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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 Mission of 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 the Permanent Mission on 12 and 13 February 2024.

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

I. Introduction

1. On 12 and 13 February 2024, 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 a draft convention on the prevention and punishment of crimes against humanity. On the agenda was the second resumed session of the Sixth Committee of the General Assembly, to be held from 1 to 5 and 11 April 2024, pursuant to General Assembly resolution 77/249. The workshop was designed to facilitate informal exchanges between participants and to encourage the active participation of Member States and civil society stakeholders. In contrast with the preceding such workshop, held on 13 and 14 March 2023 (see A/C.6/77/INF/3), the first resumed session of the Sixth Committee had already occurred when this workshop was held, and participants were thus more familiar with the draft articles on the prevention and punishment of crimes against humanity adopted by the International Law Commission in 2019. In addition, several States had submitted comments on the draft articles in the latter half of 2023 in anticipation of the discussions to be conducted in April 2024.

2. The workshop consisted of six sessions, each opened by an expert speaker, followed by an exchange among participants. The workshop was in English only.

3. The meeting was chaired by Michael Hasenau, Legal Adviser, Permanent Mission of Germany to the United Nations, and Leila Sadat, Professor, Washington University in St. Louis and Yale University law schools, who also served as Rapporteur.[1]

4. Six experts delivered presentations on distinct aspects of the draft articles and facilitated the ensuing discussion, as follows:

- **Sareta Ashraph**, Senior Legal Adviser, Strategic Litigation Project, Atlantic Council, discussed the definition of the crimes
- **William Schabas**, Professor, School of Law, Middlesex University London, discussed prevention and enforcement
- **Olympia Bekou**, Head, School of Law, University of Nottingham, discussed capacity-building
- **Erin Farrell Rosenberg**, Senior Legal and Policy Adviser, Mukwege Foundation, discussed victims
- **Priya Pillai**, Head, Asia Justice Coalition Secretariat, discussed investigation, extradition and mutual legal assistance
- **Anjli Parrin**, Director, Global Human Rights Clinic, University of Chicago Law School, chaired the session on process, and was joined by Anna Pála Sverrisdóttir, Permanent Mission of Iceland to the United Nations; Daniel Leal Matta, Legal Adviser, Permanent Mission of Guatemala to the United Nations; and Nizhan Faraz Rizal, Permanent Mission of Malaysia to the United Nations

5. The meeting was opened by Mr. Hasenau, who observed that Germany attached great importance to the project of developing a convention on the prevention and punishment of crimes against humanity. Given that there was not an international

[1] Washington University in St. Louis Law School students Jeni Christensen and Kristian Sturm and Yale University Lowenstein Project students Tereza Boynova and Gabriela Mitrushi provided note-taking support.

convention governing crimes against humanity, the gap must be closed in order to strengthen accountability and universally bring such crimes to justice. The new convention would add the finishing touch to treaty law on the most serious international crimes and foster inter-State cooperation with respect to their investigation, prosecution and punishment. He clarified that the meeting would operate under Chatham House rules, and that a report would be circulated after the event.[2]

6. Ms. Sadat also spoke by way of introduction, thanking those who had made the meeting possible, in particular the Permanent Mission of Germany to the United Nations. She observed that more than 100 States and many civil society organizations had commented extensively on the Commission's work during the elaboration of the draft articles, and that the ongoing work of the Sixth Committee on crimes against humanity was historic, vitally important, and "fiercely urgent". Resolution 77/249 had provided, and continued to provide, an important framework for the substantive discussion of the draft articles in an interactive, inclusive, structured and transparent process. Finally, she noted that the Commission's objective was to offer a text that would be both "effective and likely acceptable to States", and had recommended that the draft articles serve as the basis of a new treaty.

7. During the two-day meeting, a wide-ranging discussion took place. Instead of addressing each draft article in turn, as had been done during the 2023 meeting, the discussion was structured around overarching thematic elements of the draft articles, in particular those that had emerged from the first resumed session of the Sixth Committee, held in April 2023, and the comments of Governments submitted in the second half of 2023.

