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Crimes against humanity

Statement of the Chairman of the Drafting Committee, Mr. Aniruddha Rajput

1 June 2017

Mr. Chair,

It gives me great pleasure to introduce the second report of the Drafting Committee for the sixty-ninth session of the Commission. This report concerns the topic “Crimes against humanity” and is contained in document A/CN.4/L.892, which reproduces the text of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee at the present session.

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.

The Drafting Committee devoted 10 meetings, from 9 to 24 May, for the consideration of the draft articles, the draft preamble and the draft annex relating to this topic. It examined the seven draft articles and the preamble initially proposed by the Special Rapporteur in his third report (A/CN.4/704), together with a number of reformulations that were proposed by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debates in Plenary and in the Drafting Committee. The Drafting Committee provisionally adopted, at the present session, a total of 5 draft articles, a draft preamble and a draft annex on this topic.

I should mention that the placement of several draft articles has been revisited, thereby affecting the overall numbering. In the written text of my statement, when the number of a draft article already adopted at previous sessions is affected, the original number is indicated in square brackets.

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I shall now introduce the draft preamble, the 5 draft articles and the draft annex provisionally adopted by the Drafting Committee.

Let me turn first to the draft preamble.

**Draft preamble**

Mr. Chair,

I draw your attention to the draft preamble to the draft articles, which was prepared on the basis of the proposal of the Special Rapporteur. I wish to record that while I am introducing the draft preamble before the specific draft articles adopted this year, the Drafting Committee actually considered the preamble after considering the entire set of draft articles and draft annex, and thereby had the benefit of its work on the substance of the draft articles and draft annex, before considering the draft preamble.

The Drafting Committee proceeded on the basis of a revised proposal for a draft preamble presented by the Special Rapporteur, and provisionally adopted a draft preamble with nine preambular paragraphs, as presented in the report of the Drafting Committee.

The first paragraph is a historical lookback, inspired by the preamble of the Rome Statute. It recalls that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity.

The second paragraph, which is also borrowing language from the preamble of the Rome Statute, recognizes that crimes against humanity threaten the peace, security and well-being of the world.

The third paragraph has been added on the basis of a proposal made by the Special Rapporteur further to the debate in the plenary. It expresses the recognition that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*). This recognition was expressed, in particular, by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State*, in which the Court indicated, among other things, that the rule prohibiting crimes against humanity at issue in the *Arrest Warrant* case “undoubtedly possess[es] the character of *jus cogens*”.

The fourth paragraph affirms that “crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law”. It encapsulates the first major purpose of the draft articles: the prevention of crimes against humanity.

The fifth paragraph establishes the link between the fight against impunity and the prevention of crimes against humanity. It borrows language from the preamble of the Rome Statute.

The sixth paragraph was suggested by the Special Rapporteur to take into account the suggestion made in Plenary that the draft preamble should have an express reference to the Rome Statute. Since the definition of crimes against humanity set forth in draft article 3 [3] reproduces article 7 of the Rome Statute, it was considered appropriate to underline the relationship between the two texts when referring to the definition of crimes against humanity.

The seventh paragraph recalls that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity. It emphasizes another important component of the draft articles, which is the obligation of States to establish and exercise their criminal jurisdiction with respect to crimes against humanity. Although the language of this paragraph is inspired from the preamble of the Rome Statute, the Drafting Committee has decided not to mention “those responsible for” crimes against humanity in this context, since it might create tension with the presumption of innocence until proven guilty.

The eighth paragraph refers to two further elements of the draft articles to ensure effective prosecution of crimes against humanity: the pursuit of measures at the national level and the pursuit of international cooperation, notably with respect to extradition and mutual legal assistance. It states that: “because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance”.

So as to signal an important aspect of the draft articles, the ninth paragraph considers the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment. It is an important reminder of the human rights of those persons, which must be respected throughout the operation of the obligations set forth in the draft articles.

#### **Draft articles 1 [1] to 4 [4]**

Mr. Chair,

Draft articles 1 [1] to 4 [4] remain as they were previously adopted by the Commission, except that the words “or control” were deleted from draft article 4 [4], paragraph 1, to conform that paragraph with the formulation used for references to territory in all the remaining draft articles. This was not a substantive change but one made for the purpose of *toiletage*.

