

INTERNATIONAL LAW COMMISSION

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**Crimes against humanity**

Statement of the Chairman of the Drafting Committee, Mr. Pavel Šturma

9 June 2016

Mr. Chairman,

It gives me great pleasure to introduce the third report of the Drafting Committee for the sixty-eighth session of the Commission. This report concerns the topic “Crimes against humanity” and is contained in document A/CN.4/L.873, which reproduces the text of the draft articles provisionally adopted by the Drafting Committee at the present session.

The Drafting Committee devoted eight meetings, from 24 May to 2 June, to its consideration of the draft articles relating to this topic. It examined the six draft articles initially proposed by the Special Rapporteur in his second report (A/CN.4/690), 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. The Drafting Committee provisionally adopted, at the present session, a total of six 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. Furthermore, I also wish to thank the Secretariat for its invaluable assistance.

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Mr. Chairman,

I shall introduce in turn the 6 draft articles provisionally adopted by the Drafting Committee.

Let me turn first to draft article 5.

**Draft article 5 – Criminalization under national law**

Draft article 5 is entitled “*Criminalization under national law*” as proposed in the second report. The purpose of this draft article is to set out several important obligations of each State relating to the establishment of crimes against humanity as offences within that State’s criminal law. In addition to obliging the State to regard such crimes as offences under its criminal law, it addresses the associated modes of liability, the responsibility of superiors for such crimes, the inability of the orders of a Government or of a superior to exclude criminal responsibility, the inapplicability of a statute of limitations and the issue of penalties.

Draft article 5 is composed of 6 paragraphs, which address those issues in turn.

Paragraph 1 reads: “Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.”

This provision was not included in draft article 5 as initially proposed in the second report. You will recall that, during the Plenary debate, it was suggested that a link be established between the obligation to adopt national legislation on crimes against humanity and the definition of such crimes set out in draft article 3, paragraphs 1 to 3. The members of the Drafting Committee shared the view that the obligation of criminalization under national law should encompass not only the various modes of criminal responsibility, but also an express obligation to regard “crimes against humanity,” as such, as offences under the State’s criminal law.

A similar approach has been followed in existing treaties obliging States to criminalize conduct in national law, such as in article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 4 of the International Convention for the Protection of All Persons from Enforced Disappearance. The text of paragraph 1 follows the

formulation of article 4 of the International Convention for the Protection of All Persons from Enforced Disappearance.

According to paragraph 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.”

The purpose of this provision is to ensure that States criminalize the basic modes of liability: committing, attempting to commit and other forms of participation to crimes against humanity.

A discussion took place as to how detailed such a provision should be. Most existing treaties indicate generally the various modes of liability to be included in national legislation, without going into details. This approach takes into account the fact that all States already have a fully-functioning criminal law system which contains long-standing and well-developed doctrine and jurisprudence on how these various forms of participation operate. Much more detailed rules on the modes of liability, as are used in the Rome Statute to guide the International Criminal Court, would risk creating difficulties for the State in adjusting to rules unfamiliar to its criminal law and jurisprudence.

The Drafting Committee decided to adopt for paragraph 2 the general formulation proposed in the second report for draft article 5, paragraph 1, without changes. It considered that a detailed provision, while appropriate in the context of creating an international criminal court or tribunal, was not required for the purpose of addressing the modes of liability to be applied in an existing national criminal system. At the same time, the structure of the paragraph has been modified and the three principal modes of liability listed therein now appear under three distinct sub-paragraphs.

In the course of its work, the Drafting Committee discussed the possibility of referring expressly to “incitement” as one of the various modes of participation listed in sub-paragraph (c).

Members of the Committee acknowledged the particular significance of this mode of liability in the context of crimes against humanity. It was eventually decided not to refer to “incitement” expressly in the text of paragraph 2, in part because the term was not included in certain international treaties, such as the Rome Statute, and in part because that particular term was unknown to some national legal systems. Nevertheless, members of the Drafting Committee considered that incitement was covered under the concepts of “soliciting” and “inducing” in subparagraph (c) and that this would be reflected in the commentary.