II. Definition of crimes against humanity: draft article 2

A. General overview

8. It was observed that the absence of a treaty on crimes against humanity had led to a normative gap, with profound implications for access to justice. It was emphasized that a new treaty would assist States in adopting and harmonizing national laws, bolster inter-State cooperation and strengthen the complementary nature of global efforts to fight impunity. It was impossible to prevent and punish crimes that were not recognized or recognized clearly and with nuance. The international community lost its capacity to respond effectively without this. Definitions, therefore, were vital to the success of a new treaty.

9. A new treaty would also provide for a more survivor-centred approach to justice. That required listening to the experience of victims and survivors, particularly when they did not see their experiences and the harms they had suffered fully reflected in the agreed definitions of crimes. Crimes against humanity were *jus cogens* crimes that shocked the conscience with harms that traversed generations, and thus had an impact not only on the delivery of justice in the present, but also on the achievement of sustainable peace. That fact underpinned the essential role played by the Sixth Committee when it came to grappling with some of the most pressing legal issues of today and tomorrow.

[2] In memory of Auguste Pollei and Wilhelm Wegner.

B. Definition of crimes against humanity: draft article 2

10. *Relationship of the draft articles to the Rome Statute of the International Criminal Court*. The first two paragraphs of draft article 2 had been drawn almost verbatim from article 7 of the Rome Statute. Draft article 2 (3) contained a "without prejudice" clause, which made it clear that inclusion of the Rome Statute definition of crimes against humanity was without prejudice to broader definitions that might exist in international instruments, customary international law or national law.

11. It was noted that the Commission had decided to rely extensively on the Rome Statute because 124 States had already agreed to it. The Commission wanted to support and harmonize existing international law rather than fragment it. In draft article 2, however, the Commission had departed from the Rome Statute definition of crimes against humanity in three respects:

- In paragraph 1, the phrase "for the purpose of this Statute" used in the Rome Statute had been changed to "for the purpose of the present draft articles". That was a purely technical change;
- In paragraph 2, the wording "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" used in article 7 (1) (h) (persecution) of the Rome Statute had been changed to "in connection with any act referred to in this paragraph";
- The Commission had omitted article 7 (3) of the Rome Statute, which defined the term gender "for the purpose of [the] Statute". The Commission had retained that language in its first version of the definition of crimes against humanity included in the draft articles adopted in 2017; however, at its second reading, an overwhelming number of submissions had included requests for the Commission to delete the definition of gender on the grounds that that definition was outdated.

12. *Departures from the Rome Statute*. Several considerations were advanced regarding the possibility of deviating from the definition of crimes against humanity in the Rome Statute. Some participants felt that States should be cautious about amending the existing definition given that so many States, including some that were not parties to the Rome Statute, had already adopted it, which had either incorporated it or considered it to represent customary international law. The point was made that the definition of crimes against humanity had been the hardest definition to elaborate at the Rome Conference of 1998 because, unlike the crime of genocide and war crimes, there was no pre-existing treaty on such crimes. Moreover, there was virtually no case law from the ad hoc international criminal tribunals established prior to the negotiation of the Rome Statute, so States had essentially worked on the basis of the definition in the Charter of the Nuremberg Tribunal, some national case law and the reports of the Commission. They had added many acts to the list of crimes against humanity, including the crime of apartheid, and expanded the scope (rather than amending the definition of genocide in article 6 of the Rome Statute). The biggest clarification made in the 1990s was establishing that crimes against humanity could happen in peacetime; while that had previously been argued, it had not been established definitively until the Rome Conference. That significant achievement of the Rome Conference, which represented a delicate compromise, should be acknowledged.

13. At the same time, nearly 25 years had elapsed since the Rome Statute had been adopted, and minor changes reflecting the current state of the law, 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 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". It was observed that some of the departures from customary international law at the International Criminal Court had been provided for during the negotiation of the Rome Statute to prevent the Court from otherwise being potentially overloaded. States had wanted to create 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.

14. The question was raised as to whether the definition of crimes against humanity in the treaty should be lengthy or short and simple. It was noted that the definition of the crime often varied in the statutes of different tribunals, and a shorter definition could provide flexibility. At the same time, capacity to prosecute could be an issue, especially for smaller States, and they might prefer a more specific and concrete definition to avoid running the risk that some conduct would go unprosecuted. Moreover, a non-specific definition could raise problems under the legality principle as it might make it difficult to understand what conduct was being prohibited. States also needed a common definition to cooperate and a certain degree of standardization to be effective.

