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Workshop on a convention on the prevention and punishment of crimes against humanity

Note by the Secretariat

At the request of the Permanent Missions of France and Germany, the Secretariat is hereby circulating, as a document of the Sixth Committee, the report on the workshop on a convention on the prevention and punishment of crimes against humanity, organized by those Permanent Missions on 13 and 14 March 2023.

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Report on the workshop on a convention on the prevention and punishment of crimes against humanity

I. Introduction

1. On 13 and 14 March 2023, more than 100 participants, including State representatives and members of civil society, gathered in New York at the Permanent Mission of Germany to the United Nations to discuss the draft convention on the prevention and punishment of crimes against humanity. In the light of the resumed session of the Sixth Committee of the General Assembly, from 10 to 14 April 2023, as well as the fact that its procedures do not encompass the formal involvement of civil society stakeholders, participants were encouraged to share their views on key aspects of the project. The workshop consisted of six sessions, each opened by an expert speaker, followed by an exchange among participants. The workshop was in English only.

2. Six experts presented on distinct aspects of the draft and facilitated the ensuing discussion, as follows:

- **Charles Jalloh**, Professor, Florida International University, and member, International Law Commission, presented on the definition of "crimes against humanity" and the obligations of States
- **Darryl Robinson**, Professor, Queen's University (Canada), discussed prevention and enforcement
- **Juan Méndez**, Professor, American University, and former Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, discussed the human rights provisions of the draft articles
- **Olympia Bekou**, Head of School, University of Nottingham, discussed criminalization, jurisdiction and *aut dedere aut judicare*
- **Priya Pillai**, Head, Asia Justice Coalition, discussed investigation, extradition and mutual legal assistance
- **Leila Nadya Sadat**, Professor, Washington University and Yale University Law Schools, discussed gender aspects of the treaty and other special populations

3. The meeting was opened by Diarra Dime Labille, Legal Adviser, Permanent Mission of France to the United Nations, and Michael Hasenau, Legal Adviser, Permanent Mission of Germany to the United Nations. It was observed that the meeting would operate under Chatham House rules, and that a summary of discussions would be circulated after the event. Professor Leila Nadya Sadat, of Washington University and Yale University Law Schools, also spoke by way of introduction and offered some reflections on the importance of crimes against humanity under international law, the gaps a new treaty could fill and the history of the draft articles proposed by the International Law Commission. She noted that States and civil society had commented extensively on the Commission's work during the elaboration of the draft articles.

4. During the two-day meeting, a wide-ranging discussion took place, addressing each draft article and overarching thematic elements of the text. The opening session provided context regarding the work of the International Law Commission on the draft articles. It was noted that the meeting was taking place at a crucial juncture, building upon prior events held by Germany and other States over the past few years, including from different regional groups, and in the light of increasing support for the

Commission's draft articles on the prevention and punishment of crimes against humanity, as well as a recognition of the importance of a new global convention.

5. It was observed that the draft articles did not seek to be overly prescriptive and appeared to strike the right balance by enabling States to retain flexibility in how to implement the treaty's crimes against humanity provisions in a way that considers their legal system and their practice. The draft text does not preclude States from having more detailed legislation if they wish. It was also noted that the Commission did not, consistent with its well-established practice, clearly indicate which elements of the draft text were codifying international law and which represented the progressive development of international law. Finally, it was noted that the Commission's draft articles provided an excellent foundation upon which to build and determine next steps, and that the commentaries were rich in additional detail, furnishing an important basis for understanding the Commission's intent. A related point was that many of the provisions contained in the draft articles were deliberately modelled on existing treaty provisions from other multilateral conventions that had been widely supported by States.

II. Preamble, scope, definition of the crimes, and the obligations of States: draft articles 1, 2 and 3

A. Preamble

6. Several participants observed that the preambular statement that the prohibition of crimes against humanity was a peremptory norm of general international law (*jus cogens*) was an important addition to the text. The expression had a number of legal consequences of key importance, and it was not the first time that the International Law Commission had concluded that crimes against humanity were *jus cogens* crimes. It was observed that the commentaries relied heavily on the judgments of the International Court of Justice but that more could be done to emphasize the *jus cogens* nature of crimes against humanity in the draft treaty.

B. Draft article 1: scope

7. Draft article 1 provides that "the present draft articles apply to the prevention and punishment of crimes against humanity". It was observed that the commentaries emphasized the two primary purposes of the draft articles: (a) prevention; and (b) punishment. The draft text did not address other core crimes under international law but focused solely on crimes against humanity. Participants noted that there were treaties addressing genocide and war crimes, dating back to the period immediately following the Second World War, but that there was not presently a single instrument of the same kind that was applicable at the horizontal level with respect to crimes against humanity.

C. Draft article 2: definition of "crimes against humanity"

8. *Consistency with the Rome Statute*. It was observed that draft article 2 was drawn almost verbatim from article 7 of the Rome Statute of the International Criminal Court in the first two paragraphs, draft article 2 (1) and (2). Draft article 2 (3) contained a "without prejudice" clause, making it clear that inclusion of the definition provided in the Rome Statute was without prejudice to broader definitions that might exist in international instruments, customary international law or national law.

9. *Decision of the Commission*. The International Law Commission decided to rely largely upon the Rome Statute because 123 States had already agreed to it; States had requested that the Commission do so to underline their support for the International Criminal Court, and the Commission felt the need for consistency. The Commission made three changes to the definition, however:

(a) In paragraph 1, the Rome Statute language "For the purpose of this Statute" was changed to "For the purpose of the present draft articles". This was a purely technical change;

(b) In paragraph 1 (h), the Rome Statute language in article 7 (1) (h) (persecution) "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" was changed to "in connection with any act referred to in this paragraph";

(c) The Commission deleted article 7 (3) of the Rome Statute, which defines the term "gender" "[f]or the purpose of [the Rome] Statute". The Commission had retained this language in its first version of the definition adopted in 2017. It was stressed that it was during the second reading stage, when the Commission had focused on the comments of States and other observers, that there had been an overwhelming number of submissions requesting that the Commission delete it, arguing in the main that the definition no longer held a contemporary meaning. The Commission had deleted the provision accordingly.

