

Comments
by
Greece
on
the Draft Articles on Crimes against Humanity adopted on
first reading by the International Law Commission
at its sixty-ninth session

I. General Comments

At the outset Greece would like to commend the Special Rapporteur, Mr. Sean D. Murphy, for his mastery of the subject and his detailed and well documented reports on the topic. Greece also wishes to express its gratitude to the International Law Commission for valuable contribution to the adoption of the entire set of Draft Articles on first reading. The expedient way with which both the Special Rapporteur and the Commission proceeded clearly demonstrates their dedication and commitment to swiftly complete this important work.

Greece attaches great importance to the fight against impunity for the most heinous crimes of international concern, including the crimes against humanity. In this it welcomes the adoption on first reading of the Draft Articles which, independently of the outcome of future discussions within the Sixth Committee on their final legal form, could, with some further adjustments, contribute significantly to the prevention of such crimes and the strengthening of accountability by providing useful guidance to those States which have not yet adopted legislation regarding the criminalization and prosecution of such crimes at the domestic level.

It is true that currently and unlike other serious crimes under international law there is no international convention dealing specifically with crimes against humanity. We are also fully aware that it was the intention of both the Special Rapporteur and the Commission to produce a set of Draft Articles which would serve as a basis for the elaboration of a future convention. However, we would like to reiterate that we are not entirely

convinced about the desirability and the necessity of a convention addressing exclusively that category of crimes.

We share, thus, the views expressed by a number of States in previous sessions of the Sixth Committee that the Rome Statute of the International Criminal Court, to which already 123 States are Parties, provides a sufficient legal basis for the domestic criminalization and prosecution of crimes against humanity, through the definition of these crimes as contained in its Article 7 which has received broad support among States, and, more importantly, the principle of complementarity underpinning the Rome Statute system.

Indeed, Greece as a State Party to the Rome Statute of the International Criminal Court and a staunch supporter thereof from the very beginning, has enacted implementing legislation penalizing, inter alia, crimes against humanity as defined in Article 7 of the Rome Statute.

We are, therefore, of the view that the entry into force of the Rome Statute and the establishment of the International Criminal Court has rendered to a large extent unnecessary the elaboration of a convention on the crimes against humanity.

We also believe that, despite the cautious approach followed by both the Special Rapporteur and the Commission not to affect existing conventional regimes and the Rome Statute of the International Criminal Court, as demonstrated by the fact that paragraphs 1-3 of Draft Article 3 reproduce almost verbatim Article 7 of Rome Statute, the risk of reopening during a future negotiation of a convention the consensus reached on the definition of the crimes against humanity cannot be excluded. Moreover, we share the concerns expressed by some States and members of the Commission that such a convention may hamper efforts to achieve the widest possible acceptance of the Rome Statute, since some States may deem it sufficient to ratify the former without adhering to the latter.

Greece concurs with the Special Rapporteur and the Commission that the Rome Statute does not regulate inter-State cooperation on crimes falling within its jurisdiction. However, it is also a fact that the absence of a robust inter-State cooperation system does not affect only crimes against humanity

but also crimes of genocide and war crimes despite the fact that they make the object of specific conventions.

Greece believes, therefore, that instead of a lengthy process of negotiation of a future convention where all relevant critical issues could be reopened with an uncertain outcome, the efforts of the international community should focus, at this stage, on the one hand, on the promotion of universality and effective implementation of the Rome Statute and, on the other, on the establishment of necessary mechanisms of inter-State cooperation for the domestic investigation and prosecution of the most serious crimes of concern to the international community.

In this respect, we would like to join other States in recalling the international initiative for the adoption of a multilateral instrument on mutual legal assistance and extradition for the domestic prosecution of the most serious international crimes already supported by 60 States, including Greece.

II. Comments on specific Draft Articles

-Draft Article 3 paragraph 1 (h): In light of the recent activation of the International Criminal Courts jurisdiction over the crime of aggression, we took note with interest the reference in paragraph 8 of the relevant Commentary to the need to revisit and amend accordingly paragraph 1 (h) of Draft Article 3.

-Draft Article 5: The utility of this Draft Article should, in our view, be reconsidered by the Commission, given the already well-established and comprehensive obligations of States regarding the principle of non-refoulement deriving from major international conventions on refugee or human rights law and the case-law of regional and international judicial or quasi-judicial bodies. The possible overlap with other treaty regimes was also pointed out by several members of the Commission during the relevant discussions. Moreover, we are not sure whether the specific nature of crimes against humanity which, according to their definition, are committed as part of a widespread or systematic attack directed against a civilian population was duly taken into account. Finally, we wonder whether the reference to “territory under the jurisdiction of another State” in both paragraphs of this Draft Article is adequate in this context given the problems that may create and we invite the Commission to reconsider its use.