15. *Definition of gender*. Several participants expressed support for the Commission's omission from the draft articles of the definition of gender set out in article 7 (3) of the Rome Statute. It was noted that the Rome Statute definition of gender was no longer used by the Prosecutor of the International Criminal Court and that that definition did not fit modern conceptions of the term. The treaty should represent modern international law, and the mainstreaming of gender was important, as was the recognition of sexual and gender-based crimes. It was noted that during the 1990s gender had had quite a different meaning and that it was a newer concept; many States had found discussions of gender during the Rome Conference unsettling.

16. *Forced marriage*. It was noted that proposals were on the table to add the crime of forced marriage to the list of crimes against humanity. Forced marriage had been articulated as an "other inhumane act" by international criminal courts and tribunals, including the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court. The benefit of adding a specific provision to draft article 2 (1) on this crime would be to provide clarity to States and individuals regarding the conduct specifically proscribed by law.

17. *Gender apartheid*. The proposal to amend the definition of apartheid in draft article 2 (1) (j) to add gender apartheid, in addition to racial apartheid, would codify gender-based apartheid and underline the unique context and intent of the crime of apartheid, the latter being the intent to maintain an institutionalized regime enshrining systematic oppression and domination. It was noted that the term "gender apartheid" had long been in use and codifying it would help to close an accountability gap and bolster States' ability to recognize, prevent and punish that crime.

18. *Amending the crime of forced pregnancy and recognizing the existence of other forms of reproductive violence*. It was observed that the definition of forced pregnancy in draft article 2 (2) (f) provided that it should not be interpreted as "affecting national laws relating to pregnancy". A proposal to delete that phrase was made, as forced pregnancy was the only crime listed for which legality under national law was referenced as a circumstance that would prevent the act from being characterized as a crime against humanity. While the draft articles, like the Rome Statute, recognized the crimes of forced pregnancy and forced sterilization, an amendment to draft article 2 (1) (g) had been proposed to change the phrase "sexual violence" to "sexual or reproductive violence"

to facilitate the recognition of other grave violations of reproductive autonomy that might exist, in addition to the two codified crimes.

19. *Definition of enforced disappearance*. Some participants urged amending the definition of enforced disappearance in draft article 2 (2) (i) as it was stricter than what was generally required under international law. For example, the International Convention for the Protection of All Persons from Enforced Disappearance did not include the requirement that the enforced disappearance of persons should be carried out "with the intention of removing them from the protection of the law for a prolonged period of time". It was noted that tribunals had not required that condition in their jurisprudence, and that the expression "prolonged period of time" was vague.

20. *Definition of persecution*. There was much discussion regarding the crime of persecution. It was noted that the phrase "in connection with" used in draft article 2 (1) (h) narrowed the definition beyond even the Rome Statute definition by removing crimes other than crimes against humanity as linked offences for purposes of persecution. It was also observed that customary international law could be broader and eliminate any requirement for persecution to be linked to other offences. Some States parties to the Rome Statute, for example, France and Germany, had removed that requirement when implementing the Rome Statute. The question of adding other protected categories, including Indigenous Peoples and persons with disabilities, to article 2 (1) (h) was raised. It was noted that article 11 of the Convention on the Rights of Persons with Disabilities required States to protect persons with disabilities in situations of risk, including situations of armed conflict and humanitarian emergencies, which would presumably include crimes against humanity.

21. *Addition of the slave trade*. Sierra Leone had formally submitted a proposal for amendments to articles 7 (Crimes against humanity) and 8 (War crimes) of the Rome Statute. The amendments would incorporate provisions envisaging the slave trade as a crime against humanity and as a war crime and slavery in international and non-international armed conflict as a war crime. The proposal to include a provision on the slave trade in the draft articles was also introduced in the Sixth Committee and received favourably by many States. This proposal would rectify what appeared to be an omission in articles 7 and 8 of the Rome Statute. Even though slavery and the slave trade often occurred in tandem and offered a coherent legal framework under treaty law and international customary law they were indeed separate criminal acts.