10. *Should States consider departures from the Rome Statute?* Some participants suggested that a broader or different definition of "crimes against humanity" could be considered because of the differences between an inter-State convention and the International Criminal Court. The point was made that nearly 25 years had elapsed since the Rome Statute had been adopted and that minor changes could be accommodated. It was also observed that the overall goal was a clear, stable and useful definition of crimes against humanity, and that the "without prejudice" clause in draft article 2 (3) could ensure that the work of the International Law Commission did not foreclose the possibility that some States might wish to use the customary international law definition, for example, if they were not a party to the Rome Statute. The view was expressed that the Rome Statute was the "floor", not the "ceiling". Finally, it was observed that some of the departures from customary international law at the International Criminal Court had been inserted during the negotiation of the Rome Statute because the Court might otherwise potentially be overloaded, and States wanted a jurisdictional filter that was principally aimed at avoiding overloading the docket of the Court and reinforcing the complementarity principle. The same preoccupation would not necessarily apply to a crimes against humanity convention implemented directly by States at the horizontal level.

11. *The policy element.* Article 7 (2) (a) of the Rome Statute sets out the contextual threshold for crimes against humanity. Some expressed the view that the Rome Statute narrowed customary international law by inserting a requirement that the crime had to be committed "pursuant to or in furtherance of a State or organizational policy", which the Statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda did not have in their respective definitions of "crimes against humanity". The International Tribunal for the Former Yugoslavia had expressly determined the policy element not to be a requirement of customary international law.[1]

12. *Definition of "enforced disappearance".* The International Law Commission did not make some of the changes that had been suggested, including amending the

[1] See e.g. *Prosecutor v. Kunarac et al.*, *Appeals Chamber, Judgment*, Case No. IT-96-23/1-A, 12 June 2002, para. 98.

definition of "enforced disappearance", which was broader in other instruments, specifically the International Convention for the Protection of All Persons from Enforced Disappearance (2007). The Commission did not believe that it was appropriate for it, as a technical body of legal experts, to change the definition provided in the Rome Statute, keeping in mind the fact that a substantial number of jurisdictions had incorporated it into their national laws, and the calls by various States in the Sixth Committee for the Commission's work to remain consistent with the Rome Statute of the International Criminal Court. It was noted that the language "with intention of removing them from the protection of the law for a prolonged period of time" in draft article 2 (2) (i) was inconsistent with article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, and that the expression "prolonged period of time" was vague.

13. *Definition of "persecution"*. Regarding the crime of persecution, it was noted that the "in connection with" language in draft article 2 (1) (g) might narrow the definition beyond even the Rome Statute definition by removing crimes other than crimes against humanity as linkage offences for purposes of persecution. It was observed that customary international law could be broader and eliminate any linkage requirements at all. It was also noted that some States that were parties to the Rome Statute, for example, France and Germany, had removed that requirement when implementing the Rome Statute. Finally, the question of adding other protected categories to article 2 (1) (g) arose, including Indigenous Peoples and persons with disabilities.

D. Draft article 3: general obligations

14. It was noted that article 3 was one of the most important provisions in the draft text. Paragraph 1 provides that States have an obligation not to engage in acts that constitute crimes against humanity. This obligation entails two aspects: first, an obligation not to commit the acts through their own organs or by persons within their control; second, an obligation not to aid or assist another State in the commission of an internationally wrongful act. It was inspired by paragraph 166 of the 2007 judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, which concerned the interpretation of article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Commission was clear on what the duty of States is regarding the crime of genocide and considered this equally applicable to crimes against humanity, including in relation to matters of State responsibility.

15. Paragraph 2 requires each State to undertake to prevent and punish crimes against humanity as crimes under international law whether or not committed in a time of armed conflict. This was a new proviso. The text and the commentaries clarify international law by noting that crimes against humanity are prohibited, whether such conduct is prohibited at the national level or not. It means that States may not themselves engage in crimes against humanity and also ensures that others within their jurisdiction and control, including the armed forces, rebel groups and other non-State actors, do not commit crimes against humanity.

16. Finally, paragraph 3 provides that "no exceptional circumstances whatsoever" may be invoked as a justification for crimes against humanity. This was inspired by article 2 (2) of the Convention against Torture, as well as similar provisions in other international law instruments. This stipulation provided the normative architecture for the draft.

17. It was noted that paragraph 3 did not appear to contain a reference to an obligation to bring crimes against humanity to an end along the lines of article 41 (1) in the Commission's articles on the responsibility of States for internationally wrongful acts. Article 41 (1) requires States to "cooperate to bring to an end through lawful means any serious breach" of a peremptory norm of international law. If the present draft articles are reopened, there may be an opportunity to include such an obligation in article 3.

18. Regarding the obligation of prevention in draft article 3 (general obligations), a concern was expressed regarding the use of the term "undertakes" in draft article 3 (2). It was observed that the commentaries noted that, following the judgment of the International Court of Justice in *Bosnia v. Serbia*, the word "undertake" was a formal promise, was not merely hortatory and was unqualified.[2]

19. In terms of draft article 3 (2), the question was raised as to the scope of a State's obligations of "due diligence" in response to crimes against humanity. The commentaries to draft article 3 (2) made clear that, in line with the jurisprudence of the International Court of Justice, States had an obligation to employ the means at their disposal to prevent persons or groups not directly under their authority from committing acts of genocide, and that the same obligation extended to crimes against humanity.[3] This is a "due diligence" obligation, in certain circumstances where the State has a capacity to influence the situation, and the International Court of Justice was clear that States must exhaust the legal means available to them but are not required to do the impossible. Rather, it is a best efforts clause.

III. Prevention and enforcement, including dispute resolution: draft articles 4, 15 and other potential enforcement modalities

A. General

20. It was observed that the proposed new treaty could add real value to the existing framework by creating a web of prevention and multilateral cooperation. Crimes against humanity were more prevalent and relevant than other grave offences; other crimes required special intent or armed conflict.

21. The new draft treaty could also help to build a political norm of responding to mass crimes. The present understanding at the United Nations is that genocide merits a response. But genocide is a finnicky norm and its invocation results in an extended debate about intention and about whether a particular population represents a distinct racial, ethnic, national or religious group. The question often arises whether ethnic cleansing constitutes the crime of genocide or whether there is a hidden motive to destroy a group.