#### **Draft article 5 – *Non-refoulement***

Let me now turn to draft article 5, which is entitled *Non-refoulement* as originally proposed by the Special Rapporteur and comprises two paragraphs. Although originally

designated in the third report as draft article 12, the Drafting Committee considered that it was best placed after draft article 4 [4] on prevention, since *non-refoulement* of a person is an important provision for the purpose of preventing persons from being exposed to crimes against humanity.

Under the principle of *non-refoulement*, States have the obligation not to return an individual to the territory under the jurisdiction of another State when there are substantial grounds for believing that he or she will be in danger of persecution or other specified harm. This principle, which is present in a large number of treaties addressing specific situations, is addressed here in the context of crimes against humanity.

Therefore, paragraph 1 indicates that “No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of 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”. This paragraph has been adopted as proposed in the third report. The commentary will explain that this paragraph is without prejudice to other *non-refoulement* obligations contained in treaties or under customary international law.

Like paragraph 1, paragraph 2 has been adopted as proposed in the third report. The purpose of this paragraph is to indicate that the competent authorities who are deciding whether, according to paragraph 1, there are substantial grounds for believing that a person would be in danger of being subjected to a crime against humanity, should take into consideration the general situation relating to human rights in the territory where that person may be sent.

#### **Draft articles 6 [5] to 11 [10]**

Due to the placement of the draft article on *non-refoulement* as draft article 5, the Drafting Committee has renumbered what were previously draft articles 5 to 10 as draft articles 6 [5] to 11 [10]. Further, in these draft articles the phrase “offences referred to in draft article 5” were changed to be “offences covered by the present draft articles,” so as to conform with the approach taken in subsequent draft articles, which I will address later in the context of draft article 13. Finally, due to the renumbering of these draft articles, certain internal cross-references were adjusted as a matter of *toiletage*.

#### **Draft article 12 – Victims, witnesses and others**

Mr. Chair,

I will now turn to draft article 12 entitled “Victims, witnesses and others”, as originally proposed.

According to this draft article, States shall take necessary measures pertaining to the rights of victims, witnesses and other persons, affected in the aftermath of a crime against humanity. It comprises three paragraphs.

Paragraph 1 reads as follows:

“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.”

The text of subparagraph (a) was modified to be better aligned with the investigation that is to occur under draft Article 8 [7]. Therefore, the reference to an individual alleging that “a person has been subjected to a crime against humanity” has been replaced by the term “any individual who alleges that acts constituting crimes against humanity have been or are being committed”.

As for subparagraph (b), the adopted text refers to “victims” in addition to the other persons listed in the original proposal. According to this provision, such persons shall be protected, in particular, against ill-treatment and intimidation to which they may be exposed as a consequence to their participation in the proceedings. Members of the Drafting Committee suggested that the elements set forth in article 68 of the Rome Statute on “Protection of the victims and witnesses and their participation in the proceedings” be included in the commentary to this draft article. Finally, the term “protective” has been added to qualify the measures referred to in the second sentence.

The Drafting Committee discussed whether it would be appropriate to include in draft article 12 a definition of the term “victims”. Most international instruments addressing victims do not contain any definition and in practice the term has been construed in different ways, based on factors such as the nature of the harm, whether indirect harm has occurred, or the connection of family members to the person directly harmed. Members of the Drafting Committee concluded that the precise determination as to which persons are “victims” should be left to the standards operating within national legal systems, an approach highlighted by changing the phrase “subject

to its national law” originally proposed in the third report to the phrase “in accordance with its national law”. At the same time, it was agreed that the commentary would draw upon existing practice from case law and the views of treaty bodies so as to provide guidance as to the range of persons who might be considered victims in the context of crimes against humanity.

Paragraph 2 deals with the presentation and consideration of the views and concerns of victims at appropriate stage of the criminal proceedings. Paragraph 3, which concerns the issue of reparation, reads as follows:

“Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity 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.”

The focus of this paragraph is on the obligation of each State to take the necessary measures to ensure that its domestic legal system allows the victims of crimes against humanity to obtain reparation. The Drafting Committee considered it useful to specify that such reparation would be for “material and moral damages”, a position also taken by article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance. The second part of the sentence lists some of the most important forms that reparation may take. The term “or other”, emphasize the indicative nature of the forms of reparation listed.

