

Provisional

For participants only

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International Law Commission

Sixty-eighth session (first part)

Provisional summary record of the 3297th meeting

Held at the Palais des Nations, Geneva, on Thursday, 12 May 2016, at 10 a.m.

Contents

Crimes against humanity (*continued*)

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Present:

Chairman: Mr. Comissário Afonso

Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Gómez-Robledo
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Ms. Jacobsson
Mr. Kittichaisaree
Mr. Kolodkin
Mr. Laraba
Mr. McRae
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Saboia
Mr. Singh
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10 a.m.

Crimes against humanity (agenda item 9) (*continued*) (A/CN.4/690)

The Chairman invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of crimes against humanity (A/CN.4/690).

Mr. Forteau said that he had been impressed by the quality of the Special Rapporteur's second report. However, it was perhaps unreasonable to expect the Commission members to have had time to fully grasp all the implications of the report, which, at more than 100 pages, was more than double the maximum length recommended by the Commission in 2011. While the English version of the report had been informally distributed to the Commission members in January 2016, the regrettable delay in the issuance of the other language versions until April 2016 had added to the difficulties in examining the report, especially in view of the highly technical nature of the topic, which required a particular focus on specific legal terminology. Moreover, the report contained six new draft articles on fundamental, diverse and, in some cases, controversial issues.

He was concerned that the length of the report might result in excessively detailed commentaries, like those adopted the previous year, even though experience had repeatedly shown that short and succinct commentaries were more useful. He therefore called for moderation and suggested that the Commission might perhaps draw inspiration from the explanatory reports to Council of Europe treaties. Given that the draft convention was primarily intended for incorporation into national law, and bearing in mind the diversity of domestic legal systems, the Commission should also be careful not to elaborate overly detailed draft articles.

In the light of the foregoing, his comments on the Special Rapporteur's proposals were necessarily very selective and, in some respects, provisional in nature. With regard to draft article 5, some caution was perhaps required in relation to the Special Rapporteur's conclusion that the failure to criminalize crimes against humanity as such might preclude prosecution and punishment, bearing in mind that international criminal law allowed States a margin of discretion with regard to how they should punish international crimes. A study of the case law of the International Criminal Court in relation to the principle of complementarity might have been useful in determining the type or degree of criminalization under national law that would be required in order for a State to be considered to have fulfilled its obligation to combat impunity. Criminalization comparable to that provided for in draft article 3 might well be sufficient. The link between draft article 3 on the definition of crimes against humanity and draft article 5 on criminalization should be clarified, in particular to determine whether the obligation to criminalize crimes against humanity applied to the entire definition in draft article 3, to the first three paragraphs, or only to the first paragraph. Regrettably, the Special Rapporteur had not explained the reasoning behind the language proposed in draft article 5, including why he had not referred to "legislative" measures in paragraph 1 thereof, in line with such instruments as the 1994 Inter-American Convention on Forced Disappearance of Persons. He seemed to have relied instead on the language of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That said, the proposed draft article also deviated somewhat from the 1984 Convention, again without explanation, in that it provided that each State "shall take the necessary measures" whereas the Convention had the wording "shall ensure", which seemed stricter. Concerning criminalization of the attempted commission of a crime against humanity, he wondered why the Special Rapporteur had not aligned the wording of draft article 5 (1) with the stricter formulation of article 25 (3) of the Rome Statute of the International Criminal Court, which was modelled on article 2 of the 1996 code of crimes against the peace and security of mankind. There was surely a risk of introducing contradictions by not reflecting the wording of article 25 (3) of the Rome

Statute, including the conditions contained therein. That concern was all the more valid given that elsewhere, such as in draft article 5 (3) (b), the Special Rapporteur had quite rightly reproduced the language of the corresponding provisions of the Rome Statute. As suggested by the Special Rapporteur in his introductory statement, consideration should be given to the inclusion, in draft article 5 (3) (a), of a reference to “an order of a Government” in addition to “an order of a superior”, as most international instruments — including the Rome Statute — referred to both. On the question of appropriate penalties, paragraph 3 (c) should specify that the penalties should take into account the “extreme seriousness” or the “extremely serious nature” of crimes against humanity.