22. In contrast, crimes against humanity is a more objective category. Such crimes are more easily identifiable and do not hinge on hidden motives. Coordinated killings, for example, of thousands of civilians, should trigger a political impulse to do something at the United Nations and among States. This is not in the black letter law of the document but could be a valuable consequence of its adoption. It would help to move the international community away from the fixation on genocide.

[2] See the commentaries to draft article 3, para. 8, pp. 49–50.

[3] Ibid., para. 3, pp. 48–49.

B. Draft article 4: obligation of prevention

23. *Territorial application.* It was observed that the scope of the obligation to prevent in article 4 (a) was "any territory under [the State's] jurisdiction". This could be de facto or de jure, the only limit being that States must act "in conformity with international law". In other words, the State must not use allegations of crimes against humanity as a pretext or to support the use of force outside what is permissible under the Charter of the United Nations.

24. *Modes of prevention.* The draft articles contain obligations of prevention that are familiar and similar to those in the Convention against Torture and other widely endorsed international treaties. States must adopt effective legislative, administrative, judicial or other appropriate preventive measures under draft article 4 (a). The commentaries provide helpful guidance as to what measures should be taken, including the adoption of laws penalizing crimes against humanity, the investigation of credible allegations, and the education of governmental officials (e.g. police, military and other relevant personnel).[4] This is not particularly burdensome, as most States are already party to treaties that require training, and simply adds crimes against humanity to training that is already ongoing. In addition, as part of the duty to prevent, if a State is working with a partner with respect to which it has a significant degree of control, it should exercise due diligence in monitoring whether the partner is committing crimes against humanity, an obligation similar to that found under the Convention on the Prevention and Punishment of the Crime of Genocide.

25. Regarding international prevention efforts, it was noted that the International Court of Justice found, in *Bosnia v. Serbia*, that a State's failure to cooperate with the Security Council and international justice mechanisms, such as the International Tribunal for the Former Yugoslavia, inferred that it was making a decision not to prevent crimes against humanity.[5] Likewise, it was observed that the Convention against Torture created a clear sense of obligation to prevent and that the Committee against Torture reviewed agencies of the State and their efforts to prevent torture.

26. *Cooperation with other entities.* Draft article 4 (b) obliges States to prevent crimes against humanity through cooperation with other States, relevant intergovernmental organizations and, as appropriate, other organizations. This obligation is already implicit in Articles 1 and 56 of the Charter of the United Nations. It is also present in General Assembly resolution 3074 (XXVIII) of 3 December 1973 ("Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity"), paragraph 3 of which provides that States shall cooperate with each other in halting and preventing war crimes and crimes against humanity, and paragraph 4 of which requires them to "assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes". The present draft crimes against humanity treaty takes these principles further by codifying them in a clear way and adds a provision for cooperation with organizations such as the International Committee of the Red Cross.

27. *Prevention as a pillar of the draft text.* It was observed that the obligation of prevention, included formally in article 4 of the draft articles, was a concept that pervaded the entire treaty. States would be obliged by the treaty not to commit crimes against humanity, to prevent them from happening on their territory and to take preventive measures to build a culture that made the commission of crimes against humanity less likely. A question was raised as to whether article 4 could be read as

[4] See the commentaries to draft article 4, paras. 9, 11, pp. 58–60.

[5] See *Bosnia v. Serbia*, para. 449. Failure to cooperate was a breach of the Convention on the Prevention and Punishment of the Crime of Genocide.

limiting the scope of article 3. In response, it was noted that the view of the Commission, reflected in the commentaries, was that the general obligations would be set out in article 3 and the more detailed provisions would be contained in articles 4 and 5.

28. *Due diligence and the obligation to prevent crimes against humanity.* The view was expressed that the obligation of due diligence could be made clearer and explicit in article 4, rather than in the commentaries to article 3. In response, it was observed that there was no specific formulation of the concept, but that elements could be found in the Commission's draft articles on State responsibility, the jurisprudence of the International Court of Justice and the Commission's work on *jus cogens*. It was also noted that normally discussions about prevention were linked to the responsibility to protect and that it might be helpful to elaborate on the interlinkage between those two issues. Article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide provided that any contracting party could call upon the competent organs of the United Nations to take action for the prevention and suppression of acts of genocide. It was conceivable that such a provision could be added to the draft text as well. It was also noted that the Inter-American Court of Human Rights, in its 1988 judgment in *Velásquez Rodríguez v. Honduras*, established, in paragraphs 172 to 179, what was meant by "due diligence" in regard to a duty to prevent in the context of crimes against humanity.

29. *The responsibility to protect.* The intent of the International Law Commission was to provide a streamlined text that could serve as a blueprint for the future treaty and be a practical instrument for States to consider. The Commission felt that the responsibility to protect was a sensitive area and did not engage with it. Prevention was an area in which the Commission was arguably engaging in more progressive development, and the Commission tried to find balance in a process of consensus by experts coming from different regions. It was suggested that it might be better to leave things unsaid in the treaty to encourage ratification and avoid undue complexity.

C. Draft article 15: settlement of disputes

30. It was observed that article 15 was part of the draft treaty's enforcement mechanism. As contained in the text, the language was relatively standard, requiring that States endeavour to resolve their disputes through negotiations (draft article 15 (1)), and if that failed, to submit their disputes to the International Court of Justice unless they agreed to instead submit their dispute to arbitration (draft article 15 (2)). That formulation was found in many treaties, such as article 66 (2) of the United Nations Convention against Corruption and article 30 (1) of the Convention against Torture. That said, some treaties specified a period of time for negotiations, requiring dispute settlement if that period had elapsed, for instance, if not resolved within 12 months or "within a reasonable time", which might be a useful addition. Draft article 15 (3) allowed States to "opt out" of the compromissory clause by submitting a declaration to that effect. If the treaty ultimately permitted reservations, then the opt-out clause was not necessary. If not, then it could be included.

31. In terms of draft article 15, some participants noted that article IX of the Convention on the Prevention and Punishment of the Crime of Genocide did not have a provision permitting States to opt out of compulsory dispute settlement (although States had entered reservations to article IX). Others noted that, if there was an opt-out clause, it should be accompanied by a time limit for exercising it, as some States had suggested in their comments to the International Law Commission. The need for the opt-out clause would disappear if reservations were permitted under the treaty. It was observed that the Commission did not traditionally draft "final clauses" and thus did not address the question of reservations. It was also observed that the Commission

was cautious in its approach and that States might now go back to a jurisdictional clause that gave compulsory jurisdiction to the International Court of Justice if they wished. That would promote accountability regarding a *jus cogens* crime and increase the political cost to a State of non-compliance. Several participants noted that the International Court of Justice was viewed favourably by States, which might suggest that compulsory jurisdiction was appropriate. At the same time, a concern was expressed that States might choose not to join the treaty if there was not an opt-out clause.

