

INTERNATIONAL LAW COMMISSION

Seventy-first session

Geneva, 29 April-7 June and 8 July-9 August 2019

Check against delivery

Crimes against humanity

Statement of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff

22 May 2019

Mr. Chair,

This morning, it is my pleasure to introduce the first report of the Drafting Committee for the seventy-first session of the International Law Commission, which concerns the topic “Crimes against humanity”. The report, which is to be found in document A/CN.4/L.935 issued on 20 May 2019, contains the texts and titles of the draft preamble, the draft articles and the draft annex on the prevention and punishment of crimes against humanity provisionally adopted by the Drafting Committee, and which the Drafting Committee recommends for adoption by the Commission on second reading.

Before commencing, allow me to pay tribute to the Special Rapporteur, Mr. Sean D. Murphy, whose mastery of the subject, guidance and cooperation once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions to the successful outcome. In particular, I would like to express my gratitude to Ms Oral and Mr. Hmoud, who kindly accepted to chair two meetings of the Drafting Committee in my absence. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Mr. Chair,

The Drafting Committee devoted six meetings to this topic, from 7 to 14 May, for the consideration of the draft title, the draft preamble, draft articles 1 to 15, including draft article 13 *bis*, and the draft annex as proposed by the Special Rapporteur in his fourth report (A/CN.4/725), which were referred to the Drafting Committee by the Commission at the conclusion of the plenary debate.

* * *

Mr. Chair,

Let me address at the outset the question of the title of the draft articles.

Further to suggestions made by a number of members of the Commission during the plenary debate, the Drafting Committee adopted the following title of the draft articles: “Prevention and punishment of crimes against humanity”. Such a title was deemed appropriate in view of the scope of the draft articles, as well as their object and purpose. It is also consistent with the title of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide that the draft articles are intended to complement.

Mr. Chair,

Let me now turn to the draft preamble.

Draft preamble

I shall begin with the draft preamble, which comprises ten preambular paragraphs. The title “Preamble” adopted on first reading was deleted. In line with the practice of the Commission for texts adopted on second reading, the Drafting Committee considered that a title for a preamble was superfluous and should be omitted.

Mr. Chair,

The first paragraph is a historical reference, 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 Drafting Committee adopted this paragraph with no changes to the text adopted on first reading.

The second paragraph, which also borrows language from the preamble of the Rome Statute, recognizes that crimes against humanity threaten the peace, security and well-being of the world. The Drafting Committee also adopted this paragraph with no changes to the text adopted on first reading.

The third paragraph, which is an addition to the text adopted on first reading, reads as follows: “[r]ecalling the principles of international law embodied in the Charter of the United Nations,”. It has been added following suggestions made by some States to refer to certain principles, such as the prohibition of use of force and non-intervention, and should be read in conjunction with the second preambular paragraph. The Drafting Committee concluded that such a reference was appropriate, and could be made by referring generally to the principles of international law embodied in the Charter of the United Nations. The Drafting Committee modelled this additional preambular paragraph on the preamble of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

The fourth paragraph deals with the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*). The paragraph has been adopted with only one change to replace the opening clause “*Recognizing further*” with “*Recalling also*”. The Drafting Committee found that the term “*Recalling*” would acknowledge the *jus cogens* character of the rule prohibiting crimes against humanity without implying that the rule had not previously been accepted and recognized as such. The Drafting Committee adopted this paragraph on the understanding that the commentaries thereto would indicate evidence in support of such acceptance and recognition, and would clarify that the *jus cogens* character of the overall prohibition does not imply that all the rules contained in the draft articles are of a *jus cogens*

character. Accordingly, this paragraph now reads: “[r]ecalling also that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)”.

The fifth 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, and has been adopted with no changes to the text adopted on first reading.

The sixth 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 and has been adopted with no changes to the text adopted on first reading.