22. *Other inhumane acts and the legality principle*. A concern was expressed about the ambiguity of the phrase "other inhumane acts". That phrase had historically been included in the definition of crimes against humanity, which had its origins in the Martens clauses in the Hague Conventions of 1899 and 1907. It had been included to capture particularly pernicious and new forms of cruelty and barbarism, but it might raise a legality problem in certain legal systems or be difficult to use in others. It was observed that common law and civil law countries might take different approaches, particularly on the incorporation of customary international law in their national legal systems. Thus, that residual category might be both useful and problematic.

III. Prevention and enforcement including dispute resolution: draft preamble and draft articles 1, 3, 4 and 15

A. General overview

23. It was observed that the draft articles themselves included the phrase "prevention and punishment" in their title, taking inspiration from the Convention on the Prevention and Punishment of the Crime of Genocide, but not reproducing it. The Genocide Convention was 75 years old and a product of its time. It had very few

articles on prevention, and most of the gaps in that respect had been filled by the jurisprudence of the International Court of Justice in its 2007 judgment on *Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v. Serbia & Montenegro)* and subsequent case law. With respect to the elements of the crime itself, reference was made to the case law of the international criminal tribunals and the International Criminal Court and, to a lesser extent, the case law of the International Court of Justice. Presumably, as negotiations progressed on a new crimes against humanity convention, such case law would be considered to ensure that the obligations included were interpreted in the manner intended.

24. The Genocide Convention was a major step forward for States as it recognized that some encroachments on sovereignty were necessary and permitted. The invocation of genocide often resulted in an extended debate about intention and about whether a particular population represented a distinct racial, ethnic, national or religious group. The question often arose as to whether ethnic cleansing constituted the crime of genocide or whether there was a hidden motive to destroy a group. In contrast, crimes against humanity were much broader. The Genocide Convention itself addressed the problem of prevention of inchoate crimes including attempt and incitement. It was difficult to measure the success of the Genocide Convention as situations in which it had succeeded were not necessarily visible, while cases where it seemed to have failed had been observed.

B. Scope: draft preamble and draft article 1

25. Draft article 1 provided that "the present draft articles apply to the prevention and punishment of crimes against humanity". It was observed that in the commentary to the draft article it was emphasized that the two primary purposes of the draft articles were prevention and punishment. Participants noted that there existed treaties addressing genocide and war crimes which dated back to the period immediately following the Second World War, but that there was not a single instrument of the same kind that was applicable at the horizontal level in respect of crimes against humanity.

26. Several participants observed that the statement in the draft preamble establishing 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 this was not the first time that the Commission had concluded that crimes against humanity were *jus cogens* crimes. It was observed that the commentaries to the draft articles relied heavily on the judgments of the International Court of Justice but more could be done to emphasize the *jus cogens* nature of crimes against humanity in the draft articles. In particular, the question of *erga omnes* standing was not addressed in the commentaries.

C. General obligations: draft article 3

27. It was noted that draft article 3 was one of the most important provisions of the text. Paragraph 1 provided that States had an obligation not to engage in acts that constituted crimes against humanity. That obligation entailed two aspects: first, an obligation not to commit such acts through their own organs or persons within their control, and second, an obligation not to aid or assist another State in the commission of an internationally wrongful act. The provision was inspired by paragraph 166 of the 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

Genocide Convention. The Commission was clear on what the duty of States was regarding the crime of genocide and considered that to be equally applicable to crimes against humanity, including in relation to matters of State responsibility.

28. Paragraph 2 required each State to undertake to prevent and punish crimes against humanity as crimes under international law whether or not committed in time of armed conflict. That was a new provision. The text of the provision and the commentary thereto clarified international law by noting that crimes against humanity were prohibited, whether or not such conduct was prohibited at the national level. That meant that States themselves must not engage in crimes against humanity and also ensured that others within their jurisdiction and control, including armed forces, rebel groups and other non-State actors, did not commit crimes against humanity.

29. Paragraph 3 provided that "no exceptional circumstances whatsoever" could be invoked as a justification for crimes against humanity. It was inspired by article 2 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as similar provisions in other international law instruments, which provided the normative architecture for the draft.

30. 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) of the Commission's articles on the responsibility of States for internationally wrongful acts. Article 41 (1) required States to "cooperate to bring an end through lawful means any serious breach" of a peremptory norm of international law. If the draft articles were reopened, there might be an opportunity to include such an obligation in draft article 3.

