

Introduction to the ILC Plenary on 1 May 2017
of the Third Report of the Special Rapporteur
for Crimes against Humanity

Thank you, Mr. Chairman.

Allow me to begin by congratulating you, Mr. Chairman, and the other members of the Bureau on your election. I look forward to working with you over the course of this session and, indeed, with all the Members of the Commission, both those who have previously served on the Commission and those new to it.

At the Commission's sixty-sixth session in 2014, it decided to include the topic "Crimes against humanity" in its programme of work, and to appoint me as special rapporteur. The syllabus for the topic, which appears as an annex to the Commission's 2013 annual report (A/68/10, annex B), states that the objective of the Commission on this topic is to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity. The draft articles would focus on building up national criminal laws on crimes against humanity, to enhance the ability of States to investigate, and to prosecute or extradite, alleged offenders. Doing so would not interfere with and, indeed, would be complementary to, the jurisdiction of international criminal courts, such as the ICC.

At its sixty-seventh session in 2015, the Commission considered my first report, which led to the provisional adoption of draft articles 1 to 4, together with commentaries thereto. At its sixty-eighth session in 2016, the Commission considered my second report, which led to the adoption of draft articles 5 to 10, together with commentaries thereto. Those articles with commentaries may be found in the Commission's annual reports for 2015 and 2016.

I submitted my third report (A/CN.4/704) in English to the secretariat on 20 January of this year and an advance copy dated 23 January was circulated to the Members. The final, edited version of the report, with all language translations, has been available since 10 April, and I hope that the delay did not create any difficulties for my colleagues. It may be worth noting, especially for our new colleagues, that while the substance of the advance report in English is the same as that of the final English version, there are differences in both page numbering and paragraph numbering. Consequently, for purposes of this debate, if references are made to pages or paragraphs of the report in English, it is best to use the final version, which is the one that has page numbers assigned in the table of contents.

During last summer's session, and in the Sixth Committee this past fall, I was urged to complete this project as soon as possible. Among other things, it was noted that our work load this summer might be lighter than usual, thereby providing ample time for addressing this topic. Consequently, my third report is somewhat longer than I had originally intended, but it places us in a position to complete a first reading on this topic this summer.

The report is divided into eleven chapters, and includes two annexes. The first annex contains the ten draft articles provisionally adopted by the Commission over the past two years. The second annex contains the seven additional draft articles I am now proposing to the Commission.

The **Introduction** of the report, which appears at paragraphs 1 to 18, notes our work on this topic to date, describes the debate in 2016 in the Sixth Committee, and sets forth the purpose and structure of the report. Paragraph 2 notes that 39 States addressed this topic during the Sixth Committee debate – most of which I observed in person – and I was pleased that their reactions generally were favourable and supportive of our work. As highlighted in paragraph 5, many States

indicated that they support drafting these articles for the purpose of establishing a convention on the prevention and punishment of crimes against humanity.

I also note that the Commission continues to receive very helpful comments from States on the question we put to them in 2014 regarding national laws and practice, most recently comments from El Salvador (received in January) and Mexico (received in February), and France (received in March). Comments received from Governments can be found on the Commission's website.

Chapter I of the report, which appears at paragraphs 19 to 93, addresses the rights, obligations and procedures applicable to the **extradition** of an alleged offender, based upon the different types of extradition provisions included in various treaties addressing crimes. Criminal law treaties that address extradition tend to follow one of two approaches. Some treaties contain little detail, consisting of just a general obligation to consider the offences in the treaty to be extraditable offences in a State's existing extradition treaties and any future extradition treaty the State completes. Other treaties contain more detailed extradition provisions, allowing the treaty itself to be used as a basis for extradition, and addressing a wide range of issues that can arise in the context of extradition, including: the inapplicability of the political offence exception; satisfying the requirements of national law in the extradition process; extradition of a State's own nationals; the prohibition on extradition when an individual will face persecution after extradition; and requirements of consultation and cooperation. Chapter I concludes by proposing a **draft article 11**, which follows the approach of using detailed provisions in the context of crimes against humanity

Chapter II of the report, which appears at paragraphs 94 to 107, addresses the obligation of *non-refoulement*, which is the prohibition on returning an individual to a territory when there are substantial grounds for believing that he or

she will be in danger of a specified harm. This obligation is found in a wide range of legal instruments, including conventions relating to refugees and asylum, human rights and criminal law. In such treaties, the obligation of *non-refoulement* is triggered when there are substantial grounds for believing that the person will be in danger of persecution or other specified harm upon return, with the harm in question varying depending on the subject matter of the treaty. Though there are limited exceptions to the *non-refoulement* obligation in the specific context of conventions on refugees, including on grounds of national security, such exceptions are not included in more recent human rights treaties or treaties dealing with specific crimes. Chapter II concludes by proposing a **draft article 12** providing for an obligation of *non-refoulement* in the context of crimes against humanity.