The Drafting Committee also noted that the concept of “contributing” in subparagraph (c) embraces the possibility of contributing to the commission or attempted commission of crimes against humanity by a group of persons acting with a common purpose. While the Drafting Committee considered whether to elaborate further in the draft article on this particular mode of liability, it was decided that a more general reference to “contributing” was preferable, again given the differences in national criminal systems on this mode of liability.

### Paragraph 3

Paragraph 3 addresses the criminal responsibility of military commanders and other superiors for offences committed by subordinates in certain circumstances. This type of criminal liability, often referred to as “command responsibility” or “superior responsibility,” is common in a number of international instruments, and in particular in the statutes of international criminal courts and tribunals. While some instruments, such as Additional Protocol I to the 1949 Geneva Conventions, address this matter in general terms, other instruments contain a more detailed standard by which criminal responsibility applies to a military commander or other superior in regard to the acts of others. While many national legal systems recognize the concept of command responsibility, State practice in this area is uneven and might benefit from greater harmonization based on a contemporary formulation. Consequently, there was general agreement in the Drafting Committee that the more detailed approach should be followed and that paragraph 3 should be modelled on article 28 of the Rome Statute, as suggested by the Special Rapporteur in his second report.

The text proposed in the second report under draft article 5, paragraph 2, was adopted for paragraph 3 with a minor editorial change in the chapeau; the term “also” was moved so as to be after the verb “shall”. Hence, the chapeau of paragraph 3 reads: “Each State shall also take the

necessary measures to ensure that the following are offences under its criminal law”. Article 28 of the Rome Statute is then reproduced under sub-paragraph (a), which concerns the criminal liability of military commanders or persons effectively acting as such, and sub-paragraph (b), concerning the superior and subordinate relationships not described in sub-paragraph (a).

Mr. Chairman,

Let me now turn to paragraphs 4, 5 and 6. Those three paragraphs correspond to the third paragraph of draft article 5 as contained in the second report. In light of the suggestions made in Plenary, the Drafting Committee deemed it appropriate to separate the three sub-paragraphs proposed in the second report so as to be self-standing paragraphs since they address different, although interrelated, issues.

Paragraph 4 reads: “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.” All jurisdictions addressing crimes against humanity permit grounds for excluding criminal responsibility. The purpose of this paragraph is to exclude orders of a Government or of a superior from such grounds.

The first part of the sentence corresponds to the chapeau of paragraph 3 as suggested in the second report. Consistent with the language of paragraphs 1 and 2, the Drafting Committee chose to add to paragraph 3 the term “under its criminal law” since this paragraph also is focused on an important aspect of criminalization in the national legal order. In this context, it bears noting that the term “under its criminal law” broadly encompasses not only legislative measures, but other measures as well that a State may employ so as to fulfil its obligation. Further, the term “under its criminal law” in this context broadly encompasses all law within the national system that is applied in the context of criminal proceedings, including constitutional law. This will be made clear in the commentary. For the same reasons, this term has been used consistently in paragraphs 4, 5 and 6.

Paragraph 4 not only refers to orders of a superior as suggested originally, but also of a Government. It followed from the Plenary debate that such a reference, which already appeared

under article 8 of the Nürnberg Charter and is firmly established under international law, needed to be made explicitly. Paragraph 4 was therefore amended accordingly.

Paragraph 5 reads: “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.” The purpose of this provision is to ensure that States do not include in their criminal law a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution.

A rule on statute of limitations has not been systematically included in treaties addressing crimes. However, in 1968, States adopted the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which requires State Parties to adopt “any legislative or other means necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment” of those two types of crimes (art. IV). It was generally agreed in the Drafting Committee that such a provision was necessary in the context of the present draft articles.