Furthermore, the expression “as appropriate” was added to emphasize that various scenarios may arise in the wake of crimes against humanity. In some situations, a State may be responsible for such crimes, while in other situations a non-State actor may be responsible. In some situations, the capacity of a responsible State to provide full compensation to all victims may be limited, especially in circumstances where a State is struggling to rebuild itself in the aftermath of a crisis. The commentary will reflect that the appropriate type of reparation, and whether it is to be done on an individual or collective basis, can only be decided in context. Finally, the Drafting Committee slightly modified the order of the forms of reparation listed and considered it useful to add the phrase “cessation and” prior to “guarantees of non-repetition” to be consistent with the standard formulation for such reparation.

Mr. Chair,

Let me turn now to draft article 13.

**Draft article 13 – Extradition**

Draft article 13 is entitled “Extradition” as proposed in the third report. The extradition of an alleged offender for crimes against humanity is a possible avenue open to the States by the draft articles provisionally adopted by the Commission at its previous session. The purpose of this draft article is to set out the rights, obligations and procedures applicable to the extradition process, in the event that extradition is to take place.

A number of existing instruments contain provisions on extradition, which vary in their level of detail and which might be considered as “long-form” and “short-form” models of such provisions. The Drafting Committee debated which model would be more appropriate in the context of the draft articles and concluded that a more detailed provision, such as article 16 of the 2000 United Nations Convention against Transnational Organized Crime and article 44 of the 2005 United Nations Convention against Corruption, would provide useful guidance to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity. The Drafting Committee also took into account that such provisions are well understood by States.

Although adopting the “long form” model, the Drafting Committee agreed that certain modifications could be made to tailor the model to the situation of crimes against humanity. Further, it was agreed that the commentary should make clear that the entire draft article is to be read in light of the *aut dedere aut judicare* obligation set forth in draft article 10 [9], whereby a State in which an offender is located is obligated to submit the case to its competent authorities for the purpose of prosecution. While extradition is an alternative means of satisfying that obligation, if a State for any reason decides not to extradite an alleged offender, it remains bound to submit the case to its competent authorities for the purpose of prosecution. It was also understood that the commentary would provide guidance as to the factors that should be considered by a requested State when confronted with multiple requests for extradition.

Draft article 13 is composed of 10 paragraphs, which I will address in turn.

Paragraph 1 contains the obligation of each State to regard the offences covered by the draft articles as extraditable offences in any existing or future extradition treaty with another State. It is modelled on the provisions in existing international instruments, such as article 8 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Another issue discussed in the Committee was whether this paragraph should refer to draft article 3 [3], draft article 6 [5] or to both provisions in order to encapsulate the relevant offences that were to be considered as extraditable offences. It was decided to use the term “offences covered by the present draft articles” throughout the entire draft articles, with the understanding that the commentary would explain that this would refer both to the definition of crimes against humanity in draft article 3 [3] and to the criminalization of the offences envisaged in draft article 6 [5].

Paragraph 2 precludes a State from regarding crimes against humanity as a “political offence” for which extradition may be denied. Such preclusion was generally supported by the members of the Commission and was adopted without change, except for the previously-mentioned reference to “offences covered by the present draft articles”.

Paragraphs 3 and 4 contain important provisions addressing the situation where a State that makes extradition conditional on the existence of a treaty has received a request for extradition from another State with which it has no extradition treaty. Paragraph 3 provides that the requested State may consider the present draft articles as the legal basis for extradition for offences covered by the draft articles. This paragraph was adopted without change, except for the general reference to “offences covered by the present draft articles”.

Paragraph 4, as adopted, reads:

“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.”

In addition to a change in the chapeau of paragraph 4, which was made to align it with the reference to “offences covered by the present draft articles”, a change was made in subparagraph (a) to follow the generally-accepted approach used in the Convention against Transnational Organized Crime and the Convention against Corruption. Members of the Committee considered that this change was required in view of the logical sequence flowing from paragraph 3 and the importance of having a clear text for judges when interpreting and applying the relevant instrument. Subparagraph (b) was adopted as suggested in the third report, on the understanding that the commentaries to such provision would clarify and explain its extent and reach.

Paragraph 5 addresses the situation where States do not make extradition conditional on the existence of a treaty, requiring such States to regard the offenses as extraditable between themselves. This paragraph was adopted with the single change to align it with the reference to “offences covered by the present draft articles”.

Paragraph 6, as adopted, reads: “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.” There was agreement among the Members of the Committee that the reference in the “including” clause to the “minimum penalty requirement”, as originally proposed in the third report, was neither appropriate nor necessary in the context of crimes against humanity. At the same time, the reference to “grounds upon which the requested State may refuse extradition” was retained, on the understanding that the commentary would give examples of acceptable and unacceptable conditions for refusal.