D. Possible establishment of a monitoring body

32. The possible establishment of a monitoring body does not appear in the draft articles but has been raised in comments and in article 19 (institutional mechanisms) of the model Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity published by the Crimes Against Humanity Initiative of the Whitney R. Harris World Law Institute in 2010. During the work of the International Law Commission, the idea was suggested by Sierra Leone and the Office on Genocide Prevention and the Responsibility to Protect and was discussed in the Special Rapporteur's third and fourth reports, in which the Special Rapporteur canvassed various models. The monitoring body could take many forms, including a fact-finding commission or a committee of experts, such as those attached to certain human rights treaties.

33. It was noted that there were pros and cons to including a monitoring mechanism in the treaty. On the positive side, it would breathe life into the obligations under the treaty and provide clarity, accountability and additional enforcement. A significant portion of the commentaries of the International Law Commission quoted or drew from the work of various treaty bodies, suggesting their importance in interpreting treaty text. The hesitation, however, involved questions of resources, budget, elections and the administrative complications of creating a new entity. There could also be duplication with the Special Adviser to the Secretary-General on the Prevention of Genocide or the Human Rights Council.

34. In terms of a monitoring mechanism, it was suggested that the views of States on this question be explored further. Several participants noted that the combination of the opt-out clause on International Court of Justice jurisdiction and the lack of a monitoring mechanism could be problematic in terms of interpretation of the articles, dispute settlement and enforcement. Indeed, during the debates of the International Law Commission, the decision whether or not to have some type of monitoring mechanism was observed to be policy driven and perhaps best left to States. The possibility of rationalizing such mechanisms, which was being discussed, could also be broadened to potentially include a crimes against humanity convention.

IV. Human rights provisions: principle of non-refoulement (draft article 5), fair treatment of the offender (draft article 11), and victims, witnesses and others (draft article 12)

A. General

35. It was noted that the proposed convention, in its entirety, was a human rights convention. It would contribute to the idea that there should be no impunity for the most serious crimes under international law. The text, as drafted, would contribute to closing the cycle of impunity in so many examples of crimes against humanity committed recently and which were even being committed today. It would promote

human rights by contributing to the definition of “crimes against humanity” and setting out their legal effect, and particularly the obligation to prohibit and punish set out in the preamble and in draft article 2. It would also offer reparations and guarantees of non-repetition (draft article 12 (3)), and, by keeping the definition of crimes against humanity in line with article 7 of the Rome Statute, would make an important contribution to domestic efforts to break the cycle of impunity.

36. Several participants pointed out that the new treaty could clarify what kinds of actions constituted crimes against humanity for domestic actors, including national judiciaries and prosecutors, and would provide families and victims of serious crimes with powerful arguments and legal tools. In Latin America, the 1985 trials in Argentina and trials in other Latin American countries could not have happened without the concept of crimes against humanity, which helped to persuade national judiciaries to open investigations, set aside concerns about statutes of limitations and conduct them properly. It was underscored that the abolition of any statutes of limitations (article 6 (6) of the draft of the International Law Commission) was important because often a significant amount of time would elapse before it was possible to investigate, prosecute and punish those types of crimes. In addition, it was noted that, as provided by article 15 (2) of the International Covenant on Civil and Political Rights, nothing in the draft articles should prejudice the criminal investigation, trial or punishment of any person for any act or omission committed in the past which, at the time of its commission, was considered a crime against humanity according to the general principles of law recognized by the community of nations.

B. Draft article 5: principle of non-refoulement

37. The principle of non-refoulement is an important provision to include in a treaty to be signed and ratified by many States. Refugee flows today challenge the ability to respect obligations under refugee law. The non-refoulement clause of the 1951 Convention relating to the Status of Refugees (and its 1967 Protocol) represents an important instrument, but its protections are limited to people who have been declared refugees owing to the threat of persecution. Conversely, the non-refoulement provisions of the Convention against Torture (article 3) and the International Convention for the Protection of All Persons from Enforced Disappearance (article 16) are not limited to people granted asylum or declared refugees. These treaties provide more complete protection to individuals who might be returned to their countries but who are at risk of torture or enforced disappearance there. With respect to crimes against humanity, it is important to establish a fundamental prohibition upon sending all offenders to a country where they might be at risk.

C. Draft article 11: fair treatment of the offender

38. *Norms of fair treatment.* Article 11 of the draft text provides norms of fair treatment of alleged offenders. Adhering to norms of fair treatment is important for establishing the legitimacy of efforts taken in national courts to end impunity. It was also noted that the rights set forth in draft article 11 (1) included by implication (but could be made more explicit) an absolute prohibition on torture or any other cruel, inhuman and degrading treatment and the right to decent and humane prison conditions.

39. *Requirements of a fair trial.* The right to a “fair trial” is specified in draft article 11 (1). It was observed that the words “fair trial” could be made more precise and complete. However, it was also noted that those words and draft article 11 (1)

itself referenced principles from human rights law, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as regional instruments. Some of the elements included in the notion of a fair trial included the need for an independent judiciary to investigate and judge these crimes, a defendant's access to lawyers of their choosing, the ability to confront evidence, and all other aspects of fair trials under human rights law. It was observed that a fair trial should exclude military courts, which would not be independent enough to try crimes against humanity. Although the breadth of the treaty was noted, concern was expressed that the provisions of the draft were too laconic and that additional rights should be added for clarity. That could be the subject of future discussions.