The seventh paragraph refers to the definition of crimes against humanity set forth in article 7 of the Rome Statute. Since draft article 2 borrows language from 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. There were two changes made to the text adopted on first reading: the term “*Recalling*” was replaced with “*Considering*” and the word “as” before “set forth in” was deleted. The Drafting Committee found that, since draft article 2 does not exactly replicate article 7 of the Rome Statute, those changes were appropriate. The paragraph now reads: “[c]onsidering the definition of crimes against humanity set forth in article 7 of the Rome Statute of the International Criminal Court”.

The eighth 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. The paragraph was adopted with only one change for consistency purposes: as the term “*Recalling*” was replaced in the seventh paragraph, the Committee concluded that the word “also” after “*Recalling*” in the eighth paragraph should be deleted.

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. This ninth paragraph corresponds to the seventh preambular paragraph as adopted on first reading. The Drafting Committee found it appropriate to reverse the order of the ninth and tenth preambular paragraphs in order to conclude the preamble with a reference to two core elements of the draft articles, namely the measures to be taken at the national level and international cooperation, notably with respect to extradition and mutual legal assistance, to ensure effective prosecution of crimes against humanity. In light of this, it has been adopted with no changes to the text adopted on first reading, with the exception of the deletion of the words “*as well*” after “*Considering*”. The tenth paragraph corresponds to the eighth preambular paragraph as adopted on first reading, with no changes to the text adopted on first reading, with the exception of the addition of the word “*also*” after “*Considering*”.

Mr. Chair,

I would like now to turn to draft article 1.

Draft article 1 – Scope

Draft article 1 is entitled “Scope”. The Drafting Committee adopted the draft article with no changes to the text adopted on first reading.

Draft article 1 consists of a single sentence which states that “[t]he present draft articles apply to the prevention and punishment of crimes against humanity.” Provisions on “scope” are on the model usually followed by the Commission. The Drafting Committee discussed whether the term “apply” was the appropriate one for the purposes of the draft articles, or if it should be replaced with the term “concern”. As the practice of the Commission is to usually use the term “apply” in formulating this type of provision for draft articles, the Drafting Committee was of the view that the draft article should not be changed.

Mr. Chair,

Let me now turn to draft article 2.

Draft article 2 – Definition of crimes against humanity

The title of draft article 2 is “Definition of crimes against humanity”. This draft article corresponds to draft article 3, as adopted on first reading. The Drafting Committee found it appropriate to reverse the order of draft articles 2 and 3, so as to provide the definition of crimes against humanity first and to present in a logical sequence thereafter the draft articles that concern States’ obligations.

Mr. Chair,

That said, I will move now to the substance of draft article 2.

Draft article 2 is entitled “Definition of crimes against humanity” as adopted on first reading. The objective of this draft article is to provide a definition of crimes against humanity for the purposes of the draft articles, as well as a “without prejudice” clause to any broader definition provided for in international instruments, customary international law or national law. It comprises three paragraphs.

The text adopted on first reading essentially reproduced Article 7 of the Rome Statute in three consecutive paragraphs, except for three non-substantive changes, following a general agreement in the Commission that the definition of crimes against humanity contained in the Rome Statute should not be modified by the Commission in the context of the work on this topic. A significant number of comments received from States, international organizations and others supported this approach and requested that the text of draft article 2 be maintained. At the same time, a large number of those comments called for two specific modifications in paragraph 1 (h), and paragraph 3, which I address in turn.

First, draft article 2, paragraph 1 (h) provides a definition of persecution as an underlying act of crimes against humanity for the purpose of the draft articles. Following suggestions made by States, the Special Rapporteur recommended in his fourth report the deletion of the clause “or in connection with the crime of genocide or war crimes”, since that formulation was designed to establish a type of jurisdiction unique to the International Criminal Court, and not to indicate the ambit of what constitutes persecution as a crime against humanity. This proposal met the agreement of the majority of the Drafting Committee. However, some members suggested deleting the entire second half of sub-paragraph (h), including the phrase “in connection with any act referred to in this paragraph or in connection with...”. According to those members, this further connection element was too stringent, and was not reflective of either customary international law or of the definition of persecution contained in other international instruments. Nevertheless, most members of the Drafting Committee concluded that it would be preferable not to alter the text of the Rome Statute in a manner that could sweep into the definition of crimes against humanity a wide range of discriminatory practices which did not necessarily amount to crimes against humanity, like a prohibition on an ethnic group establishing a trade union. Therefore, the proposal of the Special Rapporteur was accepted. It was understood that the commentary would note other aspects of the definition relevant to the concerns expressed, such as the inclusion of “other inhumane acts” in paragraph 1(k). In addition, the phrase “as defined in paragraph 3” was deleted from this sub-paragraph due to the deletion of paragraph 3 as adopted on first reading, which I will address in a moment.