Regarding the originally proposed paragraph 7 on the need to expedite and simplify extradition procedures, there was agreement among the members of the Drafting Committee that this paragraph was not necessary for the purposes of the draft articles. Accordingly, this paragraph was deleted.

Paragraph 7 deals with situations where certain countries do not extradite an individual unless the requesting country is the country where the offence has occurred. Paragraph 7 was only changed to align it with the reference to “offences covered by the present draft articles”.

With regard to the originally proposed paragraph 9 on the extradition by a State of its national upon condition that the national would be returned to serve his or her sentence, there was agreement among the members of the Drafting Committee that this paragraph was not necessary for the purposes of the draft articles, in part because such an unusual circumstance may be viewed as already covered by paragraph 6. Accordingly, this paragraph was deleted.

Paragraph 8 relates to a request for extradition of an individual for the purpose of enforcing a sentence after the individual has been convicted in the requesting State but flees to his or her State of nationality. This provision, which encourages the State of nationality to itself enforce the sentence, and which is inspired by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, was adopted as proposed in the third report.

Paragraph 9, as adopted, reads:

“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.”

The Drafting Committee noted that nothing in the present draft articles actually obligates a State to extradite an alleged offender, but still regarded this paragraph as important because it

stresses to States that they should not extradite when the request for extradition has been made on grounds that are impermissible under international law. The Drafting Committee altered the detailed list of such grounds from those found in the original proposal of the Special Rapporteur, in light of similar provisions contained in the Rome Statute and in the International Convention for the Protection of All Persons from Enforced Disappearance. In this connection, the term “sex”, as originally proposed, has been replaced by the term “gender” in English. In addition, “culture”, “membership of a particular social group”, and “other grounds that are universally recognized as impermissible under international law” have been added to the list of said grounds.

Paragraph 10, which concerns consultation with the requesting State before refusing an extradition request, has been adopted without change. It was understood that the commentary would highlight that the expression “where appropriate” constituted an important component of this provision.

With regard to the originally proposed paragraph 13 on the conclusion of bilateral or multilateral agreements or arrangements on extradition, there was agreement among the members of the Drafting Committee that this paragraph was not necessary for the purposes of the draft articles, in part because of paragraphs 3, 4 and 5. Accordingly, this paragraph was deleted.

Mr. Chair,

Allow me now to address draft article 14, which is entitled “Mutual legal assistance”.

#### **Draft article 14 – Mutual legal assistance**

Following the views expressed by the members of the Commission during the plenary debate, and considering issues of length and balance with the other draft articles, the Special Rapporteur suggested a new structure for this draft article on the basis of which the work of the Drafting Committee proceeded. The new structure divides the original draft article 14 into two halves. The first half remains in the text of the draft article and contains general obligations with respect to mutual legal assistance binding upon every State, whether or not it has a mutual legal assistance treaty with the other State when a request for mutual legal assistance arises. The second half is placed in a draft annex and applies when a request for mutual legal assistance arises and the two States in question are not bound by a treaty of mutual legal assistance. Thus, the annex contains what the report referred to as a “mini-mutual legal assistance treaty” that comes into play whenever two States have no such treaty between them.

Draft article 14 is composed of 8 paragraphs, which I will address in turn. For the sake of consistency with other draft articles, draft article 14 does not contain any subheadings. Immediately after discussing this draft article, I will address the provisions of the proposed draft annex, which are closely linked to this draft article.

Paragraph 1 contains an obligation that the States should afford to one another “the widest measure of mutual legal assistance” in investigations, prosecutions and judicial proceedings. This paragraph is to be understood as addressing mutual legal assistance in situations not involving legal persons, which is addressed in paragraph 2. Paragraph 1 of draft article 14 has been adopted without change, except for the reference to “offences covered by the present draft articles”, to align it with the previously adopted general reference.

Paragraph 2, which addresses mutual legal assistance in the context of legal persons, reads as follows: “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 in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 7, in the requesting State.” The Drafting Committee considered that adding “other” after “judicial” would be appropriate in the case of legal persons, in view of the possibility of administrative proceedings relating to legal persons, as noted in draft article 6 [5], paragraph 7.