Paragraph 5 corresponds to the proposal made in the second report under draft article 5, paragraph 3(b). The term “under its criminal law” has been added for reasons already explained. Moreover, the plural is used for the term “offences” instead of the singular.

Finally, paragraph 6 reads: “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.”

As indicated in the second report, international treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, leave to States parties the discretion to determine the punishment, based on the circumstances of the particular offender and offence. The purpose of this provision is to ensure that, while recognizing that penalties attached to crimes against humanity may vary under the criminal law of each State, such penalties are expected to be appropriate given the gravity of the offences. The formulation used in paragraph 6, which appears in numerous treaties, such as article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, thus allows a balance to be struck: on the one hand, allowing States a certain discretion in punishing the

offender based on the particular circumstances of the offence; while on the other hand indicating to States that such punishment must take into account the gravity of crimes against humanity.

Paragraph 6 corresponds to the text of draft article 5, paragraph 3(c), as proposed in the second report. Similar to paragraph 5, the text of this provision was modified to include the term “under its criminal law” and to refer to “offences” rather than “offence”.

Mr. Chairman,

Let me now turn to draft article 6.

**Draft article 6 – Establishment of national jurisdiction**

The title of draft article 6 is “*Establishment of national jurisdiction*” as proposed in the second report. The purpose of this draft article is to set out the obligation of States to establish their jurisdiction over crimes against humanity in certain circumstances. It comprises three paragraphs.

Paragraph 1 reads: “Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 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.”

This paragraph concerns the obligation of States to establish several types of national jurisdiction. In particular, it addresses the establishment of territorial jurisdiction, active personality jurisdiction and passive personality jurisdiction. This provision, common in a number of treaties such as article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, seeks to make it difficult for an alleged offender to escape the exercise of States’ jurisdiction.

Following the model of existing treaties, such as the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic

Agents, draft article 6 indicates that States “shall take necessary measures to establish their jurisdiction over” the relevant offences in three “cases” or situations.

The first situation, found in sub-paragraph (a), concerns establishing jurisdiction based on the location of the crime, often referred to as “territorial jurisdiction”. Consistent with the terminology used in draft article 4, the proposal made in the second report referred to any territory under “the jurisdiction or control” of a State. The Drafting Committee, however, considered it appropriate to refer to territory “under [the State’s] jurisdiction”. This change is not substantive in nature; the term “any territory under its jurisdiction” is intended to encapsulate the territory *de jure* of the State, as well as the territory under its control *de facto*. Rather, this drafting change was made to align the terminology used in the present draft articles with the formulations of relevant treaties in the field, such as article 5, paragraph 1(a), of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which refers only to “territory under its jurisdiction” to cover both situations. The text of draft article 4, therefore, will need to be revisited in the future to ensure consistency.

The second situation, found in sub-paragraph (b), concerns the “active personality” jurisdiction, a common form of jurisdiction in national law based on the nationality of the alleged offender. You may recall that proposals were made during the debate in Plenary for the consideration of the closely-related issue of stateless persons. The Drafting Committee has therefore included in draft article 6 an optional basis of State jurisdiction relating to “a stateless person who is habitually resident in the territory of that State”. The adopted formulation is based on the language of existing conventions, such as article 5, paragraph 1(b), of the 1979 International Convention against the taking of hostages.

The third situation, found in sub-paragraph (c), addresses “passive personality jurisdiction”, which is jurisdiction based on the nationality of the victim of the crime. This type of jurisdiction, although existing in several national criminal systems, remains controversial for a number of States. This type of jurisdiction is therefore provided for on an optional basis, as is consistent with many existing treaties, and is reflected by the term “if that State considers it appropriate”.

Paragraph 2 reads: “Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 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.”