Thus, draft article 2, paragraph 1(h), as adopted by the Drafting Committee, now reads as follows: “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph”.

Second, with regard to paragraph 3, a significant number of comments received from States, international organizations and others considered the definition of gender to be outdated and should be deleted or replaced. The proposal made by the Special Rapporteur in his fourth report to delete paragraph 3 was met with general agreement during the plenary debate. This

paragraph was therefore deleted by the Drafting Committee. As a consequence, the reference to this paragraph in paragraph 1 (h) was also deleted. Some members of the Drafting Committee emphasized that the reason for this deletion and the substantive meaning of “gender” as reflected in international practice should be carefully explained in the commentary.

Some States and others also called for a change to draft article 2, paragraph 2 (i), which provides a definition of “enforced disappearance of persons” for the purpose of paragraph 1. Although this definition reproduces verbatim the definition provided in the Rome Statute, it is not the same definition as appears in certain other instruments, such as the International Convention for the Protection of All Persons from Enforced Disappearance. Several members of the Drafting Committee urged deleting or modifying the last clause of the definition concerning the intention of removing the persons concerned from the protection of the law for a prolonged period of time. It was expressed that international law had evolved since the adoption of the Rome Statute, and that this element is not present in the International Convention for the Protection of All Persons from Enforced Disappearance adopted in 2006. Most members felt, however, that the definition provided for in the International Convention, or in other international instruments or national laws, would be preserved by the “without prejudice” clause that appears in the last paragraph of the draft article. In view of the general request made by many States and others generally not to alter the definition contained in Article 7 of the Rome Statute in the present draft articles, it was deemed preferable to retain the text adopted on first reading, with the understanding that the commentary would stress that doing so was without prejudice to other instruments or customary international law in this regard.

Finally, draft article 2, paragraph 3, which corresponds to paragraph 4 as adopted on first reading, was amended to include a reference to customary international law, as suggested by some States. This proposal met with the agreement of the Drafting Committee, and this paragraph now reads as follows: “This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.” It was also understood that the commentary would clarify that the term “international instruments” refers to instruments adopted by States or in the context of international organizations.

Mr. Chair,

Allow me to move to draft article 3.

Draft article 3 – General obligations

The Drafting Committee adopted draft article 3 with changes to the text adopted on first reading, following proposals by some States, by the Special Rapporteur, and by members of the Commission. I should recall that draft article 3 corresponds to draft article 2 as adopted on first reading.

Although all elements of the text adopted on first reading were retained, the structure of the draft article was changed, and elements of draft article 4 were moved to draft article 3. In addition, express language on the obligation of States not to engage in acts that constitute crimes against humanity was added. As a result, the word “obligation” in the title of draft article 3 was replaced with “obligations” in the plural.

Draft article 3 now reads:

Article 3

General obligations

1. Each State has the obligation not to engage in acts that constitute crimes against humanity.
2. Each State undertakes to prevent and punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.
3. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

I will address each paragraph in turn.