31. With respect to draft article 3 (2), a question was raised as to the scope of a State's obligations in the face of crimes against humanity. The commentary 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 that they had the same obligation in respect of crimes against humanity. That was a "due diligence" obligation, which applied in certain circumstances where the State had a capacity to influence the situation, and the Court was clear that it was an obligation of "conduct" and not one of result. In the words of the Court, "a State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred in the State manifestly failed to take all measures to prevent genocide were within its power, and which might have contributed to preventing the genocide".[3]

D. Obligation of prevention: draft article 4

32. *Prevention as a pillar of the draft text*. It was observed that the obligation of prevention, which was explicitly included in draft article 4, was a concept that permeated the entirety of the draft articles. Under the draft articles, States were obliged 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.

33. *Territorial application*. Draft article 4 (a) provided that the scope of the obligation to prevent was "any territory under [a State's] jurisdiction". It was noted in the commentary to the draft article that obligations of prevention were found in

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 430.

most international criminal law treaties and many human rights treaties, with reference being made to Human Rights Council resolution 28/34 of 2015 on the prevention of genocide. In addition, in the commentary to draft article 4 (b), the Commission referenced the obligations of States to cooperate with each other to prevent crimes against humanity and to cooperate with relevant intergovernmental organizations. There was thus little evidence that the Commission intended the obligation to be extraterritorial in nature. Thus, draft article 4 (a) could be read as restricting the obligation imposed by draft article 3 (2) to prevent crimes against humanity.

34. In contrast, the obligation imposed by the International Court of Justice was extraterritorial, as Serbia had been found to be in breach of its obligation to prevent genocide in Bosnia, and the Court had found that the substantive obligations arising from articles I and III of the Genocide Convention were not "on their face limited by territory".[4] That raised the question of whether the territorial scope of the obligation of prevention under the draft articles was different than the territorial scope of that obligation under the Genocide Convention. It was striking that the Commission's draft articles did not codify what the Court had stated in 2007; they seemed to build upon the principle but did not codify it.

35. *Cooperation with other entities*. Article 4 (b) obliged States to prevent crimes against humanity through cooperation with other States, relevant intergovernmental organizations and, as appropriate, other organizations. That obligation was already implicit in Articles 1 and 56 of the Charter of the United Nations. It was also present in General Assembly resolution 3074 (XXVIII), which, in its paragraph 3, provided that States should cooperate with each other in halting and preventing war crimes and crimes against humanity, and, in its paragraph 4, required them to "assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes". The draft articles took those principles further by codifying them in a clear way and including a provision for cooperation with organizations such as the International Committee of the Red Cross. Article VIII of the Genocide Convention provided that any State party may call on the organs of the United Nations in case of genocide. It was conceivable that a similar provision could be added to the proposed convention. Some States had interpreted article VIII as a call for collective action. That call to action was echoed in paragraph 139 of the 2005 World Summit Outcome, wherein the pillars of the "responsibility to protect" were set out.

36. Regarding international prevention efforts, it was noted that the International Court of Justice had found that a State's failure to cooperate with the Security Council and international justice mechanisms like the International Tribunal for the Former Yugoslavia could lead to an inference 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 examined agencies of the State and their efforts to prevent torture.

37. *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 draft article 4, rather than simply being mentioned in the commentary to draft article 3. In response, it was observed that there was no specific formulation of the concept, but that its elements could be found in the Commission's articles on the responsibility of States for internationally wrongful acts, the jurisprudence of the International Court of Justice and the Commission's work on *jus cogens*. It was also noted that discussions about prevention were normally linked to the responsibility to

[4] Ibid., para. 183.

[5] Ibid., para. 449. The Court found that failure to cooperate with the International Tribunal for the Former Yugoslavia was a breach of article VI of the Genocide Convention.

protect, and it might be helpful to elaborate on the interlinkage between those two issues.