This paragraph indicates that a State shall also establish its jurisdiction over the offences based solely on the presence of the alleged offender on its territory. The text of paragraph 2 has been amended, following the model of article 3 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to use the phrase “cases where” and to refer to territory in the same manner as previously indicated. Like other treaties, paragraph 2 obligates the establishment of such jurisdiction, but acknowledges the possibility of the State extraditing or surrendering the alleged offender, a matter that is addressed in greater detail in other draft articles, such as in the context of exercising jurisdiction under draft article 9.

According to paragraph 3: “The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.” The purpose of this provision is to indicate that the draft articles do not exclude a State from adopting other types of criminal jurisdiction under its national law relating to crimes against humanity. The Drafting Committee deleted the opening part of paragraph 3, as proposed in the second report, which contained a without prejudice clause referring to “applicable rules of international law”. Members of the Committee shared the view that, given the ongoing debate relating to the exercise of national criminal jurisdiction, it would be more appropriate, at this stage, for the Commission not to include such a clause. For this reason, the Drafting Committee adopted the formulation that can be found in many existing and widely-adhered-to international instruments.

Mr. Chairman,

Let me now turn to draft article 7.

### **Draft article 7-*Investigation***

Draft article 7 is entitled “*Investigation*”. It consists of a single paragraph. The purpose of this provision is to trigger an investigation by the State where there is occurring or has occurred a

situation of crimes against humanity. Draft article 7 reads as follows: “Each State shall ensure that its competent authorities proceed to a prompt 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.”

You will recall that this draft article, as proposed in the second report, gave rise to a number of comments and suggestions during the debate in Plenary. The proposal made in the second report addressed two issues namely investigation by certain States and cooperation among States. In light of the Plenary debate, the Drafting Committee considered that the issue of cooperation among States should be dealt with in other draft articles. Members of the Drafting Committee also shared the view that the issue of investigation should be directed at the State in whose territory crimes against humanity may have occurred or are occurring, an approach that follows models of existing international instruments.

For this reason, the formulation of draft article 7 follows article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In particular, the Drafting Committee deemed it appropriate to use the standards of “prompt and impartial investigation” and of “reasonable ground to believe”, which are accepted in international practice and jurisprudence. In addition, for the sake of consistency with the other draft articles, draft article 7 is applicable when “crimes against humanity have been or are being committed in any territory under [the] jurisdiction” of the State.

Let me turn to draft article 8.

**Draft article 8 - Preliminary measures when an alleged offender is present**

The title of this draft article is “*Preliminary measures when an alleged offender is present*”. The purpose of this provision is to set forth the obligation of a State to exercise its jurisdiction when an alleged offender is present on any territory under its jurisdiction by taking certain measures. Three categories of measures are identified under the three paragraphs that comprise this draft article. They address in turn the obligation to take the alleged offender into custody if necessary to ensure his or her presence, the obligation to carry out a preliminary inquiry and the obligation to notify other relevant States.

The Drafting Committee shared the view that the structure and text of draft article 8 should be modelled on article 6 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, whose provisions could be reproduced, *mutatis mutandis*, in the context of crimes against humanity.

Paragraph 1 reads:

“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 referred to in draft article 5 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.”

The purpose of this provision is to set forth the obligation of each State to take into custody a person who is alleged to have committed a crime against humanity, if necessary to ensure his or her presence pending an investigation to determine whether the matter should be submitted to prosecution. Such prosecution could be carried out by the authorities of that State, or of other relevant States, as well as of international criminal courts or tribunals. This provision is modelled on article 6, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the text of which has been reproduced with some minor editorial changes. In line with the approach taken for other draft articles, paragraph 1 refers to the territory under the jurisdiction of the State and also distinguishes criminal, extradition and surrender proceedings.