-Draft Article 6 [5]: Regarding paragraph 1 of this Draft Article, it is suggested to add after the words “crimes against humanity” the phrase “*as defined in the present draft articles*”.

-Draft Article 7 [6]: With regard to paragraph 2 of this Article, we would like to support comments made by States during the relevant discussions within the Sixth Committee that a degree of flexibility and procedural and/or prosecutorial discretion should be provided given the complexity of the crimes against humanity, the difficulties that national jurisdictions may encounter in properly adjudicating cases of such crimes committed in other parts of the world, the conflicts of jurisdiction which may arise and the risks of forum shopping.

-Draft Article 10 [9]: With regard to this Draft Article, we would like to reiterate our call to the Commission to align further its wording with the wording of the so-called “Hague formula”, as the latter was incorporated in numerous conventions aiming at the repression of specific offences, including terrorism, and, in particular, in the Convention against Torture (Article 7) and, more recently, in the International Convention for the Protection of all Persons from Enforced Disappearances (Article 11). More specifically, we invite the Commission to rephrase this Draft Article so as to read “*The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender him or her to another State or competent international criminal tribunal, submit the case to its competent authorities for the purpose of prosecution*”. Given the fact that Draft Articles 8 [7] and 9 [8] are based on the relevant provisions of the 1984 UN Convention against Torture, we see no reason why Draft Article 10 [9] which is closely connected with the abovementioned Draft Articles should be an exception in this regard. Moreover, we are of the view that with the above proposed wording the first sentence of Draft Article 10 [9] is better articulated with its second sentence, which, in this case, should begin with the phrase “*These authorities*”.

-Draft Articles 13 and 14: With regard to these Draft Articles for which the Commission has, after extensive discussions, opted for the “long-form” model proposed by the Special Rapporteur, and while we understand that the Commission was motivated in its choice by the wish to include in the Draft Articles the most advanced and detailed clauses on the mater, we

would like to reiterate our concerns - shared also by some Commission members regarding the extensiveness of those provisions which risks overshadowing the main topic of the Draft Articles and undermining their balance.

Moreover, we think it would be appropriate to also mention in this context the international initiative, referred to under point I above, aiming at the adoption of an international treaty dealing exclusively with issues of extradition and mutual legal assistance in relation not only to crimes against humanity but also to other core crimes under international law.

An additional point that we wish to make with regard to these Draft Articles is that, while the Commentaries indicate the precise articles of the international instruments, after which each particular paragraph of these Draft Articles is modelled, departures from the wording of those international instruments is not always sufficiently explained and justified.

The most illustrative example, in our view, is Draft Article 13 par. 9 on the non-obligation of a State to extradite a person accused of having committed crimes against humanity when there are substantial grounds to believe that the extradition request has been made for the purpose of prosecuting or punishing that person on account of a number of grounds. We note that the Commission has decided to alter the list of the grounds initially proposed by the Rapporteur, by, inter alia, adding the term “culture” to that list. In the relevant Commentary (paragraph 25) we simply read that the term “culture” was added “*in line with the language used in draft article 3, paragraph 1 (h)*”. In the absence of any further explanation, we still fail to see the link between Draft Article 3 paragraph 1 (h) referring to “*persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural religious, gender [...] or other grounds...*” in the context of the definition of crimes against humanity and Draft Article 13 paragraph 9 dealing with the extradition or not of a person accused of having committed crimes against humanity.

-Draft Article 15: With regard to this Article on inter-State dispute settlement, we would like to echo the views expressed by some Commission members - and also reflected at the relevant Commentary - that the drafting of dispute settlement clauses should be left, together with other final clauses, to States if and when the elaboration of a convention on the basis of the final Draft Articles is decided. Notwithstanding the above and as far as the content of this Draft Article is concerned, we would like to express our preference for the initial proposal made by the Special Rapporteur in his third report (Draft Article 17) reflecting the tried and tested three-tier process of negotiation, arbitration and judicial settlement.

Composition of Greece's statement

- General Comments
- Draft article 3
 - Paragraph 1(h)
- Draft article 5
- Draft article 6 [5]
 - Paragraph 1
- Draft article 7 [6]
 - Paragraph 2
- Draft article 10 [9]
- Draft article 13
 - Paragraph 9
- Draft article 14
- Draft article 15