40. *Right of consular access.* Draft article 11 (2) includes a right of consular access, along the lines provided by article 36 (1) of the Vienna Convention on Consular Relations. However, it was noted that there was no mention of specific consular rights or rights of dual nationals. It was also observed that the 2004 judgment of the International Court of Justice in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* contained more specific consular rights and that the text of the International Law Commission could be re-examined in the light of that decision.[6]

D. Draft article 12: victims, witnesses and others

41. The draft of the International Law Commission provides excellent standards on witnesses and victims in article 12. Draft article 12 (1) allows any person alleging that they are the victim of crimes against humanity to submit a complaint to the competent authorities. Draft article 12 (1) (b) provides that all individuals submitting such a complaint, or who are victims, witnesses, relatives, representatives or participants, shall be protected against ill-treatment or intimidation as a consequence of speaking out. It was observed that it would be useful to add a provision protecting individuals who were not nationals of the State but were speaking out, by giving them temporary safe conduct so that they could testify. Such protection would not need to be permanent, but temporary protection was important so as to avoid the difficulties of getting witnesses to speak in the production of evidence.

E. Open issues

42. *Double jeopardy or* ne bis in idem. The draft of the International Law Commission does not contain a provision on *ne bis in idem* along the lines of article 17 of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity of 2010. It could be useful to prohibit a prosecution of an individual for crimes against humanity who has already been prosecuted for substantially the same offence in a case that was regularly, legitimately and legally tried before a court in another State Party, and which resulted in either an acquittal or a conviction.

43. *Amnesties.* It was observed that the absence of a provision on amnesties in the Rome Statute could be explained by the fact that the Rome Statute had an enforcement mechanism and operated under the principle of complementarity, which had no equivalent in the new convention on crimes against humanity. Conversely, articles 6 and 8 of the draft produced by the International Law Commission did not have a specific provision on the prohibition of amnesties. Some participants felt that that was

[6] See the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12.

an omission that should be remedied. It was observed that a prohibition on amnesties for crimes against humanity had evolved as customary international law, as evidenced by extensive national and international jurisprudence from, inter alia, the Special Court for Sierra Leone, the International Tribunal for the Former Yugoslavia, the African Commission on Human and Peoples' Rights and the European Court of Human Rights, as well as the 2020 judgment of the International Criminal Court in *Prosecutor v. Saif Al-Islam Gaddafi*.[7] That had been discussed in the third report on crimes against humanity of the Special Rapporteur submitted to the International Law Commission and had generated concerns at the time.It was also observed that the obligation to investigate and prosecute crimes against humanity was already clear in the Commission's draft articles and commentaries, and that those obligations presumably excluded the possibility of amnesties for such crimes. The commentaries note that an amnesty in one State clearly would not bar concurrent jurisdiction in another State.[8]

V. Criminalization, jurisdiction and *aut dedere aut judicare* (draft articles 6, 7 and 10)

A. Draft article 6: criminalization under national law

44. Draft article 6 is both innovative and critically important to the proposed convention. Draft article 6 (1) imposes upon State Parties a legal obligation to implement the treaty by enacting criminal legislation. This is key to holding perpetrators accountable because it enables States to become enforcers. It also reinforces the principle of complementarity. Many States, such as Ukraine, do not yet have laws on crimes against humanity, and among those that do there are significant differences. The convention would encourage a harmonized approach.

45. *Modes of liability including superior and command responsibility.* Draft article 6 (2) sets forth measures to ensure that crimes against humanity can be successfully prosecuted. It has various modes of liability, phrased in broad language, that do not track the Rome Statute. This allows States to retain their preferred terminology in ratifying the treaty. Likewise, paragraph 3 provides for command or superior responsibility 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 punish the persons responsible. A concern was raised that inchoate offences, such as incitement, and modes of liability designed to capture system criminality, such as common plan liability, joint criminal enterprise liability or conspiracy, are absent from the text.

46. *Superior orders not a defence.* Draft article 6 (4) provides that superior orders of military or civilian persons are not grounds for excluding the criminal responsibility of a subordinate. This provision is similar to language in the Charter of the International Military Tribunal (article 8), the Statute of the International Tribunal for the Former Yugoslavia (article 7 (4)) and the Rome Statute (article 33) but is not identical to any existing instrument.

47. *Irrelevance of official capacity.* Draft article 6 (5) provides that official position is not a ground for excluding criminal responsibility. The commentary provides that while holding an official position cannot be raised as a defence, it does not affect

[7] See the 9 March 2020 judgment rendered by the International Criminal Court in *Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11.

[8] See the commentaries to draft article 10, para. 13, p. 98.

whatever procedural immunities a State official might have. A question was raised as to whether the article should make it explicit that such immunity did not apply. Others suggested that draft article 6 (5) was broadly phrased, and it was not clear that it would not impact the law on immunities. The commentaries suggest that the provision is without prejudice to the work of the International Law Commission on immunities, but a question arose as to the relationship between that convention and the law of immunities, where the Commission had suggested the unavailability of immunity, at least immunity *ratione materiae*, in relation to persons who committed crimes against humanity. The language of draft article 6 (5) was different to other treaties, raising questions about whether the inconsistency with other instruments meant that it had a different meaning to parallel provisions in other instruments, such as article 27 (1) of the Rome Statute or article IV of the Convention on the Prevention and Punishment of the Crime of Genocide. Others felt that the Commission's draft provided a good balance on this question.

48. It was noted that the International Court of Justice had established prohibitions on investigating or prosecuting Heads of State in its judgment of 14 February 2002 in the case concerning the arrest warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*),[9] and in its judgment of 20 July 2012 in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.[10] But the Court had also limited that immunity by providing, in line with the *Pinochet* decision, that Head of State immunity before national courts applied only while a person was Head of State but not after they had left office. It was observed that it would be useful to make that point clear.

49. *Non-applicability of statutes of limitations.* Article 6 (6) of the draft text requires States to eliminate statutes of limitations that might preclude the prosecution of crimes against humanity. This is a critically important provision, as it may take many years before investigation and prosecution is possible. It was noted that the language of draft article 6 (5) was complex and cryptic. Rather than stating that "States shall take the necessary measures to ensure…", perhaps a more self-executing wording could be advisable for judges and prosecutors, such as "no statutory limitation should apply to crimes against humanity".

50. *Appropriate penalties.* Draft article 6 (7) provides that crimes against humanity shall be punishable by appropriate penalties that take into account their grave nature.

51. *Liability of legal persons.* Draft article 6 (8) provides that subject to its national law, a State shall, where appropriate, establish the liability of legal persons for crimes against humanity. This is an important and innovative provision. It respects the diversity of approaches in national legal systems by providing that, subject to the legal principles of the State, the liability of legal persons may be criminal, civil or administrative. This flexibility is important because in many national jurisdictions criminal liability does not exist for non-physical persons but administrative or civil liability does.