Paragraph 2 reads: “Such State shall immediately make a preliminary inquiry into the facts.” This type of initial investigation is common in most national criminal systems and a provision of this kind appears in many international instruments. In essence, the provision sets forth the obligation of a State to conduct a preliminary investigation when it has information that an alleged offender is present in any territory under its jurisdiction. The adopted text is exactly the same than article 6, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Finally, paragraph 3 reads:

“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 6, 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 promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”

The purpose of this provision is to identify an obligation for a State exercising its criminal jurisdiction to notify other States that have or may have established jurisdiction over the offences, so that those States might consider whether to request extradition of the alleged offender. The Drafting Committee deemed it appropriate to reproduce the formulation of article 6, paragraph 4, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, with only small editorial changes to accommodate the text to the present draft articles.

Mr. Chairman,

**Draft article 9 - *Aut dedere aut judicare*.**

Let me now turn to draft article 9. It is entitled “*Aut dedere aut judicare*”.

This provision sets forth the “obligation to extradite or prosecute” present in a number of existing treaties. This obligation calls upon a State in the jurisdiction of which an alleged offender is present either to submit the alleged offender to prosecution within that State’s own national system, or to extradite or surrender him or her to another State or to an international criminal tribunal.

Draft article 9 is comprised of a single paragraph, which reads:

“The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. 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.”

The first sentence of this paragraph sets forth the obligation to extradite, surrender or prosecute that was addressed in the second report under draft article 9, paragraph 1. The inclusion of this provision was generally supported by the members of the Commission during the debate in Plenary. The changes introduced in the Drafting Committee are purely linguistic and do not address the substance of the provision. Members of the Drafting Committee shared the view that, for the sake of internal consistency, this sentence should start with a focus on “The State” so as to follow the formulation of previous draft articles and should also follow the same concept of “territory under whose jurisdiction” adopted elsewhere.

The formulation adopted draws upon the text of a number of existing instruments, but also includes the concept of “surrender” of the offender, as appears in article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance. This concept recognizes the possibility that there may exist an international criminal tribunal competent to prosecute the alleged offender for the relevant offences, in which case the State might surrender the person to that tribunal. Consideration was given as to whether the concept of “extradition” should be associated solely with the sending of the person to a State and the concept of “surrender” associated solely with the sending of the person to a competent international criminal tribunal, but it was decided not to strictly limit the concepts in that way. The terminology used in national criminal systems varies and, for that reason, the Drafting Committee has considered that a more general formulation would cover all possible situations where a State could decide to send an alleged offender to another a State or to an international tribunal for the purpose of prosecution.

A discussion also took place as to whether “international criminal tribunal” should be qualified by language to say that it must be a tribunal whose jurisdiction the sending State has recognized, as appears in article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance. It was decided, however, that such a qualification was not necessary, as a State that is not already bound under international law to send a person to an international criminal tribunal can choose, if it prefers, to submit the matter to prosecution in its national criminal system. Consideration was also given by the Drafting Committee as to whether to assert in draft article 9 that the obligation contained therein was “without exception whatsoever and whether or not the offence was committed in a territory

under its jurisdiction”. This expression is used in some treaties as a matter of emphasis. The Drafting Committee concluded that it was not necessary to include this clause, but that the unequivocal nature of the obligation set forth in the draft article should be stressed in the commentary.

The second sentence of draft article 9 relates to an issue that was addressed in the second report under draft article 9, paragraph 2. The text proposed has been simplified for linguistic reasons, and follows the formulation of a number of existing instruments. The purpose of this paragraph is to signal to any State that, in the event that it submits the matter to its competent authorities for prosecution, the State must take its decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

**Draft article 10 - “Fair treatment of the alleged offender”**

Mr. Chairman,

Let me now turn to draft article 10. It is entitled “*Fair treatment of the alleged offender*” as proposed in the second report and comprises three paragraphs, which I will introduce in turn.

Paragraph 1 states: “Any person against whom measures are being taken in connection with an offence referred to in draft article 5 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.”