The first paragraph is new language introduced to the text adopted on first reading. Further to suggestions by some States, the Special Rapporteur proposed mentioning explicitly in the draft articles the obligation of States not to commit acts that constitute crimes against humanity. Such an obligation was considered implicit in the first reading text under draft article 4 on the obligation of prevention. The Drafting Committee agreed that express language confirming each State's obligation "not to engage in acts that constitute crimes against humanity" could be added for the sake of clarity. That formula is appropriate for recognizing that States themselves do not commit crimes; rather, crimes are committed by persons. But the "acts" that "constitute" such crimes may be acts attributable to States under the rules on the responsibility of States for internationally wrongful acts. At the same time, following the debate in plenary and in the Drafting Committee, the Committee found it appropriate to add such language as paragraph 1 to draft article 3, as part of the general obligations of States, rather than to draft article 4. The opening clause under which "[e]ach State has the obligation" has been used to emphasize that this constitutes a pre-existing obligation, to be distinguished from obligations to prevent and to punish crimes against humanity that are elaborated throughout the remainder of the draft articles.

The second paragraph of draft article 3 corresponds to the first paragraph of draft article 2 as adopted on first reading, with a non-substantive structural change. This paragraph is an umbrella provision aiming at identifying the general obligation to prevent and punish crimes against humanity. Such general obligation is to be implemented through the specific obligations to prevent and to punish that are set forth in more detail throughout the remaining draft articles. Since this general obligation consists of preventing and punishing crimes against humanity, the Drafting Committee found that reformulating this provision to begin with "[e]ach State undertakes to prevent and punish crimes against humanity," to be followed then by the further language adopted at first reading, would be a useful way to express more clearly such a general obligation.

The third paragraph is the "no exceptional circumstances" clause and corresponds to the second paragraph of draft article 4 as adopted on first reading. Except for the place where this paragraph is now located, the text itself was adopted with no changes to the text adopted on first reading. The Drafting Committee concluded that this paragraph would be better placed in draft article 3 as it is directly relevant to the general obligation of States now located in paragraph 1 of

this draft article. At the same time, it was kept as a separate paragraph, since it is also relevant to the acts of non-State actors, such as rebel groups, with respect to crimes against humanity.

Mr. Chair,

I will now turn to draft article 4.

Draft article 4 – Obligation of prevention

The title of draft article 4 is “Obligation of prevention”, as adopted on first reading. The purpose of this draft article is to set forth the various elements that collectively promote the prevention of crimes against humanity.

When addressing draft article 3, I stated that the second paragraph of draft article 4, as adopted on first reading, was moved to draft article 3. Accordingly, draft article 4 now only has one paragraph. This paragraph was adopted with two changes to the text adopted on first reading, following proposals by States. It now reads:

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

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

First, the word “including” before “through” was deleted from the *chapeau*. Based on comments received from States, the Drafting Committee was of the view that the word “including” left the obligation of States under this provision too broad and open-ended. Thus, the Committee found it appropriate to delete this word.

Second, in sub-paragraph (a), the word “appropriate” before “preventive measures” was added for similar reasons. The Committee was of the view that adding the word “appropriate” was useful as it affords some flexibility to each State when implementing this obligation, allowing it to tailor other preventive measures to the circumstances faced by that particular State.

Mr. Chair,

Allow me now to move to draft article 5.

Draft article 5 – *Non-refoulement*

The title of draft article 5 is “*Non-refoulement*”, as adopted on first reading. Under the principle of *non-refoulement*, States have the obligation not to return an individual to another State when there are substantial grounds for believing that he or she will be in danger of being subjected to a 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.

The Drafting Committee adopted draft article 5 with two changes to the first reading text, following proposals by States and some members of the Commission. The term “territory under the jurisdiction of”, in the first paragraph as adopted on first reading, was deleted. As a consequence, draft article 5, paragraph 1, now reads: “No State shall expel, return (*refouler*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.”

This change, which was proposed in the fourth report of the Special Rapporteur and was generally accepted in the plenary, aims at addressing the transfer by a State of a person to the control of another State, regardless of whether or not this involves transfer to a different territory. The Drafting Committee thus decided to delete the term “territory under the jurisdiction of” since the “territorial” formula used elsewhere in the draft articles was not appropriate for the purposes of this paragraph. This paragraph was adopted on the understanding that the commentary will note the broad range of situations where a person might be surrendered from one State to another. The

commentary will also explain that this provision is without prejudice to other non-refoulement obligations contained in treaties or under customary international law.