Paragraph 3 lists the wide range of possibilities available for States in relation to mutual legal assistance. The Drafting Committee agreed with the Special Rapporteur’s suggestion to include elements proposed during the plenary debate such as references to testifying by videoconference, obtaining forensic evidence, and identifying and locating alleged offenders, victims, witnesses and others. In relation to subparagraph (a), the term “as appropriate” was added for the purpose of taking into account privacy concerns regarding victims and witnesses.

Paragraph 4 has been adopted as originally proposed in the third report. It was the Drafting Committee’s understanding that the commentary would explain that “bank secrecy” also included secrecy of similar financial institutions.

Paragraph 5 reads as follows: “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.” With the exception of adding a comma after “give practical effect to”, this paragraph has been adopted as originally proposed in the third report.

Paragraph 6, reads as follows:

“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.”

Except for the addition of “its” before “national law”, this paragraph has been adopted as originally proposed in the third report.

With regard to the originally proposed paragraph 7, which provided further detail with respect to the voluntary transmission of information, there was agreement among the members of the Drafting Committee that such paragraph was not necessary for the purposes of the draft articles and that its contents would serve as the basis for the commentary to paragraph 6. Accordingly, paragraph 7, as originally proposed in the third report, was deleted.

I now move to the next paragraph, paragraph 7, as adopted by the Drafting Committee. Paragraph 7 reads as follows: “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, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.” Thus, this paragraph focuses on the relationship between draft article 14 and an existing treaty on mutual legal assistance between the two States concerned. As a general matter, an existing treaty between the two States will continue to govern their mutual legal assistance, but the obligations in the draft article will also apply if they provide for a greater level of such assistance. To avoid any ambiguity, there was agreement among the members of the Committee that the term “except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance” should be added at the end of the sentence. The Drafting Committee considered that, in so doing, there would be no room for doubt that whichever instrument gives the highest level of mutual legal assistance shall apply.

Paragraph 8 addresses the relationship of the draft article to the draft annex. It reads as follows:

“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.”

Thus, where there is no treaty on mutual legal assistance between the requesting and requested State, the provisions of the draft annex shall apply. If there is such a treaty, then the provisions of that treaty shall apply rather than the annex. Such States may nevertheless consider using the draft annex if doing so facilitates cooperation.

Paragraphs 10 to 28, as contained in the third report, were moved to the draft annex, in view of the proposed new structure of draft article 14. The Drafting Committee considered that,

in the second sentence, adding “corresponding” before “provisions”, and adding “provisions of” before “the draft annex”, would bring greater clarity to the text. The Drafting Committee also considered that the word “strongly” before “encouraged” in the third sentence should be deleted in order not to put too much emphasis on the possibility to apply the draft annex.

Mr. Chair,

Before turning to draft article 15, allow me to present the draft annex, which corresponds to the originally proposed paragraphs 10 to 28 of draft article 14, as contained in the Special Rapporteur’s third report.

Paragraph 1 indicates that the draft annex applies in accordance with draft article 14, paragraph 8, which I have previously discussed. Thus, the annex will apply when a request from one State to another for mutual legal assistance is not governed by any other treaty on mutual legal assistance.

The subheading of paragraph 2, “Designation of a central authority” has been adopted as proposed by the Special Rapporteur.

Paragraph 2 of the draft annex, which corresponds to the originally proposed paragraph 10 of draft article 13, concerns the designation of a central authority that shall have the responsibility and power to receive requests for mutual legal assistance. This paragraph was adopted as proposed in the third report, the only change being the deletion of the phrase “instrument of ratification, acceptance or approval of or accession to the present draft articles.” This change was made because it is the practice of the Commission not to include such phrases in its draft articles, leaving them instead to be added by States at a later stage.

The subheading of paragraphs 3, 4 and 5, “Procedures for making a request” was adopted as proposed by the Special Rapporteur.

Paragraph 3 of the draft annex, which corresponds to the originally proposed paragraph 11 of draft article 13, concerns the written nature of requests for mutual legal assistance, as well as the language in which such requests shall be made. For the reason I just mentioned, while adopting this provision, the Drafting Committee deleted the original reference to “instrument of ratification, acceptance or approval of or accession to the present draft articles.”

Paragraph 4 of the draft annex, which corresponds to the originally proposed paragraph 12 of draft article 13, has been adopted without change. This paragraph lists the requirements pertaining to the contents of a mutual legal assistance request.

Paragraph 5 of the draft annex, which corresponds to the originally proposed paragraph 13 of draft article 13, was adopted without change. This paragraph allows for States to request

additional information when necessary in accordance with national law or when it can facilitate the execution of a request.