38. *Lack of clarity in the obligation to prevent ongoing crimes against humanity*. The draft articles were not very clear on a State's obligations to prevent ongoing crimes against humanity, either on its own territory or extraterritorially. The question was raised as to when the obligation begins, and it was noted that in the view of the International Court of Justice, "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".[6] In its provisional measures orders for *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) and Application of the Convention on the Prevention* and *Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, the Court had held that the claim that genocide was being committed was "plausible". The issue for consideration was the extent to which the "plausibility" of a genocide charge overlapped with the "serious risk" that genocide was being or would be committed. The European Court of Human Rights referred to a "real risk" in non-refoulement cases. It was also noted that 32 States had intervened in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. Their views concerning the scope of the obligation to prevent genocide varied considerably but informed the understanding of what States believed the obligation to prevent entailed. Those views had not been available at the time the Commission prepared its draft, and thus were not accounted for in the draft articles.

39. *Other modes of prevention*. The draft articles contained obligations of prevention that were familiar and similar to those in the Convention against Torture and other widely endorsed international treaties. Under draft article 4 (a) States were required to adopt effective legislative, administrative, judicial or other appropriate preventive measures. The commentaries to the draft articles provided 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 government officials (e.g. police, military and other relevant personnel). The latter measure was not particularly burdensome as most States were already party to treaties that required training, and could simply add crimes against humanity to training that was already ongoing. The International Court of Justice had found that there was a duty on States parties to the Genocide Convention to take measures, which must otherwise be lawful, in order to compel those with whom they had influence to prevent genocide.[7]

E. Settlement of disputes: draft article 15

40. Draft article 15, the dispute settlement provision, was an important part of the enforcement mechanism in the draft articles. Although the language of the provision was relatively consistent with some treaties in that it required States to endeavour to resolve their disputes through negotiations before addressing their dispute either to the International Court of Justice or resorting to arbitration, it was noted that many treaties also specified a period of time for negotiations, requiring dispute settlement if that period had elapsed. Such a provision might be a useful addition to the draft articles.

41. At the same time, various differences between draft article 15 and article IX of the Genocide Convention were commented upon. It was observed that draft article 15

[6] Ibid., para. 431.

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43.

only referred to the "interpretation or application" of the instrument and not its "fulfilment", unlike article IX of the Genocide Convention. That could be problematic, as the International Court of Justice seemed to suggest that the wording of article IX was important in ascertaining the obligations of States under the Convention.[8]

42. Draft article 15 (3) allowed States to "opt out" of the compromissory clause by submitting a declaration to that effect. In contrast, article IX of the Genocide Convention did not have a provision permitting States to opt out of compulsory dispute settlement (although States had entered reservations to article IX). Some noted that if there was an option to opt out, it should be accompanied by a time limit for exercising it, as some States had suggested in their comments to the Commission. It was also suggested that the need for the opt-out provision would disappear if reservations were permitted under a future treaty. Because the Commission did not traditionally draft final clauses it had not addressed the question of reservations. The Commission had taken a cautious approach; States could choose to revert to the use of a jurisdictional clause in the proposed treaty, which would give compulsory jurisdiction to the International Court of Justice. That would promote accountability for violations of a *jus cogens* crime and increase the political cost to a State for non-compliance. Several participants noted that the Court was viewed favourably by States, which might suggest that compulsory jurisdiction would be appropriate. That said, a concern was expressed that States might choose not to join the treaty without the option to opt out of dispute settlement.

F. Possible establishment of a monitoring body

43. The concept of a monitoring body did not appear in the draft articles but had been raised in comments and in article 19 (Institutional Mechanisms) of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity issued by the Crimes against Humanity Initiative in 2010. Sierra Leone and the Office on Genocide Prevention and the Responsibility to Protect had suggested the possibility of establishing a monitoring body when the Commission had been carrying out its work, and the idea had been explored in the third and fourth reports of the Commission's Special Rapporteur for the topic of crimes against humanity, in which the Special Rapporteur had canvassed various models. A monitoring body could take many forms, such as a fact-finding commission; it could also consist of a committee of experts like those created by various human rights treaties.

44. There were positive and negative aspects to including a monitoring mechanism in the proposed treaty. On the positive side, it would breathe life into the treaty's obligations, provide clarity, ensure accountability and facilitate enforcement of the treaty. The commentaries to the draft articles extensively quoted or drew from the work of various treaty bodies, suggesting their importance in interpreting treaty text. The hesitation around a monitoring mechanism involved matters of resources, budgets, elections and the administrative complications of creating a new entity. A monitoring mechanism might also create duplication with the work of the Special Adviser to the Secretary-General on the Prevention of Genocide or the Human Rights Council.