The second change to this draft article was made in the second paragraph. The term “territory under the jurisdiction of the”, in the second paragraph as adopted on first reading, was deleted. As a consequence, draft article 5, paragraph 2, now reads: “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.”

This change was proposed by members of the Commission in order to better align the second paragraph with the amended first paragraph. Following a debate in the Drafting Committee whether this change would be appropriate for the purposes of the second paragraph, the Committee concluded that the change was warranted in light of the amended first paragraph and of the text of the provisions on non-refoulement in treaties on which draft article 5 was modelled, namely article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and article 16, paragraph 2, of the International Convention for the Protection of All Persons from Enforced Disappearance.

Mr. Chair,

I will now turn to draft article 6.

Draft article 6 – Criminalization under national law

Draft article 6 is entitled “Criminalization under national law”, as adopted on first reading. 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 law. In addition to obliging the State to regard such crimes as offences under its criminal law, it addresses in turn the associated modes of liability; the responsibility of commanders and other superiors for such

crimes; the inability of the orders of a Government or of a superior, or of the official position of a person, to exclude criminal responsibility; the inapplicability of a statute of limitations; the issue of penalties; and the liability of legal persons.

Draft article 6 contains eight paragraphs. With the exception of paragraph 3, the text adopted on first reading was maintained.

The new text adopted for paragraph 3 by the Drafting Committee reflects the proposal by the Special Rapporteur in his fourth report, following concerns expressed by States, international organizations and others. The third paragraph now reads as follows:

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

The text adopted on first reading had been modelled on article 28 of the Rome Statute. However, in light of the comments submitted by States, international organizations and others, the Drafting Committee found it appropriate to change this paragraph to a more streamlined version, which would not be overly prescriptive. It was felt that the detailed formulation from the Rome Statute may be more appropriate for the statute of an international court than for addressing national criminal jurisdiction. The new text of the third paragraph builds upon article 86, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions, upon the statutes of the ICTY and the ICTR, and upon Rule 153 of the 2005 study on customary international humanitarian law conducted by the International Committee of the Red Cross. This text was considered appropriate for the present draft articles since it constitutes a general standard that already has been largely accepted by States in their national laws, military manuals, and jurisprudence, and that would not foreclose a State using a detailed rule closer to article 28 of the Rome Statute should they wish to do so.

Mr. Chair,

I will now move to draft article 7.

Draft article 7 – Establishment of national jurisdiction

The title of draft article 7 is “Establishment of national jurisdiction”, which was the title adopted on first reading. 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. The Drafting Committee adopted this draft article with no changes to the text adopted on first reading. In doing so, members of the Committee considered that the commentary should address some of the concerns raised by States with respect to this provision, as laid out in the fourth report of the Special Rapporteur.

Mr. Chair,

Let me turn to draft article 8.

Draft article 8 – Investigation

Draft article 8 is entitled “Investigation”, as adopted on first reading. The purpose of this provision is to trigger an investigation by the State whenever it is believed that acts constituting crimes against humanity have been or are occurring. Draft article 8 was adopted by the Drafting Committee with only one change to the text adopted on first reading. It now reads: “[e]ach State shall ensure that its competent authorities proceed to a prompt, thorough and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.”

The one change from the first reading is that the word “thorough” was added before “and impartial”, following suggestions made by some States and Commission members. The Drafting

Committee was of the view that adding the word “thorough” would be useful to help ensure that the State pursues a serious and meaningful investigation. At the same time, the word “prompt” is retained and helps to balance the word “thorough”; while the investigation must be thorough, it must also be conducted promptly, so as not to last any longer than is necessary. It was agreed that the commentary should note that the amount of time needed to conduct a thorough investigation must be considered in relation to the nature of crimes against humanity; since such crimes occur on a widespread or systematic basis, any investigation of such wide-ranging acts may well be much longer than would be the investigation of a single act that allegedly constitutes a crime.