With regard to draft article 6 on the establishment of national jurisdiction, he supported the Special Rapporteur’s decision to draw on the more complex model used in the Convention against Torture, rather than simply reproducing article 8 of the 1996 code of crimes. While that might be seen as a step backwards, it was important to bear in mind that in order to successfully prosecute crimes against humanity the parties and the courts must have sufficient investigative capacity, which often required a certain link between the prosecuting State and the crime committed or the victims. In that sense, he considered the Special Rapporteur’s proposed text to be generally well balanced. In fact, the same approach had been adopted *mutatis mutandis* by the Institute of International Law in its 2015 resolution on universal civil jurisdiction with regard to reparation for international crimes, article 2 (2) of which provided that courts “shall be considered to provide an available remedy if they have jurisdiction and if they are capable of dealing with the claim in compliance with the requirements of due process and of providing remedies that afford appropriate and effective redress”. He also welcomed the fact that draft article 6 did not prohibit universal jurisdiction, since paragraph 3 thereof stated that the draft article did not exclude the establishment of other criminal jurisdiction by a State, in accordance with international law. That formulation was in line with the view taken by the International Court of Justice in its judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that article VI of the Convention, which only obliged the Contracting Parties to exercise territorial jurisdiction, “certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law”. That formulation could be reflected in draft article 6 (3), by replacing “without prejudice to applicable rules of international law” [*sans prejudice des règles applicables du droit international*] with “in a manner compatible with international law” [*d’une manière compatible avec le droit international*]. Draft article 6 (2) incorporated the principle of *aut dedere aut judicare*, the only condition being that the alleged offender must be present in territory under the State’s jurisdiction or control; in his view, that corresponded to the concept of universal jurisdiction as currently understood by most authors. Perhaps a provision concerning the hierarchy among, or the coordination of, the types of jurisdiction provided for in draft article 6 could be added, or guidance on that point could be included in the commentary. Given that there was less risk of several courts declaring themselves competent at the same time than of none doing so, he proposed deleting the words “and the State considers it appropriate” from paragraph 1 (c). Although the Rome Statute provided only for territorial jurisdiction and active personality jurisdiction, it was legitimate, at least in terms of progressive development, to require States to provide in their national legislation for passive personality jurisdiction, which in practice was often the best, if not the only, basis for establishing jurisdiction to prosecute international crimes.

It was difficult to come to any firm conclusions concerning draft article 7, since insufficient information was provided in the report. The Special Rapporteur had relied primarily on the Convention against Torture and other human rights treaties, whereas it would have been more helpful to analyse the practice of the investigative bodies mandated

by the Human Rights Council or the Security Council when mass crimes were committed. In particular, the reports issued in recent years on the international crimes committed in Libya and Syria described useful developments in investigation and evidence-gathering methods. Since the general obligation to investigate applied both to the obligation to punish a specific crime against humanity and to the obligation to prevent crimes against humanity more generally, a distinction should be made between the general obligation to investigate in draft article 7 and the more specific one in draft article 8. It should also be stipulated in article 7 that, in addition to carrying out an investigation, the States concerned should take the necessary measures to halt the crimes, thereby creating a link with draft article 4 on the obligation of prevention.

He welcomed draft article 9, although he wondered why the Special Rapporteur had included paragraph 2, which was less clear than the Hague formula and seemed superfluous. The Special Rapporteur had wisely chosen not to go into detail about the rules that would govern extradition, although, in order to ensure respect for the rights of the extradited person, it might be useful to specify that the extradition or surrender of the alleged offender should be “in accordance with the applicable rules” [*dans le respect des règles applicables*], and provide an explanation in the commentary. The relationship between draft article 8, especially paragraph 2 thereof, and draft article 10 (2) should be clarified, since they were somewhat contradictory and greater protection was currently provided under draft article 10 (2) than under draft article 8 (2). It would be important to ensure that the two provisions were in line with existing bilateral and multilateral extradition conventions. In conclusion, he was in favour of referring all six draft articles to the Drafting Committee.