The purpose of this provision is to set forth the obligation of a State to guarantee fair treatment to an alleged offender against whom certain measures are being taken by that State. The text provisionally adopted by the Drafting Committee is close to the text proposed in the second report. In light of the relevant treaties, members of the Drafting Committee shared the view that a general provision was appropriate, rather than a very detailed one modelled on relevant provisions of the International Covenant on Civil and Political Rights and the Vienna Convention on Consular Relations.

Paragraph 1 refers to just “measures” rather than “legal measures” in order to cover all categories of measures that could be taken against an alleged offender and not to restrict the

rights of an alleged offender to certain limited situations. Moreover, the text of paragraph 1 indicates that fair treatment shall be “guaranteed” instead of “provided”, since this terminology is usually employed in existing treaties.

According to paragraph 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.”

This paragraph concerns an alleged offender who is not a national of the State detaining him or her for offences referred to in draft article 5. In this case, the alleged offender is entitled to rights that are listed under sub-paragraphs (a), (b) and (c).

A proposal was made in Plenary to replicate the Vienna Convention on Consular Relations in this paragraph. Members of the Drafting Committee shared the view that the purpose of this provision is not to replicate article 36 of the Vienna Convention but, rather to ensure that certain key steps are taken so that the rights of the alleged offender for consular access as exist under the Vienna Convention, under other relevant conventions, and under customary international law can be applied as they normally would. For that reason, the text of draft article 10, paragraph 2, follows the formulation of other treaties adopted after the Vienna Convention, such as the 1997 International Convention for the Suppression of Terrorist Bombings, which provide a general formulation to address such consular rights.

It is to be noted, first, that the chapeau of this provision refers to a person who “is in prison, custody or detention” to cover all possible situations of deprivation of freedom for allegations of crimes against humanity that preclude communication. Sub-paragraph (a) concerns the link of nationality between the alleged offender and his State of nationality. In case of a stateless person, this provision indicates that the person is entitled to communicate with “the State which, at that person’s request, is willing to protect that person's rights”. This formulation allows for the possibility of access to the State of residence of the stateless person, or any other State willing to offer its assistance. Sub-paragraphs (b) and (c) follow the formulation appearing in some existing treaties, such as article 7, paragraph 3, of the 1997 International Convention for the Suppression of Terrorist Bombings.

Paragraph 3 is a new provision that members of the Drafting Committee have considered appropriate to include since, for the sake of the protection of witnesses and of the preservation of evidence, the right to communicate of the alleged offender may be limited by the State. Paragraph 3 reads as follows:

“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.”

This formulation follows the text of existing conventions, such as article 7, paragraph 4, of the International Convention for the Suppression of Terrorist Bombings.

Mr. Chairman,

You will recall that it was suggested during the Plenary debate that the Special Rapporteur draft a “concept paper” on the issue of criminal responsibility of legal persons, for use by the Drafting Committee when addressing the six draft articles proposed by the Special Rapporteur in his Second Report. The Special Rapporteur prepared this document for the members of the Drafting Committee in advance of its first meeting. The paper discusses and contains three options for addressing this issue. However, due to a lack of time, the Drafting Committee was not able to consider this issue. This issue will be addressed by the Drafting Committee during the second part of the session.

Mr. Chairman,

This concludes my introduction of the third report of the Drafting Committee for the sixty-eighth 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.

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## **Draft article 5**

### ***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 the following are offences under its criminal law:
  - (a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
    - (i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
    - (ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
  - (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
    - (i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
    - (ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

- (iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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 offences referred to in this draft article shall not be subject to any statute of limitations.

6. 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.

## **Draft article 6**

### ***Establishment of national jurisdiction***

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 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 referred to in draft article 5 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.

## **Draft article 7**

### ***Investigation***

Each State shall ensure that its competent authorities proceed to a prompt 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.

## **Draft article 8**

### ***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 referred to in draft article 5 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 6, 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 promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

## **Draft article 9**

### **Aut dedere aut iudicare**

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. 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.

## **Draft article 10**

### ***Fair treatment of the alleged offender***

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 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.
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.

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