Mr. Chair,

Let me now turn to draft article 9.

Draft article 9 – Preliminary measures when an alleged offender is present

The title of this draft article is “Preliminary measures when an alleged offender is present”, as adopted on first reading. 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.

In their submissions, some States expressed a concern regarding the impact that the obligation contained in paragraph 3 may have on ongoing investigations. The Special Rapporteur, while noting that the obligation of a State to report its findings to other States was included in a number of widely-adhered-to treaties, acknowledged that doing so in the context of crimes against humanity merits some caution, bearing in mind both the potential need to protect the identity of victims and witnesses, and the potentially large scope and complexity of investigations of such crimes. On the basis of a proposal by the Special Rapporteur, the Drafting Committee therefore decided to add “, as appropriate,” in the second sentence of paragraph 3, which now reads as

follows: “The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”

Mr. Chair,

I will now move to draft article 10.

Draft article 10 – *Aut dedere aut judicare*

Draft article 10 is entitled “*Aut dedere aut judicare*”, as adopted on first reading. 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, to submit the alleged offender to prosecution within that State’s own national system, unless it extradites or surrenders the offender to another State or to an international criminal court or tribunal.

The Special Rapporteur, following a suggestion made by some States, proposed a non-substantive re-alignment of the text, with a view to following more closely the actual “Hague formula” used in various treaties. The proposal was supported by the Drafting Committee, with the understanding that such a stylistic change would not change the emphasis of the provision on the obligation to submit the case to competent authorities for the purpose of prosecution.

The Drafting Committee also found that the word “court” should be added to the draft article to complement the existing expression “competent international criminal tribunal”. The Committee concluded that the expression “international criminal court or tribunal” was more appropriate to encompass all international judicial institutions addressing crimes.

The amended draft article 10, as adopted by the Drafting Committee, reads as follows:

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

The provision was adopted on the understanding that the commentary will address concerns raised by some States and some members of the Commission regarding surrender of persons to international criminal courts and tribunals.

Mr. Chair,

Let me now turn to draft article 11.

Draft article 11 – Fair treatment of the alleged offender

Draft article 11 is entitled “Fair treatment of the alleged offender”, as adopted on first reading. This provision is focused on the obligation of the State to accord to an alleged offender who is present in territory under the State’s jurisdiction fair treatment, including a fair trial and full protection of his or her rights. Moreover, draft article 11 acknowledges the right of an alleged offender, who is not of the State’s nationality but who is in prison, custody or detention, to have access to a representative of his or her State. Draft article 11 comprises three paragraphs and was adopted with only one change to the first reading text.

In his report, the Special Rapporteur suggested to delete the clause “, including human rights law”, from the first paragraph, since it was superfluous and could be interpreted as downplaying the possible role of international humanitarian law. During the plenary debate, members of the Commission did not favour omitting the reference to human rights law, while acknowledging that the role of international humanitarian law should not be diminished. The Special Rapporteur thus proposed to maintain the reference to human rights law and to add a similar reference to international humanitarian law. This would also allow for the commentary to

indicate that crimes against humanity can be committed in peacetime or in time of armed conflict, in which case one or the other source of law will be more dominant.

The Drafting Committee agreed with this proposal and revised the first paragraph as follows: “Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law and international humanitarian law”.

Mr. Chair,

Let me now turn to draft article 12.

Draft article 12 – Victims, witnesses and others

Draft article 12 is entitled “Victims, witnesses and others” as adopted on first reading. It addresses the rights of such persons affected by crimes against humanity. It comprises three paragraphs.

Paragraph 1 addresses the right to complain to the competent authorities, and the protection from ill-treatment or intimidation of those who complain or otherwise participate in proceedings within the scope of the draft articles. Paragraph 2 deals with the presentation and consideration of the views and concerns of victims at appropriate stages of the criminal proceedings. Paragraph 3 concerns the issue of reparation. Paragraphs 1 and 2 were adopted by the Drafting Committee with no changes to the first reading text.