Chapter III of the report, which appears at paragraphs 108 to 158, addresses the rights and obligations of States regarding **mutual legal assistance** in connection with criminal proceedings, based upon the different types of mutual legal assistance provisions included in various treaties. Some treaties that include mutual legal assistance provisions are minimalist, typically containing just a general obligation to afford the greatest possible measure of assistance. Treaties with more detailed provisions place a general obligation on all States parties, but also include what might be referred to as a “mini-mutual legal assistance treaty” or “mini-MLAT”. Such provisions essentially create a detailed bilateral MLAT relationship between States parties in circumstances where they do not otherwise have such a MLAT relationship (or when those States elect to use the mini-MLAT to facilitate cooperation). Mini-MLAT provisions address topics such as: transferring detained persons to another State to provide evidence; designating a central authority to handle mutual legal assistance requests; the use of

videoconferencing for witnesses to provide testimony; and permissible and impermissible grounds for refusing mutual legal assistance requests. Chapter III concludes by proposing a **draft article 13** on mutual legal assistance.

Chapter IV of the report, which appears at paragraphs 159 to 196, addresses the participation and protection of **victims, witnesses, and others** in relation to proceedings within the scope of the present draft articles, as well as reparation for victims. Although prior treaties addressing crimes under national law often have not contained provisions concerning victims and witnesses, more recent treaties do contain such provisions. Those treaties typically address the protection of victims and witnesses, as well as reparation for victims; they also sometimes address the participation of victims in legal proceedings undertaken against the alleged offender. Chapter IV concludes by proposing a **draft article 14** addressing these points.

Chapter V of the report, which appears at paragraphs 197 to 207, addresses the **relationship** of the present draft articles with the rights and obligations of States with respect to **competent international criminal tribunals**, such as the International Criminal Court. As a general matter, the present draft articles have been crafted to avoid any such conflicts. Even so, to avoid any unanticipated conflict, there is value in a provision that makes clear that the rights or obligations of a State under the constitutive instrument of a competent international criminal tribunal prevail over the rights and obligations of the State identified in the present draft articles. Chapter V concludes by proposing a **draft article 15** addressing this issue.

Chapter VI of the report, which appears at paragraphs 208 to 211, addresses obligations upon **federal States**. It reviews the practice by some States of making a unilateral declaration when signing or ratifying a treaty to exclude its application to

part of their territories. In recent years, such declarations have been viewed with sufficient disfavour that some treaties have included articles precluding the ability of States to make such declarations. Chapter VI concludes by proposing a **draft article 16** addressing this issue.

Chapter VII of the report, which appears at paragraphs 212 to 263, addresses **monitoring mechanisms and dispute settlement**. Various monitoring mechanisms already exist that are capable of scrutinizing situations of crimes against humanity, either as such or in the context of the types of violations (for example, torture) that may occur when such crimes are committed. If States wish to establish a new monitoring mechanism, numerous treaties, especially human rights treaties, provide for a monitoring mechanism body. This body can take the form of a committee, commission, court, or meeting of States parties.

One interesting development in this regard, which was not discussed in the third report, is the creation this past December by the U.N. General Assembly of a new body to collect evidence of international crimes in Syria. That body is formally known as “the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.”¹

If the present draft articles are transformed into a convention on the prevention and punishment of crimes against humanity, there exists a possibility for the selection of one or more new types of mechanisms to supplement existing mechanisms. The study produced by our secretariat last year (A/CN.4/698), which may also be found on our website, provides an excellent survey of types of mechanism used in various fields of international law, such as treaty body

¹ See G.A. Res. 71/248 (21 Dec. 2016).

committees, meetings of States Parties, and reporting requirements. Development of a new mechanism for crimes against humanity might help ensure that States parties fulfil their commitments under the convention, such as with respect to adoption of national laws, pursuing appropriate preventive measures, engaging in prompt and impartial investigations of alleged offenders, and complying with their *aut dedere aut judicare* obligation.

Selection of a particular mechanism or mechanisms, however, turns less on legal reasoning and more on policy factors, the availability of resources, and the relationship of any new mechanism with those that already exist. Further, choices would need to be made with respect to structure; a new monitoring mechanism might be incorporated immediately in a new convention or might be developed at a later stage, such as occurred with the creation of a committee for the International Covenant on Economic, Social and Cultural Rights. Finally, such a monitoring mechanism might be developed in tandem with a monitoring mechanism for the Convention against Genocide, for which there have been periodic calls. As such, while I believe that the discussion in the third report may be of some use to States in the future, the report makes no proposal with respect to the selection of one or more new mechanisms.

Chapter VII also discusses how, in addition to monitoring mechanisms, many treaties also have dispute settlement clauses. These clauses will typically obligate States parties to negotiate in the case of a dispute. Should negotiations not succeed, such clauses provide for further methods of compulsory dispute settlement, including arbitration and resort to the International Court of Justice. Chapter VII concludes by proposing a **draft article 17** on dispute settlement.

Chapter VIII of the report, which appears at paragraphs 264 to 297, addresses **other issues** that have arisen in the course of discussions within the

Commission relating to this topic, specifically concealment of crimes against humanity, immunity and amnesty. Based on the analysis set forth in the report, I propose that the Commission not seek to include draft articles on these topics.

Chapter IX of the report, which appears at paragraphs 298 to 301, proposes a **preamble** which highlights several core elements that motivate and justify the present draft articles.