B. Draft article 7: establishment of national jurisdiction

52. Draft article 7 provides a solid basis to carry out domestic investigations and prosecutions. Under it, States are encouraged to provide relatively broad bases of jurisdiction over crimes against humanity. They are required to establish their

[9] See the case concerning the arrest warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), *Judgment, I.C.J. Reports 2002*, p. 3.

[10] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

jurisdiction if the offence is committed in their territory under draft article 7 (1) (a) and by one of their nationals or a stateless person habitually resident in their territory under draft article 7 (1) (b). They are permitted to exercise jurisdiction if the victim of a crime against humanity is a national of their State (passive personality principle) if they "consider[] it appropriate". They are also required to establish their jurisdiction if the offender is present on their territory if they do not extradite or surrender the person to another State or international tribunal providing for universal jurisdiction. This will help to reduce the impunity gap by ensuring that States do not become safe havens for the perpetrators of crimes against humanity. In addition, the possibility of using universal jurisdiction (which already exists for war crimes and crimes against humanity in many jurisdictions) could be more unequivocally stated.

53. Draft article 7 (1) (b) applies the active personality principle to resident stateless persons who are perpetrators of crimes against humanity. However, it seems more likely that a stateless person would be the victim of a crime against humanity. However, draft article 7 (1) (c) is silent on that point, as are the commentaries. This may be a gap in the jurisdictional regime proposed by the Commission that should be examined. It was noted that the Rome Statute did not provide for passive personality as a basis of jurisdiction, but that limit might not be appropriate in an inter-State convention.

C. Draft article 10: *aut dedere aut judicare*

54. The principle of *aut dedere aut judicare* is a necessary element to bring perpetrators of the most serious crimes to justice. Draft article 10 provides that the State under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State of competent international criminal court or tribunal, submit the case to its competent authorities for prosecution. This is a fundamental tool to allow the permissive norm of universal jurisdiction – in draft article 7 – which obliges the State in which the perpetrator is present to either prosecute or extradite. This is a significant tool in the fight against impunity, as evidenced by the *Pinochet* and *Hissène Habré* cases, and, as noted above in paragraph 43 of the present report, may conflict with the ability to apply an amnesty. Under the jurisprudence of the International Court of Justice in *Belgium v. Senegal, supra*, the true obligation is to open an investigation and the secondary obligation is to extradite even if no international warrant has been issued. In its 2014 report on *aut dedere aut judicare*, the International Law Commission discussed the question of priority and the scope of the obligation to prosecute. The Commission appeared to suggest that they were two independent obligations. A State must have a basis to prosecute, and then extradition appeared as an option.

55. That said, a question was raised as to whether the manner in which article 10 had been drafted gave priority to extradition, with submission to prosecution second. The Commission had not relied directly on pre-existing treaty language for draft article 10, although it was not dissimilar to article 7 (1) of the Convention against Torture and article 9 of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity of 2010. It was also noted that the draft articles were interconnected: the non-refoulement provision of draft article 5 meant that there might be a situation in which a State could not extradite an alleged perpetrator because they might also be a victim of crimes against humanity. In such a case, presumably, the State would have an obligation to investigate and prosecute.

VI. Investigation, extradition and mutual legal assistance (draft articles 8, 9, 13, 14 and annex)

A. General

56. The importance of the draft articles with regard to investigation, extradition and mutual legal assistance cannot be overstated. They are comprehensive and need to be examined in their totality, as well as individually, as they form part of a complex matrix. They provide an excellent basis for further negotiations that should be undertaken. They have been drafted over a period of years, and accountability and cooperation with regard to these kinds of atrocities are extremely important in many regions of the world. These four articles, and the annex, can be usefully divided into two categories: (a) prevention (including investigation and deterrence); and (b) cooperation. With respect to the provisions on mutual legal assistance, the International Law Commission had borrowed heavily from transnational crime treaties on organized crime and corruption, provisions that are very robust. They had thus enhanced the effectiveness of the legal regime applicable to core international crimes such as crimes against humanity, following the example of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity of 2010.

B. Draft article 8: investigation

57. Draft article 8 requires States to ensure that their competent authorities proceed to a "prompt, thorough and impartial investigation" whenever there are "reasonable grounds" to believe that crimes against humanity are being committed (or have been committed) in any territory under their jurisdiction. This is an important legal obligation, which is loosely based on article 12 of the Convention against Torture (and is similar to article 12 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance), but the brevity of the provision gives rise to a number of questions. First, what is the level of engagement and obligation imposed upon the State? Certainly, as a treaty obligation, there is a good faith requirement imposed upon the State to investigate if the reasonable grounds threshold is achieved. That leads to the second question: what constitutes reasonable grounds? It seems clear that "reasonable grounds" does not require the filing of a formal complaint, and that failure to file a complaint is not a justification for a failure to investigate.

58. Moreover, the text requires a "prompt" investigation. The commentaries indicate that this means "without delay" and references the assessment of the Committee that 15 months is "unreasonably long".[11] The commentaries of the International Law Commission, again making reference to the Committee, observe that the requirement of a "prompt" investigation is important because otherwise, physical evidence of the crime could quickly disappear. In addition, victims may be in danger of further crimes, which a prompt investigation may be able to prevent. The investigation must also be thorough, meaning that the State has taken "all reasonable steps available", and "impartial", meaning that the State must proceed in a "serious, effective and unbiased manner". Again, relying upon the recommendations of the Committee, the International Law Commission has suggested that a commission or the appointment of independent experts could fulfil this requirement.[12]

[11] Commentaries to article 8, para. 4, p. 88.

[12] Ibid., para. 6, p. 89.

C. Draft article 9: preliminary measures when an alleged offender is present

59. The three paragraphs of draft article 9 provide for certain preliminary measures to be taken by the State upon the territory of which the alleged offender is found. Draft article 9 (1) calls upon the State to take the person into custody based on an examination of the information available to it. This is a mandatory provision: The State "shall take the person into custody or take other legal measures to ensure his or her presence". Draft article 9 (2) requires the State to then "immediately make a preliminary inquiry into the facts", and draft article 9 (3) requires a State taking a person into custody to "immediately" notify the States with jurisdiction over the accused under draft article 7 (1) (the territorial State or the State of the accused or victim's nationality) that it is undertaking a preliminary inquiry and indicate whether or not it intends to exercise jurisdiction. Reading the draft articles together, the exercise of preliminary measures under article 9 must also comply with the fair treatment standards regarding individuals in custody under article 11.