Paragraphs 6 and 7 of the draft annex correspond to the originally proposed paragraphs 14 and 15 of draft article 13, respectively. These paragraphs were adopted as proposed by the Special Rapporteur. Paragraph 6 clarifies that 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. This paragraph was adopted on the understanding that the commentary would highlight that States must act in good faith when executing requests. Paragraph 7, in its turn, stresses that requests shall be executed as soon as possible taking into account any deadline suggested by the requesting State.

Paragraph 8 of the draft annex corresponds to draft article 13, paragraph 16, as originally proposed in the third report. This paragraph enunciates the grounds under which mutual legal assistance may be refused. The text proposed in the third report has been adopted with no changes, with the exception that subparagraph (a) refers to “the provisions of this draft annex”. It was understood that the commentary will clarify the scope of the various grounds listed.

Paragraph 9 has been adopted as suggested in the third report, originally designated paragraph 17 of draft article 13. It indicates that reasons shall be given when a request for mutual legal assistance is refused.

Paragraph 10 has also been adopted as proposed in the third report. As per this provision: “Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.”

Paragraph 11 stresses that, before refusing a request for mutual legal assistance, the requested State shall engage in consultations with the requesting State on the matter. It has been adopted as proposed in the third report, the only change being the reference to the relevant provisions of the annex.

Paragraphs 13 and 14 address use of information by the requesting State as indicated in the subheading.

Paragraph 13 corresponds to paragraph 21 of draft article 13, as proposed in the third report, and has been adopted without changes. It indicates that the requested State shall keep the information received within the scope of the request and that exculpatory evidence may be released to an accused person.

Paragraph 14 deals with the requirement of confidentiality. Its text was adopted as originally proposed in the third report under paragraph 22 of draft article 13.

Let me now turn to paragraphs 15 and 16, which deal with testimony of a person from the requested State as indicated in the subheading. These paragraphs concern situations where a person goes from the territory under the jurisdiction of the requested State to the territory under the jurisdiction of the requesting State.

Paragraph 15 requires that safe conduct be guaranteed to such person for a certain period of time. The text, originally proposed in the third report under paragraph 23, has been adopted without changes. Paragraph 16 deals with the possibility, under certain circumstances, to hear a person by video conference. The adopted text corresponds to the originally proposed paragraph 24.

Let me now turn to paragraphs 17, 18 and 19 on “Transfer for testimony of person detained in the requested State”, as indicated in the subheading.

Paragraph 17, originally proposed under paragraph 25 of draft article 13, addresses the situation where a person detained in a State is called to be heard as witness or expert in another State. This paragraph states that such participation in the proceedings can happen if two conditions are met, namely the consent of the person in question and the existence of an agreement between the competent authorities of both States. This paragraph was adopted as proposed with the single change to align it with the reference to “offences covered by the present draft articles”.

The next provision, paragraph 18, sets out a number of conditions for the purpose of implementing the previous paragraph. It has been adopted as originally proposed in the third report, the only change being the reference to the draft article being changed to refer to the draft annex.

Paragraph 19 addresses protecting the person being transferred to give testimony from further prosecution or punishment. It has been adopted as originally proposed in the third report, except that the adopted text refers to the annex rather than the draft article.

Finally, paragraph 20, appearing under the subheading “costs”, addresses the issue of the allocation of costs for requests for mutual legal assistance. Such costs should be borne by the requesting State unless the parties agree otherwise. It has been adopted as originally proposed in the third report under paragraph 28 of draft article 13.

Let me now turn to the draft articles originally proposed in the third report as draft articles 15 and 16, which have been deleted by the Drafting Committee.

You may recall that, during the plenary debate, a number of members of the Commission suggested omitting the proposed draft article 15, which dealt with possible conflict between a State's obligation under the present draft articles and its obligation with respect to a competent international criminal tribunal. The Special Rapporteur proposed, and the Committee agreed, that such a draft article was not needed for several reasons: no actual conflict has been identified; various concerns exist regarding a provision that gives blanket priority to obligations arising with respect to all future international criminal tribunals; it is confusing for the principle of complementarity, which provides some deference to national proceedings, to operate in tandem with a rule that gives priority to international proceedings; and standard conflict rules in international law can be applied in the unlikely event that a conflict arises. The Drafting Committee decided accordingly not to retain this provision.