Chapter X of the report, which appears at paragraphs 302 to 326, addresses the issue of **final clauses**. This discussion may be useful to States in the event that the present draft articles are transformed into a convention. The Commission typically does not include final clauses as a part of its draft articles and consequently my report makes no proposal in that regard. Even so, this chapter discusses possible choices available to States, with an emphasis on options available for a final clause on reservations.

Chapter XI of the report, which appears at paragraphs 327 to 328, addresses our **future programme of work** on this topic. As I indicated at the outset of my remarks, if the Commission concludes its work on these seven draft articles this summer, then we will be able to complete the first reading on this topic. That would entail the Drafting Committee revisiting this May some of the previously adopted draft articles as a matter of *toilettage*. One issue that might be discussed is whether to retain draft article 5 as a single article or to break it up into a series of draft articles, an issue that was raised in the Drafting Committee in 2016, but set aside. If all goes well, we would have a full set of draft articles with commentary for the Commission to approve in the second half of this session.

Before ending this statement, I wish to note that there continues to be considerable interest in this topic outside of the Commission. I am regularly approached by governments, international organizations, treaty-bodies, non-

governmental organizations, and scholars interested in learning more about the topic, and in sharing with me their views.

For example, last **June** I briefed in New York representatives² of the UN Office on Genocide Prevention and the Responsibility to Protect about our project, and benefited from hearing their views about existing mechanisms for monitoring situations that might lead to crimes against humanity.

In **September**, I briefed by video-conference Members of the Committee on Enforced Disappearance, which linked myself in Washington, D.C. with David Nanopoulos of our secretariat in New York, and with the Members who were meeting in Geneva.

In **October**, our secretariat arranged a very helpful meeting in New York with Santiago Villalpando, Chief of the Treaty Section of the U.N. Office of Legal Affairs, to discuss the issue of final clauses. That same month, during “international law week”, I participated in an interactive dialogue with members of the Sixth Committee, organized by the permanent missions of Austria and Sweden, at which I presented and responded to questions on this topic.

In **November**, I chaired a well-attended panel on our project held as a side event at the ICC Assembly of States Parties in The Hague, which was sponsored by the Federal Republic of Germany and the Republic of Korea.³

In **December**, the National University of Singapore, in conjunction with Washington University, sponsored a two-day workshop in Singapore on the issues being considered for my third report, which was attended by scholars, practitioners, and civil society representatives from across Asia. This pan-Asian

² Gillian Kitley and Claudia Diaz.

³ The panel consisted of Judge Richard Goldstone, former Chief Prosecutor of the ICTY and ICTR; Judge O-Gon Kwon, formerly of the ICTY; Solomon Sacco of Amnesty International; Professor Leila Sadat of Washington University School of Law; and Judge Christine van den Wyngaert of the International Criminal Court.

workshop was a nice complement to the pan-European workshop held in Nuremberg in 2015.

My hope is to continue such efforts over the next year. For example, **this coming Saturday**, I am invited by Amnesty International to participate in a workshop here in Geneva to discuss my third report, at which will be represented many non-governmental organizations, including: Amnesty International; Human Rights Watch; Humanitarian Law Center; International Commission of Jurists; International Committee of the Red Cross; La Fédération internationale de l'action des chrétiens pour l'abolition de la torture (FIACAT); Redress; and Trial International. At the workshop, there will also be representatives from the Committee on Enforced Disappearance and the Office of the High Commissioner for Human Rights. Moreover, Amnesty International recently published a 44-page paper analysing my third report, indicating both areas of support and of concern,⁴ which was circulated by the secretariat to the Members. I, of course, welcome such engagement.

When opportunities present themselves to lecture on this topic in academic settings, I seize them. Thus, over this past year I have lectured at the Geneva Academy of International Humanitarian Law and Human Rights, the John Marshall Law School in Chicago, and the Columbia Law School in New York. Later this month, I look forward to traveling to the Czech Republic with Mr. Sturma to lecture on this topic at the Charles University of Prague.

During last year's debate, Mr. Hassouna asked if I had any information about the initiative lead by Belgium, The Netherlands and Slovenia to develop a mutual legal assistance and extradition treaty for prosecution of the most serious

⁴ Amnesty International, *International Law Commission, Commentary to the Third Report on Crimes against Humanity* (2017), available at <https://www.amnesty.org/en/documents/ior40/5817/2017/en/>.

international crimes. In anticipation of perhaps another such question, I can report that I am not aware of any notable progress with respect to that initiative over this past year, though I understand that there may be an experts group meeting in late June in The Netherlands, at which there will be presentations and panel discussions. Interestingly, the Advisory Committee to the Netherlands Government on public international law issues recently recommended that the government support the initiative of a convention on crimes against humanity. In any event, it remains my view that the two initiatives are not in conflict.

Mr. Chairman, I wish to highlight my thanks for the contributions of the various persons indicated on the cover page of my third report, and my thanks for the assistance to date from the secretariat which, as always, has been first rate.

I very much look forward to hearing the views of my colleagues with respect to this third report, and to our collaboration as we move forward on this topic.

Thank you.