Mr. Hmoud said that an effective law enforcement instrument was needed to ensure universal criminalization, effective investigation and prosecution and active cooperation by States and other relevant actors in combating crimes against humanity. It was thus essential that the proposed rules, which were generally based on existing treaty law, customary law or case law, should be balanced and should take into account the capacity of States to implement any proposed obligations in a manner compatible with their legal systems. In general, he considered the approach adopted by the Special Rapporteur to be acceptable. Since the aim was to draft a convention, it was imperative to ensure that the draft articles were harmonized with other international legal instruments, especially in the fields of criminal justice and human rights. The obligations set out in the draft articles must be sufficiently clear and specific to avoid any misinterpretation and legal gaps in the protection regime, while allowing for a degree of flexibility. With regard to the relationship with customary international law, it was clear from the report that there was sufficient practice to warrant the inclusion of the proposed draft articles, and it could be argued that there was a customary basis underpinning several of them, particularly with regard to the establishment and exercise of national jurisdiction and the treatment of the alleged offender. While certain aspects of the proposed rules were still subject to debate, emerging norms supported their inclusion in any future instrument relating to crimes against humanity. The draft articles proposed in the second report focused on the criminal responsibility of perpetrators and the measures that States could adopt to punish and prevent such crimes, in accordance with the goals of the project, and were in line with the principle of legality and the common interest of the international community in combating crimes against humanity.

Turning to draft article 5, he said that criminalization under national law was among the core obligations of the project, as many States still did not have any form of legislation criminalizing crimes against humanity. The definition contained in draft article 3 should form the basis for criminalization under national law. At the same time, criminal responsibility should be established on the basis of the forms of commission or participation in the crime provided for in draft article 5 (1), as such forms were well established under the general principles of criminal law. It was important also to criminalize incitement, provided that the link between incitement and commission of the

crime was established. It could be argued that there was an increasing trend in national legal systems to impose criminal responsibility on corporations and other legal persons. While the inclusion of that form of criminalization in the draft articles might contribute to the goal of deterrence, the logic of the International Military Tribunal at Nuremberg remained valid: “[c]rimes against international law are committed by [natural persons], not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” While criminal sanctions could be provided for under the draft articles, his preference would be for civil and administrative sanctions against corporations involved in the commission of crimes against humanity.

The case cited in paragraph 38 of the report, in which a defendant had been found guilty because he had been a member of an organization that committed torture, was not an example of the kind of participation in the commission of a crime that should be covered by draft article 5, as the accused had to have taken part in the specific act that constituted the crime in order to be held criminally responsible. There were of course examples in national legal systems of cases where such a distinction had been made.

There was significant jurisprudence and literature on the issue of command responsibility, and the elements contained in draft article 5 reflected the current applicable standard, as set out in article 28 of the Rome Statute. However, the courts of the parties to any future instrument would still have to interpret certain elements, such as the test for “objective knowledge” of the commander. In that respect, it would be useful to elaborate in the commentary on the meaning of various elements, taking into account the case law of international courts and tribunals.

He agreed with the Special Rapporteur that draft article 5 (3) should cover orders from Governments as well as from superiors. It should be made clear in the commentary that, while such orders might be seen as a mitigating factor, the punishment should be commensurate with the gravity of the crime. States would not object to the notion that crimes against humanity should not be subject to any statute of limitations. That provision would play an important preventive role and would also ensure harmonization among States that had specific legislation on the inapplicability of the statute of limitations and those that did not, thus preventing a situation where extradition to a State that had jurisdiction could be refused by the authorities of another State because the act was no longer considered a crime in the latter. Although the draft articles were silent on the issue of retroactivity, he wondered whether States could be given the option to apply the draft instrument retroactively, for example by making a declaration to that effect upon signature or ratification. The consequences of such a declaration would have to be spelled out, including whether other States would be obliged to extradite to the declaring State individuals present in their territories who were sought for crimes committed before the entry into force of the draft instrument.

