.

Taking into account the rights of victims, witnesses, and others related to Crimes Against Humanity, as well as the right of alleged offenders to fair treatment,

Having followed with great interest the deliberations on the item reflecting the views of the Member States on the agenda item,

Noting the work of the International Law Commission on the “Crimes Against Humanity”,

Commending the historical role of AALCO in furthering its engagement with the International Criminal Court,

Noting with recognition the introductory statement of the Secretariat,

1. **Reaffirms** the importance of the topic for AALCO Member States in light of the efforts currently underway to proceed to the negotiations stage at the Sixth Committee (Legal) for a treaty in this regard;
2. **Encourages** Member States to deliberate upon the provisions of the Draft Articles in the Sixth Committee (Legal);
3. **Directs** the Secretariat to continue following the progress of this topic at the Sixth Committee (Legal);
4. **Encourages** Member States to actively engage with the AALCO Secretariat by organising capacity building programmes on this topic; and
5. **Decides** to place this item on the agenda of the Annual Session as and when required.