

INTERNATIONAL LAW COMMISSION

Sixty-seventh session

Geneva, 4 May – 5 June and 6 July – 7 August 2015

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Crimes against humanity

Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau

5 June 2015

Mr. Chairman,

It gives me great pleasure to introduce the second report of the Drafting Committee for the sixty-seventh session of the Commission. This report concerns the topic “Crimes against humanity” and is contained in document A/CN.4/L.853, which reproduces the text of the draft articles provisionally adopted by the Drafting Committee at the present session.

The Drafting Committee devoted four meetings, from 28 May to 2 June, to its consideration of the draft articles relating to this topic. It examined the two draft articles initially proposed by the Special Rapporteur in his first report (A/CN.4/680), together with a number of suggested reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debate in Plenary. As a result of the break-up of the provisions contained in one of the draft articles initially proposed by the Special Rapporteur, as well as the creation of a new draft article on “scope,” the Drafting Committee provisionally adopted, at the present session, a total of four draft articles on this topic.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Mr. Sean Murphy, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. I would like to thank in

particular Mr. Tladi for kindly accepting to chair the first meeting of Drafting Committee in my absence. Furthermore, I also wish to thank the Secretariat, and Mr. Nanopoulos in particular, for its valuable assistance.

Mr. Chairman,

I shall introduce in turn the four draft articles provisionally adopted by the Drafting Committee.

Before doing so, I would like to draw the attention on three mistakes made at the time when document A/CN.4/L.853 was edited. Firstly, in the English version, at the beginning of draft article 3, paragraph 3, at the bottom of page 2, the letter 's' at the end of "purposes" should be deleted, since the singular shall be used. Secondly, in the French version, the numbering of the paragraphs of draft article 4 does not appear as it should be. Paragraph 1 of draft article 4 corresponds to the paragraph which begins by "Tout Etat s'engage..."; paragraph 2 corresponds to the paragraph starting with « Aucune circonstance... ». Finally, the end of article 3, paragraph 1, sub-paragraph (h), should read « le » *crime de génocide* and not « du » *crime de génocide*.

Regarding the structure followed, you will remember that, during the Plenary debate, it was urged that an initial article be developed on the scope of the draft articles. Further, it was felt that draft article 1 was unbalanced in the way that it purported to address both prevention and punishment, and that it might be broken up into separate articles. Following these proposals, the Special Rapporteur suggested to the Drafting Committee an initial draft article on "scope", resulting in the provisional adoption of draft article 1. Further, the Special Rapporteur suggested that the provisions contained in the three paragraphs of the original draft article 1 be placed in two draft articles, resulting in the provisional adoption of draft articles 2 and 4. The original draft article 2 was largely retained as proposed, but was renumbered as draft article 3.

Let me turn first to draft article 1.

Draft article 1 – Scope

Draft article 1 is entitled “Scope”. It consists of a single sentence which states that “[t]he present draft articles apply to the prevention and punishment of crimes against humanity.”

The members of the Drafting Committee shared the sentiment that the draft articles should begin with a provision on “scope” on the model usually followed by the Commission. They also considered that such a provision should generally indicate what the draft articles would cover, and that any element not strictly on the scope of the project should be removed from this draft article. The term “apply” is used to reflect the usual formulation of this type of provision in the work of the Commission, including in article 1, paragraph 1, of the 1996 *Draft Code of Crimes against the Peace and Security of Mankind*.

The title of the project, “Crimes against humanity”, is relatively general and the Drafting Committee found it appropriate to clarify at the outset that the draft articles apply to the “prevention and punishment” of such crimes. As highlighted by the Special Rapporteur during the Plenary Debate, as well as by several Members of the Commission, there already exists a legal framework for dealing with crimes against humanity, which resides in various international conventions, national laws, and prior instruments of this Commission, as well as the various international criminal courts and tribunals’ statutes and jurisprudence. Against this background, the Drafting Committee was of the view that the present draft articles do not intend to replace or compete with this framework, but to complement it by filling an existing gap relating to the prevention and punishment of crimes against humanity.

Consequently, draft article 1 stresses that the draft articles will focus on the prevention and punishment of crimes against humanity, the two main dimensions that will be developed in future reports by the Special Rapporteur and corresponding draft articles, especially as it relates to improving capacity within national legal systems and the promotion of inter-State cooperation.

Let me now turn to draft article 2.

Draft article 2 – General obligation

The title of draft article 2 is “General obligation”. The draft article reads: “Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.”

This new article corresponds to the first paragraph of the first draft article contained in the First Report. The purpose of this umbrella provision is to identify, as the title suggests, a general obligation that is applicable to the entire set of draft articles, and not only to the dimension of prevention. As such, this obligation merits placement in a free-standing draft article. The Drafting Committee agreed that this general obligation to prevent and punish is to be implemented through the specific obligations to prevent and to punish that will be set forth in more detail in subsequent draft articles.

Draft article 2 indicates that “crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.” The words “undertake to” were used rather than “shall” as a means of aligning this general obligation with the analogous obligation set forth in Article 1 of the 1948 Genocide Convention. It was noted that the International Court, when interpreting the Genocide Convention, stated in 2007 that the ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, and to accept an obligation.