60. Finally, the commentaries note that the General Assembly and the Security Council have recognized the importance of preliminary measures in the context of crimes against humanity.[13] Thus, failure to undertake preliminary measures may be a violation of a State's obligations under the Charter of the United Nations. The International Court of Justice, in *Belgium v. Senegal*, underscored, in paragraphs 72 to 88 of its judgment, the importance of these obligations under the Convention against Torture.

D. Draft article 13: extradition

61. Draft article 13, on extradition, is the longest article of the text of the International Law Commission. Subdivided into 13 paragraphs, it addresses the rights, obligations and procedures applicable to the extradition of an individual accused of crimes against humanity. This is a core feature of the draft, linked to articles 7, 9 and 10, and is a paramount requirement, that States must cooperate in the realm of extradition regarding individuals accused of crimes against humanity. The Commission drew inspiration from the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity of 2010 and decided to model its draft on article 44 of the 2003 United Nations Convention against Corruption, which in turn was modelled on article 16 of the 2000 United Nations Convention against Transnational Organized Crime.

62. Draft article 13 is detailed so as to provide sufficient legal clarity for States wishing to rely upon it as the basis for extradition from another State with which they have no extradition treaty, draft article 13 (4), and requires States to ensure that all offences in draft article 2 are deemed extraditable by them (draft article 13 (2)). Draft article 13 (3) makes clear that crimes against humanity cannot be regarded as political offences and cannot refuse extradition on those grounds alone. Paragraph 8 requires States to ensure that their national law is adapted to permit expeditious extradition of individuals accused of crimes against humanity. Finally, paragraph 7 allows States to provide for grounds to refuse extradition, but the commentaries note that whatever the reason for refusing extradition, the obligation to submit the case to its competent authorities for prosecution under draft article 10 would remain.[14] In addition, before refusing extradition, paragraph 13 requires the requested State to allow the requesting

[13] See the commentary to draft article 9, para. 4, p. 91.

[14] See the commentaries to draft article 13, para. 20, p. 116.

State “ample opportunity to present its opinions and to provide information relevant to its allegations”.

63. Draft article 13 (10) addresses the situation in which extradition is for the purposes of enforcing a sentence, but the convicted person is a national of the requested State which refuses to extradite its nationals. In such case, the draft article requests the State to agree to enforce the sentence itself. Draft article 13 (11) is a safeguards provision, noting that there is no obligation to extradite if the requested State has “substantial grounds” for believing that the request was made for the purpose of prosecuting or punishing a person on account of their gender, race, religion, nationality, ethnic origin, culture, membership in a particular social group, political opinions or other ground universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person’s position for any of these reasons. Paragraph 11 is modelled on article 16, paragraph 14, of the 2000 United Nations Convention against Transnational Organized Crime, and article 44, paragraph 15, of the 2003 United Nations Convention against Corruption. However, the Commission made two changes. First, it replaced the word “sex” with the word “gender”; the commentaries are silent on the reason for this change. Second, it included the term “culture” and “membership of a particular social group” in the provision. Sexual orientation is not explicitly included but could be argued it is included by implication or within the concept of “social group”.

64. *Dual criminality and multiple requests for extradition.* The Commission declined to include a provision on dual criminality,[15] and declined to address the issues of multiple requests for extradition,[16] leaving this to national law. Many participants observed that it would have been useful if the Commission had included a provision on competing requests for extradition, and it was noted that there was some language on conflicting requests in article 51 of the draft mutual legal assistance treaty, as well as in the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity of 2010, in article 12, which creates a cascade of preferences beginning with the territorial State.

E. Draft article 14 and annex: mutual legal assistance

65. Draft article 14 (1) provides that States shall afford one another the widest measure of mutual legal assistance in investigating, prosecuting and regarding judicial proceedings for crimes against humanity. The provisions of article 14 of the draft text draw inspiration from the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption. Draft article 14 (3) sets out the reasons for which mutual legal assistance may be requested, and paragraphs 4 to 9, as well as the annex, elaborate on these elements. The key was to enhance State cooperation by providing detail sufficient for States to have clarity and to understand what is required of them; and to establish the necessary legal framework. The Commission departed from the Organized Crime Convention and the Convention against Corruption in certain respects, for example, by adding assistance in identifying victims and witnesses, as well as offenders, in draft article 14 (3) (a).

66. *Relationship of the draft articles to other mutual legal assistance treaties.* Draft article 14 (7) states that the provisions of the draft article will not affect a State’s obligations under other treaties that may govern mutual legal assistance. It was observed that paragraph 19 of the commentaries to this article was potentially contradictory by providing that if particular paragraphs of draft article 14 required

[15] Ibid., paras. 37–39, pp. 120–121.

[16] Ibid., paras. 35–36.

the provision of a higher level of assistance than other mutual legal assistance treaties, then the provisions of the crimes against humanity convention should apply as well.[17]

67. *Rationale for the annex to the draft articles.* Draft article 14 (8) provides that the draft annex applies to requests if the States in question are not already bound by a mutual legal assistance treaty and encourages a State to apply the provisions of the annex if it facilitates cooperation. The addition of the annex follows the work of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity of 2010. It allows for the complex provisions of mutual legal assistance to become part of the crimes against humanity framework, but without overburdening the text so that it becomes difficult to read and understand. The beauty of the Convention on the Prevention and Punishment of the Crime of Genocide is the simplicity of the text, which can be read and understood by an educated lay reader and gives a clear idea of what genocide is and what obligations States have undertaken by ratifying the convention. This would ideally be the case for a new treaty on crimes against humanity as well. The annex functions like a mini mutual legal assistance treaty, providing some of the details of what mutual legal assistance should look like, including such aspects as the creation of a centralized authority, request procedures and grounds for refusal.