G. Incitement to crimes against humanity

45. It was observed that there was a connection between criminal prosecution as a form of deterrence and the prevention of crimes against humanity. In that regard, it was important to consider inchoate crimes, such as attempt and incitement, as

[8] Ibid., paras. 168 and 169.

essential elements of prevention. Including incitement to crimes against humanity as a mode of liability could be particularly important to that effort and would build upon the historical precedent set by the Nuremberg Tribunal, as well as the jurisprudence of the International Criminal Tribunal for Rwanda concerning incitement to genocide.

46. Article 25 (e) of the Rome Statute referred to incitement without result as an inchoate crime, but only in the context of genocide. At the Rome Conference, it had been agreed that incitement should not be defined as an inchoate crime in connection to crimes against humanity or war crimes because the Commission had not included it in the draft text. In addition, the Rome Statute specified that incitement to genocide should be direct or public. There was concern that criminal proceedings for incitement in connection with other international crimes could encroach on legitimate freedom of expression, or even be racially discriminatory.

47. The draft articles provided for liability in cases of attempts to commit crimes against humanity and aiding and abetting such crimes. Perhaps those who incited could be prosecuted for aiding and abetting. That would potentially extend the criminalization under the treaty to offences that preceded crimes against humanity.

IV. Capacity-building: a fourth pillar

A. General overview

48. The importance of building capacity should not be underestimated. Several States had raised the importance of capacity-building in their most recent comments, noting that the enhancement of national capacity should be a core pillar of a future convention, alongside the prevention and punishment of crimes against humanity envisaged in the draft articles. That was because States had been entrusted with the primary responsibility to prevent, investigate and prosecute crimes within their domestic legal systems, as well as to promote effective international cooperation.

49. Draft article 4 underscored the obligation of prevention, calling for States to take various legislative, administrative and judicial measures within their national jurisdictions, as well as to cooperate with other States and organizations. Similarly, draft article 6 mandated States to criminalize crimes against humanity in their domestic law and outlined several measures that States should take to ensure effective investigation and prosecution. Strengthening national capacity was therefore a key priority. Only through capacity-building could States empower their national jurisdictions to effectively implement preventive measures and oversee national investigations and prosecutions in line with international standards.

50. It was observed that the three main pillars of the draft articles – prevention, punishment and normative development – offered a robust framework for addressing crimes against humanity on a global scale. It was suggested, however, that to further strengthen the effectiveness and implementation of such a treaty, a fourth pillar must be added: that of capacity-building.

B. Specific capacity-building measures

51. *Strengthening national systems*. Giving effect to a future convention would require the enactment of domestic legislation. Incorporating the convention into national legal systems would give meaning to the provisions of the convention at the national level and would enable States to fulfil the obligation to effectively prevent, investigate and prosecute crimes against humanity. More than 70 States had incorporated crimes against humanity into their national laws; many had done so

when implementing the Rome Statute provisions. Therefore, although there was a rich body of national laws that could be studied and from which to draw inspiration, consideration and review of existing provisions might be required, for example, to implement measures to prevent such crimes, not least because the proposed crimes against humanity convention would be broader.

52. The complexity of international crimes presented additional challenges to national jurisdictions, and building capacity would be required to implement the proposed treaty. National law enforcement and judicial authorities might lack the technical expertise required for the complex criminal investigations required. That challenge might be exacerbated by overwhelming caseloads and limited resources to manage cases effectively. Resource constraints could further hinder the ability of States to invest in the training and infrastructure that was crucial for preventing and addressing crimes against humanity, including training for law enforcement personnel, judicial officers and investigators, as well as the development of necessary infrastructure.

53. *Specific measures that might be useful*. Within the framework of a new convention on the prevention and punishment of crimes against humanity, States should be equipped with all the tools needed to address existing impunity gaps on crimes against humanity. Capacity-building efforts that provided resources, legislative assistance, training and technical support to enable States to enhance their ability to fulfil the obligations imposed and to effectively prevent and prosecute crimes against humanity should be considered.