One change, however, was made to paragraph 3. Several States indicated that this paragraph, as adopted on first reading, was too open ended and may imply an obligation for all States, even in the absence of any connection with the crimes, to ensure that their legal system would provide a right of reparation for the victims of those crimes. Based on a proposal made by the Special Rapporteur in his report, the Drafting Committee decided to address this concern in

the text of paragraph 3 by limiting the obligation contained in this paragraph to two types of States: the State that committed the acts that constituted crimes against humanity; and the State where the crimes occurred. Consequently, paragraph 3 now reads as follows:

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

Members of the Drafting Committee suggested that the commentary acknowledge the variety of situations that may arise with respect to crimes against humanity, which may affect the types and scale of reparations. In particular, it was understood that, in some situations, it may not be possible for a Government to provide full reparations to all the victims, including compensation. At the same time, it was also understood that the relative flexibility of this provision was not to be exploited by States so as to avoid the provision of meaningful and effective forms of reparations.

Members of the Drafting Committee also considered whether it would be appropriate to include a definition of “victims” for this draft article. Several members of the Drafting Committee were of the view that it was necessary to include a definition of “victims” in this draft article, considering that international law governs this matter, and that it was therefore desirable to establish a baseline for the definition to be included in national laws. However, most members felt that, while such a definition might be of value for ensuring that a core definition of “victim” operated for proceedings at the national level, such a definition was not usually included in treaties addressing crimes, and there was a risk of crafting a definition that is narrower than some States currently apply. Such a definition appeared to be better left for States to address in their respective legal systems as they do for crimes generally, while at the same time indicating in the commentary definitions used in international instruments, so as to provide guidance to States in this regard.

Mr. Chair,

Let me now turn to draft article 13.

Draft article 13 – Extradition

The title of draft article 13 is “Extradition” as adopted on first reading. 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.

Draft article 13, as adopted on first reading, comprised 10 paragraphs. Based on the comments received by States, the Special Rapporteur proposed the adoption of an additional paragraph 1. The first sentence of this new paragraph would provide a better opening as to the overall purpose of the draft article, which is to apply to the offences covered by the present draft articles whenever a requesting State seeks the extradition of a person who is present in a requested State. The second sentence would indicate that States should endeavour to expedite their extradition procedures. The language proposed for these two sentences was based on the United Nations Convention against Corruption and the United Nations Convention on Transnational Organized Crime. A third sentence based on Additional Protocol I to the Geneva Conventions, would address, in a general way, the concerns raised by some States that due consideration be given to an extradition request from the State where the alleged offences occurred.

There was general agreement in the Drafting Committee for adding this new paragraph. However, the Drafting Committee also concluded that the three sentences comprising this new proposed paragraph should be broken up so as to be standalone paragraphs of draft article 13, and located so as to fit well in the sequence of the paragraphs in this draft article. Accordingly, the three sentences were split into three new paragraphs of draft article 13.

Paragraph 1 of draft article 13 thus reads as follows:

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

The new paragraph 8 of draft article 13 reads:

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

Finally, the new paragraph 12 of draft article 13 reads:

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

With respect to paragraph 13, which corresponds to paragraph 10 as adopted on first reading, two stylistic changes were made. The term “where appropriate” was replaced with “as appropriate”, given that the term “as appropriate” is often used in the draft articles. The verb “consult” was also moved to be closer to “shall”. Accordingly, paragraph 13 as amended reads as follows:

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

All the other nine paragraphs were adopted without any change to the text adopted on first reading.

Mr. Chair,

I would like to address now the proposal for an additional draft article 13 *bis*.

You will recall that, in his fourth report, the Special Rapporteur proposed the inclusion of an additional draft article that would address the issue of transfer of sentenced persons. Such provision, which was included in the United Nations Convention against Corruption and the United Nations Convention on Transnational Organized Crime, would encourage States to consider entering into bilateral or multilateral agreements or arrangements on the transfer of sentenced persons. In practice, States have concluded numerous agreements for that purpose.