This draft article qualifies crimes against humanity as “crimes under international law”. This expression was used in the previous work of the Commission, including in Article 1, paragraph 2, of the 1996 *Draft Code of Crimes against the Peace and Security of Mankind*. The concept of “crimes under international law”, which has developed since the International Military Tribunal at Nürnberg, encompasses what are referred to as the “core crimes”, i.e. the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Use of this expression implies that the existence of crimes against humanity is grounded in customary international law, and is irrespective of its recognition within national law. This consequence was recognized in Principle 1 of the *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, adopted by the Commission in 1950, which states that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment”. The Drafting Committee

considered whether in this draft article to characterize crimes against humanity alternatively as one of the “most serious crimes of concern to the international community as a whole,” but decided that such language would be better placed in a preamble or introduction.

Draft article 2 also emphasizes that crimes against humanity are crimes under international law “whether or not committed in time of armed conflict”. The Drafting Committee considered it important to maintain this element from the original proposal by the Special Rapporteur in view of the historic evolution of the definition of crimes against humanity. As explained in the First Report, these crimes were originally linked to the existence of an armed conflict in the context of the Nürnberg Tribunal. Customary international law has developed since then, and it is now firmly established that no such connection is required. In addition, further to the debate in Plenary, the Special Rapporteur suggested replacing the outdated dichotomy of “war and peace” by the term “armed conflict”, which corresponds to contemporary international law. For the same reason, the verb “confirm” is not used in this draft article. This verb, borrowed from the Genocide Convention, is outdated and was more appropriate at the time when the core crimes were developing, not now that they are firmly established in international law.

Finally, draft article 2 indicates that “States” undertake to prevent and punish crimes against humanity. Further to the debate on the issue of the outcome of the topic, the Special Rapporteur preferred not to retain the expression “State Party”, in order not to prejudge the final recommendation of the Commission.

Mr. Chairman,

Let me now turn to Draft article 3.

Draft article 3 – Definition of crimes against humanity

The title of Draft article 3 is “Definition of crimes against humanity”, which corresponds to the proposal made by the Special Rapporteur in his First Report for a draft article 2. The purpose of this draft article is to provide a definition of crimes against humanity, as well as a “without prejudice” clause to any broader definition provided for in any international instrument or national law.

Draft article 3 is composed of four paragraphs. The first three paragraphs comprise the definition of crimes against humanity, while paragraph 4 is the “without prejudice” clause.

Paragraphs 1, 2 and 3 essentially reproduce Article 7 of the Rome Statute. There was a general agreement in the Plenary and in the Drafting Committee that the definition of crimes against humanity contained in the Rome Statute should not be modified by the Commission in the context of the work on this topic. Paragraphs 1, 2 and 3 are therefore a faithful reproduction of this provision, except for the three following non-substantive changes. First, paragraph 1 starts with the words “For the purpose of the present draft articles”, while the Rome Statute refers to “this Statute”. Second, the act of persecution defined in sub-paragraph h) refers to any act “in connection with the crime of genocide or war crimes” while the Rome Statute refers to “any crime within the jurisdiction of the Court”. This formulation is faithful to article 5 of the Rome Statute which defines the crimes within the jurisdiction of the Court. Third, paragraph 3 begins with the words “For the purpose of the present draft articles” and not by “for the purpose of this Statute” as in the Rome Statute.

Paragraph 4 is a new provision based on a proposal made in the Plenary that received widespread support during the debate. It indicates that “[t]his draft article is without prejudice to any broader definition provided for in any international instrument or national law.” As such, this paragraph contains a without prejudice clause which applies equally to the other paragraphs in this draft article.

The purpose of paragraph 4 is to indicate that the definition adopted for these draft articles has no effect upon broader definitions that may exist currently in other instruments, such as the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, or in national laws. It also makes clear that the present draft articles have no effect on the adoption, in the future, of a broader definition of crimes against humanity in an international instrument or a national law.

The Drafting Committee noted that a clause of this kind exists in Article 10 of the Rome Statute, which provides: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” A clause of this kind also exists in many treaties addressing the punishment of crimes in national law, such the 1984 Convention against Torture which, after defining “torture”, provides: “This

article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.

The Drafting Committee deemed it appropriate to use the term “international instruments”, which is used in a number of treaties containing a clause of this type. This term has a broader meaning than binding international agreements, covering non-binding declarations by States as well.

While the Drafting Committee favoured the inclusion of paragraph 4, the Drafting Committee was also of the view that it would be appropriate, in any preamble or introduction to these draft articles, to indicate that an important objective of the draft articles is the harmonization of national laws, which can then serve as the basis for international cooperation. Indeed, any additional elements to this definition adopted in a national law would not fall within the scope of the present draft articles, and therefore would not benefit from the provisions set forth within them. Views were also expressed that the location of paragraph 4 might be revisited later in the work on this topic.

Mr. Chairman,

Let me now turn to draft article 4.