The provision originally proposed in the third report under draft article 16 dealing with federal State obligations also has not been retained by the Drafting Committee. Although such a provision exists in a number of treaties, it was noted that this matter was covered by article 29 of the 1969 Vienna Convention on the Law of Treaties, which indicates that "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Further, this issue is related to the issue of reservations to treaties, which the plenary decided formed part of the final clauses of a treaty that should be left to the discretion of States in the course of negotiating and adopting a new convention.

Mr. Chair,

Allow me to turn to draft article 15, entitled "Settlement of disputes". It is comprised of 4 paragraphs.

A debate took place within the Drafting Committee as to whether it would be appropriate for the Commission to propose a provision on dispute settlement. While drafting such a clause is usually left for the States, the Commission has made proposals in the past when engaged in the preparation of a draft convention. This was notably the case in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons in 1972. The Drafting Committee has concluded that, in view of the nature of this topic, it would be appropriate to adopt a draft dispute settlement clause.

Under paragraph 1, "States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations." This paragraph emphasizes negotiation as the first step in the settlement of disputes relating to the draft articles. It is commonly found in a number of existing treaties, such as the United Nations Convention against Corruption. The Drafting Committee adopted without change the proposal of the Special Rapporteur made in his third report for this paragraph.

Paragraph 2 addresses judicial modes of dispute settlement that can be used by States if the dispute could not be settled by negotiations. It reads as follows: “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.” Members of the Drafting Committee decided not to retain the original proposal made in the third report, which was considered as giving precedence to arbitration over dispute resolution at the International Court of Justice, an approach viewed as inappropriate in the context of crimes against humanity. The adopted proposal is a new formulation not found in existing treaties, although inspired by article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination.

According to paragraph 2, a State can submit the dispute, if not settled by negotiation, directly to the International Court of Justice without first pursuing, for a period of time, the possibility of arbitration. The sequence in the sentence indicates that the International Court of Justice should be considered as immediately available to settle disputes regarding the interpretation or application of the Convention. It is not, however, the sole possibility for adjudication. Since the draft articles encompass a very broad range of obligations that could give rise to very different types of disputes, recourse to arbitration is also left open to the parties to the dispute; but only if they mutually agree to consider and agree upon such recourse.

Paragraphs 3 and 4 offer States the possibility to opt out the dispute settlement provision contained in paragraph 2. Those provisions are common in existing treaties, such as the United Nations Convention against Corruption or the International Convention for the Protection of All Persons from Enforced Disappearance. Paragraph 3 states that “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.” As you may recall, it was considered in the Plenary that the question of reservations to a future convention should be left to States, as suggested by the Special Rapporteur in his third report. Therefore, the possibility for States to opt out the compromissory clause may bear a particular interest should States decide eventually not to allow for reservations to the substantive provisions of a future treaty. Under paragraph 4, “Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.”

Mr. Chair,

Further to the consideration of the draft articles and of the draft preamble referred to it by the Plenary, the Drafting Committee discussed the issue of amnesty. In his summation of the debate in the plenary, the Special Rapporteur indicated that the dominant view in the Commission was not to address the matter in the draft articles, at least not at this time, but instead to address the matter in the

commentary, which could be coordinated with Members having an interest in this issue. Given that the draft articles were referred to the Drafting Committee on that basis, the Special Rapporteur distributed in the Drafting Committee four paragraphs of proposed commentary that would be associated with draft article 10 [9] on *aut dedere aut judicare*. Several Members in the Drafting Committee provided suggestions for improvements to the draft commentary and all Members were invited to provide further views during this half of the Commission's session prior to the submission of the commentary to the Secretariat for editing and translation. The issue of whether the Secretariat should conduct a study on this issue was discussed, but was not pursued further.

In his summation of the debate in the plenary, the Special Rapporteur also noted conflicting views among the Members with respect to whether and how to address the issue of immunity with respect to this topic, and suggested that this issue also be discussed in the Drafting Committee to see if a consensus position was possible. Unfortunately, due to a lack of time, the issue was raised but could not be considered in substance in the Drafting Committee. After consulting with the Secretariat, the Chairman of the Drafting Committee indicated that a time would be identified in the second half of this session to discuss the issue further.

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Mr. Chair,

This concludes my introduction of the second report of the Drafting Committee for this session. It is my sincere hope that the Commission will adopt the draft preamble, draft articles and draft annex on the topic "Crimes against humanity" that are before you, on first reading.

Thank you.