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paragraph 1, specifically: “extermination”; “enslavement”;¹⁵⁶ “deportation or forcible transfer of population”; “torture”; “forced pregnancy”; “persecution”; “the crime of apartheid”; and “enforced disappearance of persons”. These definitions also appear in article 7 of the 1998 Rome Statute and were viewed by the Commission as relevant for retention in draft article 2.

(41) Article 7, paragraph 3, of the 1998 Rome Statute provides for the purposes of that Statute a definition of “gender” as referring “to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”. That paragraph (as well as a cross-reference to that paragraph in article 7, paragraph 1 (h)), has not been retained in draft article 2. Since the adoption of the Rome Statute, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term “gender”, notably: the 2004 guidance document by the International Committee of the Red Cross;¹⁵⁷ the 2010 Committee on the Elimination of Discrimination against Women general recommendation No. 28;¹⁵⁸ the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence;¹⁵⁹ and recent reports of United Nations special rapporteurs or independent experts.¹⁶⁰ Moreover, the Office of the Prosecutor of the International Criminal Court in 2014 issued the “Policy paper on sexual and gender-based crimes”, which states:

Article 7 (3) of the Statute defines “gender” as referring to “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and

¹⁵⁶ The definition of “enslavement” refers in part to “trafficking in persons”. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2237, No. 39574, p. 319, defines “trafficking in persons” at article 3 (a) as follows:

“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

¹⁵⁷ ICRC, *Addressing the Needs of Women Affected by Armed Conflict: an ICRC Guidance Document*, Geneva, 2004, p. 7 (“The term ‘gender’ refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term ‘sex’ refers to biological and physical characteristics”).

¹⁵⁸ Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 38 (A/66/38 (Part Two))*, annex III, p. 108. Paragraph 5 of the recommendation refers to gender as “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences”.

¹⁵⁹ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *Treaty Series*, No. 210. Article 3 (c) of the Convention defines “gender” for purposes of the Convention to “mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.

¹⁶⁰ See, for example, the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (2017) (A/HRC/35/23), paras. 17 *et seq.*; the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2018) (A/73/152), para. 2 (“Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms.”).

interpret this in accordance with internationally recognised human rights pursuant to article 21(3) [of the 1998 Rome Statute].¹⁶¹

A similar approach of viewing gender as a socially constructed (rather than biological) concept has been taken by various other international authorities¹⁶² and in the jurisprudence of international criminal courts and tribunals.¹⁶³

(42) Accordingly, the Commission decided not to include the definition of “gender” found in article 7, paragraph 3, of the 1998 Rome Statute, thereby allowing the term to be applied for the purposes of the present draft articles based on an evolving understanding as to its meaning. While the term is therefore undefined in the present draft articles, the same is true as well for various other terms used in draft article 2, paragraph 1 (h), such as “political”, “racial”, “national”, “ethnic”, “cultural”, or “religious”. States, however, may be guided by the sources indicated above for understanding the meaning of the term “gender”.

Paragraph 3

(43) Paragraph 3 of draft article 2 provides: “This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law”. This provision is similar to article 1, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: “This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.¹⁶⁴ Article 10 of the 1998 Rome Statute (appearing in Part II on “Jurisdiction,

¹⁶¹ Office of the Prosecutor of the International Criminal Court, “Policy paper on sexual and gender-based crimes” (2014), para. 15. Article 21 of the Rome Statute on “applicable law” begins in paragraph 3 as follows: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights ...”.

¹⁶² *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo* [Gender identity, and equality and non-discrimination against same-sex couples], Advisory Opinion OC-24/17 of 24 November 2017, Inter-American Court of Human Rights, para. 32 (available only in Spanish); Committee against Torture, ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2016) (CAT/C/57/4 and Corr.1), para. 53; Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44)*, annex VI; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women’s access to justice (CEDAW/C/GC/33); Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44 (A/68/44)*, annex X; Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the Covenant), *Official Records of the Economic and Social Council, Report on the Thirty-fourth and Thirty-fifth Sessions, Supplement No. 2 (E/2006/22-E/C.12/2005/4)*, annex VIII; Report of the Secretary-General, Question of torture and other cruel, inhuman or degrading treatment or punishment (2001) (A/56/156); Human Rights Committee, general comment No. 28 (2000) on article 3 (equality of rights between men and women), *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, annex VI B; Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (1996) (A/51/322); Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1993) on violence against women, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38)*, chap. I.

¹⁶³ *Prosecutor v. Ferdinand Nahimana, Jean Bosco and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, Trial Chamber I, International Criminal Tribunal for Rwanda, *Reports of Orders, Decisions and Judgements 2003*, p. 376, at p. 1116, para. 1079; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 327; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, 28 February 2005, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 369–370; *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, Trial Chamber I, International Criminal Court, para. 191.

¹⁶⁴ Convention against Torture, art. 1, para. 2.