Draft article 4 – “Obligation of prevention”

Draft article 4 is entitled “Obligation of prevention”. This title is meant to suggest that the obligation has a range of elements rather than a single focus. The purpose of this draft article, then, is to set forth the various elements that collectively promote the prevention crimes against humanity. It comprises two paragraphs that correspond to the proposal made by the Special Rapporteur in his First Report for draft article 1, paragraphs 2 and 3. I will examine these paragraphs in turn.

Paragraph 1 is formulated as follows:

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

- (a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.”

The chapeau of paragraph 1 sets out the specific obligation of prevention. The Drafting Committee used the verb “undertake” to align this article with the general obligation set forth in draft Article 2.

This undertaking means, first, that the State shall refrain from committing crimes against humanity itself. As discussed in the First Report, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court found that the obligation of State Parties not to commit genocide, although not expressly stated in Article 1 of the Genocide Convention, followed from the categorization of this crime as “a crime under international law” and from the expressly stated obligation to prevent the commission of acts of genocide.

Second, this undertaking means that the State shall employ the means at its disposal to prevent persons or groups not directly under its authority from committing crimes against humanity. As explained in the First Report, the State is only expected to use its best efforts – a due diligence standard – when it has a capacity to influence effectively the action of persons likely to commit, or already committing, such acts, which in turn depends on the State Party’s geographic, political, and other links to the persons or groups at issue.

The Drafting Committee considered it appropriate to insert another important aspect in the chapeau, i.e. that States undertake to prevent crimes against humanity “in conformity with international law”. Thus, the measures to be taken by States to fulfil this obligation must be consistent with the existing rules of international law, including the Charter of the United Nations. In other words, States cannot rely on their obligation of prevention as set forth in these draft articles as a justification for the violation of existing rules, in particular those relating to the use of force.

Third, sub-paragraph (a) describes certain specific means that States must pursue in fulfilment of the obligation and is inspired by the formulation of Article 2, paragraph 1, of the Convention against Torture. Sub-paragraph (a) lists various types of measures that could be taken by States well in advance of the outbreak of any such offenses for preventing crimes

against humanity, depending on the context in which that State is operating. For example, training programmes for police, military, militia, and other personnel might be necessary to help prevent crimes against humanity. Sub-paragraph (a) specifies that these shall be “effective,” meaning that a formal prohibition alone is not sufficient; rather, robust measures must be pursued, as necessary, to prevent crimes against humanity from occurring.

Further, subparagraph (a) specifies that these measures shall be taken by a State “in any territory under its jurisdiction or control”. This part of the sentence, which is inspired by previous work of the Commission, intends to encapsulate the territory *de jure* of the State, as well as the territory under its control *de facto*.

Fourth, sub-paragraph (b) addresses the issue of cooperation. There was a general sense in the Plenary that this was an important aspect of the obligation of prevention and the Special Rapporteur made a proposal to include it in this draft article. Sub-paragraph (b) stresses that States shall cooperate with each other to prevent crimes against humanity. Further, it refers to cooperation with relevant intergovernmental organizations. The relevance of any particular intergovernmental organization will depend, among other things, on the organization’s functions, on the relationship of the State to that organization, and on the context in which the need for cooperation arises. Finally, sub-paragraph (b) stresses that States shall cooperate, as appropriate, with other organizations. These organizations include non-governmental organizations that might play an important role in the prevention of crimes against humanity in specific countries. The term “as appropriate” is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to the same extent to these organizations as it does to States and relevant intergovernmental organizations.

Draft article 4, paragraph 2, was originally contained in draft article 1, paragraph 3, as proposed in the First Report. As modified by the Drafting Committee, the paragraph now reads:

“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”.

This provision indicates that no exceptional circumstances may be invoked as a justification of the offence. Such provisions often accompany general and specific obligations of

prevention in various treaties. This text, in particular, is inspired by article 2, paragraph 2 of the Convention against Torture. It was thought that an advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors.

The wording has been refined by the Drafting Committee to fit better in the context of crimes against humanity. The outdated expression of “state of war or threat of war” has been replaced by the expression “armed conflict, as was done in draft Article 2. In addition, the Drafting Committee considered it more appropriate to use “such as” rather than “whether” to stress that the examples given were not meant to be exhaustive.

Finally, a discussion took place within the Drafting Committee as to the best placement of this paragraph, including whether it might be located in draft article 2 or as a self-standing provision, rather than being linked solely to the specific obligation of prevention. Further to an extensive discussion, it was agreed to leave this question in abeyance until further progress on the topic is made, since the scope of this provision has been dealt with only in the context of prevention at this stage. This understanding is reflected in a footnote.

This concludes my introduction of the second report of the Drafting Committee for the sixty-seventh session. It is my sincere hope that the plenary will be in a position to adopt the draft articles on crimes against humanity as presented.

Thank you very much.

Annex

Crimes against humanity

Draft article 1

Scope

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

Draft article 2

General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Draft article 3

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 as defined in paragraph 3, 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;

- 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 civilian 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. For the purpose of the present draft articles, 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. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Draft article 4

Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:
 - (a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and
 - (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.
2. 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.¹

¹ The placement of this paragraph will be addressed at a further stage.