68. Some participants found draft article 14 and the annex overly detailed, given the considerable number of treaties to which States were already party and their extensive experience with extradition and mutual legal assistance. Others found the provisions useful, noting that different States had different mutual legal assistance requirements and considerations. For some, it was deemed necessary to have bilateral treaties and national legislation. From this view, the annex would have value as a model for cooperation or for implementation as national legislation. It was observed that the draft articles were aimed at covering a legal gap with regard to the prevention and punishment of crimes against humanity, and that the mutual legal assistance provisions were largely procedural and embodied secondary rules. Given that, in the view of the International Law Commission, the annex was meant to serve as a tool for States if they thought that it would be useful, it was probably not an indispensable element of the convention. Thus, at some point, it might make more sense to free the convention from the annex and deal with these components separately.

69. *Relationship of the mutual legal assistance initiative to the draft articles.* Participants observed that the mutual legal assistance initiative treaty, elaborated outside the United Nations system by a group of States including Argentina, Belgium, Netherlands (Kingdom of the) and Slovenia, was going to be discussed and was likely to be adopted at a diplomatic conference to be held in Slovenia in May 2023. The treaty would address genocide, crimes against humanity and war crimes, and, if States so chose, torture, enforced disappearance and the crime of aggression. A question arose regarding the relationship of that quite lengthy instrument with the proposed crimes against humanity treaty under discussion at the United Nations. Participants suggested that as a general matter, the two treaties were compatible, as they could both enhance inter-State cooperation with regard to atrocity crimes. At the same time, State representatives who participated in parallel treaty negotiations for the mutual legal assistance and crimes against humanity treaties would have to provide opinions to their Governments as to the reason their States should enter into the ratification of multiple treaties. The point was made that the crimes against humanity draft articles and commentaries provided substance on crimes against humanity, as opposed to the mutual legal assistance treaty, which was extraordinarily detailed regarding the mechanics of mutual legal assistance.

[17] See the commentaries to draft article 14, para. 19, pp. 127–128.

VII. Gender and the draft articles of the International Law Commission

A. General

70. Sexual and gender-based violence often happens in secret, which renders it less visible. If the crimes against humanity treaty is negotiated, it would be the first inter-State convention to include provisions on sexual and gender-based violence in peacetime and wartime. In many situations, rape has become a weapon of war; sexual violence in detention particularly affects men and boys; there is a new phenomenon of gender apartheid; and the International Criminal Court is now trying its first case in which gender persecution has been charged. One in three women have been the victims of rape in conflicts around the world; this is not a rare or occasional offence. Rape constitutes a substantial part of the atrocities that this treaty would cover. There is an enhanced awareness of a need for accountability for otherwise invisible atrocities which are extensive and wide-ranging. That said, sexual and gender-based violence is often difficult to prove because it is often not the result of specific orders or policies but a foreseeable consequence of failure to prevent. A question remains as to whether the draft articles would prove effective in the prevention and prosecution of these crimes.

B. Gender awareness and the draft articles

71. The preamble includes language along the lines of the Rome Statute, mentioning the atrocities committed against “millions of children, women and men”. While the sentiment is positive, and consistent with the Commission’s perspective of introducing a streamlined text for States based on existing treaty language, the preamble might usefully be broadened, referencing “people” or simply “humanity”, including a Martens clause, and including a reference to universal human rights. The Commission decided to delete article 7 (3) of the Rome Statute (the definition of “gender”), based on comments from States and civil society that while the definition served a purpose in 1998, it no longer holds a contemporary meaning. Although some had suggested crafting a new definition, the Commission declined to do so.

C. Possible gaps in the draft articles

72. Some suggested expanding the categories protected under the crime of persecution to encompass “sex” as well as “gender”, and that “forced marriage”, which was found to be an “other inhumane act” in the *Ongwen* decision of the International Criminal Court, should be added to the text. Others noted the phenomenon of “forced interruption” of pregnancies, identified in the 2014 report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea (A/HRC/25/63), as a crime against humanity, but not explicitly included in the acts addressed by draft article 2. They inquired whether that offence should be specifically addressed in the text or was covered by other provisions of draft article 2 (1). It was noted that the “without prejudice” clause of draft article 2 (3) and the “other inhumane acts” provision of draft article 2 (1) (k) might cover new crimes.

73. In terms of modes of liability, draft article 6 (1) did not include the forms of liability, at least explicitly, that were successful at the International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda to successfully prosecute sexual and gender-based violence. This may require further discussion of the text.

74. The International Law Commission deleted the word “sex” from draft article 13; perhaps both “sex” and “gender” should be included there and in article 2. In addition, there is little in draft articles 3 and 4 on the general obligations of States and prevention that addresses the problem of sexual and gender-based violence, or crimes committed against other special populations such as children, Indigenous Peoples or persons with disabilities. A question arises as to whether the treaty could do more in the way of capacity-building, specifying additional measures States could use to prevent the commission of crimes against humanity, including linking to existing United Nations mechanisms focusing on conflict-related sexual violence.

75. Another area to consider is whether draft article 8 (investigation) and draft article 12 (victims, witnesses and others) adequately protect the victims of sexual and gender-based violence or other vulnerable populations. State officials are often reluctant to investigate these crimes, and the victims are particularly vulnerable and subject to being retraumatized by the judicial process. Draft article 14 does not address gender implications at all or the impact of criminal investigations and mutual legal assistance on children or those afflicted by crimes related to sexual and gender-based violence. It might be useful to conduct, as has been proposed, a “gender audit” of the draft that could examine the draft articles individually and holistically. Finally, the point was made that, in terms of gender representation, it was not just about the substance of the draft but about the process, and that the International Law Commission had had only seven women as members over the course of its more than 70-year history, suggesting that more could be done in this regard.

VIII. Conclusion

76. The workshop ended on a positive note, with the indication that this meeting was the opening of a substantive conversation that could lead to a real possibility of a crimes against humanity treaty becoming law, 76 years after the Nuremberg trials and more than 100 years after the adoption of the Hague Conventions. The draft produced by the International Law Commission provided an excellent starting point for negotiations and its three main pillars were clear: prevention, punishment and normative development. To those might be added a fourth pillar – capacity-building – to provide incentives to States to ratify the instrument. It was noted that a considerable effort had been made by those attending to take the time to do so, which was appreciated. The facilitators of the resumed session, from Guatemala, Iceland and Malaysia, then provided guidance on the upcoming April 2023 resumed session. They emphasized that all Member States should participate and engage, that the process would be transparent and inclusive, and that the Bureau would fully support the process and be open to requests for assistance.