With regard to the establishment of national jurisdiction, the draft articles should allow for the establishment of the broadest possible jurisdiction. That said, while draft article 6 (1) (a) and (b) provided for the non-controversial territorial and active personality jurisdictions as mandatory jurisdictions, he was not convinced that the formulation for passive personality jurisdiction in paragraph 1 (c) was the correct one, since it stated that it was mandatory to establish such a jurisdiction but then provided “if the State considers it appropriate”, which meant that the establishment of such jurisdiction was in fact discretionary. It would be better to reformulate the phrase to indicate that “each State may establish jurisdiction if the victim is one of its nationals”. The provision concerning the establishment of jurisdiction when the defendant was present in the territory of the State was a welcome inclusion. While the Special Rapporteur considered that it was not a form of universal jurisdiction, it served the same purpose as traditional universal jurisdiction in that it allowed a State with no connection whatsoever to the crime to exercise jurisdiction, while

avoiding the complications that would arise if the draft instrument provided for universal jurisdiction in the strict sense, which did not require the presence of the alleged offender in the State's territory. Although some were of the view that the draft articles should include universal jurisdiction *stricto sensu*, there did not seem to be either a customary basis for that proposition in relation to crimes against humanity or sufficient treaty practice. If the draft articles were to be adopted as a convention, States might decide to include traditional universal jurisdiction at a later stage.

He noted that draft article 6 (3) deviated from the formulation in article 5 of the Convention against Torture. While he understood the point made by the Special Rapporteur in paragraph 119 of the report, the draft article should not limit a State's ability to establish its jurisdiction, as long as that did not interfere with the application or operation of the draft articles. He was therefore not in favour of the phrase "without prejudice to applicable rules of international law".

He agreed with the text of draft article 7 and the fact that, under paragraph 3 thereof, all States — not only those that had jurisdiction — had an obligation to cooperate in identifying persons who might have committed a crime against humanity; however, that obligation should not be limited to identifying the perpetrators but should extend to all circumstances relating to the commission of the crime. Furthermore, the obligation set out in paragraph 2 for a State to communicate the general findings of its investigation to the other States whose nationals might be involved in the crime was perhaps limiting; the obligation should be towards all States where elements of the crime might have been committed, and those States ought in turn to promptly and impartially investigate the matter themselves.

He supported the thrust of draft article 8, noting that its obligations did not place an undue burden on the relevant State. However, it would be advisable to add language in paragraph 3 to the effect that other States having jurisdiction over the crime should be notified of the general findings of the preliminary investigation within a reasonable period of time after its conclusion.

Concerning the obligation to extradite or prosecute (*aut dedere aut judicare*), addressed in draft article 9, the Hague formula seemed the most appropriate approach and better served the goal of fighting impunity, as it was not contingent on another State or tribunal requesting extradition or surrender. The question of whether the act of sending an alleged offender to a hybrid court should be considered as extradition to another State or surrender to an international court or tribunal would be determined by the instrument establishing the hybrid court. Thus, if it was clear from that instrument that the nature of the court was essentially national, the act of sending the accused would be considered as extradition, whereas if the prevailing character of the court was international, it would be considered as surrender. Though that question should be determined on a case-by-case basis, the Commission might wish to include in the commentaries some guidance on the elements that determined the character of the court. The inclusion of the "triple alternative" form of *aut dedere aut judicare* in the draft articles would necessitate careful drafting of relevant provisions on the relationship with other international courts and tribunals, especially the International Criminal Court.

With regard to draft article 10, he was of the view that it should be left to each State in accordance with its national legal system to determine whether to try an individual in military or special courts. The test should be the nature of the process, in other words whether all stages of the trial were fair, rather than the nature of the court *per se*. Given that many States still mandated their special or military courts to try the most serious crimes, any outright exclusion of the competence of such courts might be restrictive. Extra guarantees could perhaps be provided by mandating a treaty monitoring body to supervise

the fair trial obligation. In conclusion, he supported referring the draft articles to the Drafting Committee.

Mr. Kittichaisaree, referring to the phrase “otherwise assisting in or contributing to the commission ... of such a crime” in draft article 5 (1), said that, although several legal systems provided for the concept of joint criminal enterprise, they might not go so far as to endorse the third, extended, form of joint criminal enterprise, which was the most controversial. He wondered whether the Commission should take a position on that matter. The Special Rapporteur could perhaps elaborate on the case law of *ad hoc* international criminal tribunals and the fact that there was corresponding practice in national law. Whether parties to the draft convention on crimes against humanity would accept the concept of joint criminal enterprise in their national law would depend on their national practice; however, the Commission would have to warn them that, if the third, extended, form were accepted, they would have to respect the rule of legality.

The meeting rose at 10.55 a.m. to enable the Drafting Committee on Crimes against humanity to meet.