A debate took place in the Drafting Committee as to the appropriateness of including such a provision at this stage. While some members supported the draft article, it was noted by other members that this provision was touching upon a policy question and that it might have adverse effects, such as empowering national courts in ways that are not desirable. Those other members also considered that, since States did not have the opportunity to comment on this provision before the second reading, support by States for such a provision was unclear.

The Drafting Committee therefore decided not to adopt an additional draft article on the transfer of sentenced persons.

Mr. Chair,

Let me now turn to draft article 14.

Draft article 14 – Mutual legal assistance

The title of draft article 14 is “Mutual legal assistance” as adopted on first reading. This draft article 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.

Draft article 14 is composed of nine paragraphs. Except for paragraphs 2, 7 and a new paragraph 9, all paragraphs of draft article 14 were adopted without change to the first reading

text. Therefore, I will address the paragraphs that were adopted with changes by the Drafting Committee, as well as new paragraph 9, in turn.

First, paragraph 2 was adopted as proposed by the Special Rapporteur in his fourth report, following comments by States. The non-substantive change aims at sharpening the distinction between the first and the second paragraph, since the second paragraph concerns only legal persons. The final clause of paragraph 2, as adopted on first reading, was moved to the beginning of the paragraph. Paragraph 2 as adopted by the Drafting Committee reads as follows:

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

Second, paragraph 7 was also adopted as proposed by the Special Rapporteur in his fourth report, following suggestions by States. The last phrase of paragraph 7 as adopted on first reading, which read “except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance” was replaced with “between the States in question”.

Paragraph 7 now 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 between the States in question.”

The Drafting Committee found that such a change was necessary to clarify the provision and avoid legal uncertainty. The change would also bring the language of the paragraph closer to language used in widely-adhered-to treaties, such as the United Nations Convention against Corruption. It was understood that the commentary will explain that the amended provision allows the provisions of an existing mutual legal assistance treaty between the States concerned to

continue to govern their relationship, but also leaves in place provisions of draft article 14 to supplement that relationship with respect to any issues not addressed in the treaty.

Third, the Drafting Committee adopted a new paragraph to draft article 14, following a proposal by the Special Rapporteur in his fourth report. The purpose of this new paragraph is to facilitate cooperation of States with international mechanisms established by the United Nations or by other international organizations and that have a mandate to collect evidence of crimes against humanity. The Drafting Committee concluded that such new provision would complement the cooperation on prevention foreseen in draft article 4 (b). Paragraph 9 reads:

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

The proposal made by the Special Rapporteur in his fourth report was revised to encompass not just mechanisms established by the United Nations, but also by other international organizations, including at the regional level. The Drafting Committee also considered that the opening text of the sentence had to be more prescriptive. The formula “as appropriate” would qualify the obligation and capture the diversity of situations governing the relations of States with such international mechanisms. At the same time, it was understood that such mechanisms did not include international criminal courts or tribunals.

Mr. Chair,

Allow me to address now draft article 15.

Draft article 15 – Settlement of disputes

Draft article 15 is entitled “Settlement of disputes” as adopted on first reading. The Drafting Committee adopted the draft article with no changes to the text adopted on first reading.

Draft article 15 consists of four paragraphs. The purpose of draft article 15 is to govern the settlement of inter-State disputes concerning the interpretation or application of the draft articles.

Mr. Chair,

I now turn to the draft annex.

Draft annex

The draft annex consists of twenty paragraphs and it is designed to complement draft article 14, in accordance with paragraph 8 of draft article 14. The draft annex applies to requests made pursuant to draft article 14 if the States in question are not bound by a treaty of mutual legal assistance.

The Drafting Committee adopted the draft annex with no changes to the text adopted on first reading.

* * *

Mr. Chair,

This concludes my introduction of the first report of the Drafting Committee for the seventy-first session. As I stated at the beginning of my statement, the Drafting Committee recommends that the Commission adopt on second reading the draft articles on prevention and punishment of crimes against humanity for the topic “Crimes against humanity”.

Thank you, Mr. Chair.