54. Provisions on capacity-building could offer States an incentive to become parties to the treaty. States with fewer resources and smaller States would be encouraged to view the instrument as a benefit, rather than as another difficult set of obligations to fulfil. It was suggested that it would be easier to accomplish this by explicitly recognizing the need for capacity-building in the treaty as a fourth pillar, while perhaps not being too prescriptive about how capacity-building should be provided given the substantial differences between States.

55. Some observed that there were a range of tools and methods and that the pandemic panel examined many of these in looking at capacity-building in that context. Some treaties had low resource-intensive legislation, with secretariats to build and develop, and others had technical bodies. Additionally, investigations of mass atrocities, such as those constituting crimes against humanity, required highly specialized training as the cases were difficult to investigate and build, even for resource-rich States.

56. *Taking inspiration from the International Criminal Court*. States would not need to reinvent the wheel to fulfil capacity-building needs to implement a new convention on crimes against humanity. As the proposed convention intersected with human rights treaties and drew inspiration from international criminal justice instruments, there was plenty of experience, expertise and lessons learned that could be leveraged to enhance capacity-building efforts. States and civil society should be strategic when approaching capacity-building, leveraging existing expertise and resources efficiently to develop a more cohesive and efficient approach. International organizations and civil society could play a leading role, encouraging and assisting States in enacting national laws implementing the treaty and investigating crimes committed on their territory or by their nationals.

57. Moreover, States that had already enacted laws on crimes against humanity could offer valuable insights and guidance to those States that had not yet done so. In addition to offering examples of laws to serve as inspiration, States and non-governmental organizations might wish to voluntarily provide assistance and capacity-building and share best practices, either internationally or within the same region, to help others to fulfil their obligations and enhance domestic capacity.

58. *Role of treaty-monitoring bodies in capacity-building*. It was observed that, given that the proposed convention on crimes against humanity straddled the fields of human rights and criminal justice at the inflection point where human rights violations became criminal offences, States could also look to the existing treaty-monitoring bodies in the human rights system as a model for the mechanism to be considered. While non-binding, a monitoring mechanism could be useful and offer valuable insights. It could provide technical assistance to States when ratifying the convention and support them in fulfilling their obligations. A monitoring mechanism could also provide for measures for early warning systems and specific capacity-building measures, facilitating the exchange of information on successful practices and making recommendations to improve implementation.

59. Inspiration could be drawn from other instruments such as the Convention against Torture and the International Convention for the Protection of all Persons from Enforced Disappearance and the bodies monitoring the implementation of such conventions, which already recognized the importance of capacity-building in preventing and punishing human rights violations. Their monitoring bodies promoted initiatives to equip States with adequate knowledge, experience and skills through the development of training guides, toolkits, practical manuals and training programmes aimed at law enforcement officials and judges to enhance the capacity of national institutions.

60. For example, article 34 of the Convention on the Rights of Persons with Disabilities had established the Committee on the Rights of Persons with Disabilities which considered State efforts to support capacity-building when implementing the Convention. States were obliged to submit reports to the Committee, and article 37 of the Convention provided that "in its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention".

61. It was suggested that perhaps it might be preferable to take a more minimalist approach to the crimes against humanity treaty by using existing bodies or frameworks. One consideration, however, was that this might be adding to the work of other bodies or reinterpreting their mandate. It seemed more likely that capacity-building needs would be met if there was an entity responsible for that task.

C. Overcoming challenges to capacity-building

62. *Resource challenges*. It was noted that all States faced limitations in their ability to build capacity as they did not have unlimited resources at their disposal. Some faced more challenges than others, but availability of resources in terms of physical and human infrastructure as well as expertise, training budgets, conflicting priorities or, indeed, political will were common.

63. States had to navigate how to engage in capacity-building efforts amid conflicting priorities and with ever-shrinking budgets. That required a delicate balancing act. Whether it was passing environmental laws, safeguarding civil rights or addressing various other societal needs, the challenges faced by States were universal. The reality in most States was that the couple of persons that would be tasked with drafting the new national law on crimes against humanity would be the same people that would be asked to draft new bills on climate action, education, etc. As experienced as they might be, they were unlikely to be experts in every area of the law, which was another issue that needed to be considered. When it came to training, there were always conflicting priorities, limited resources and challenges relating to reaching the appropriate individuals with training, training others and maintaining the knowledge acquired.

V. Victims: draft article 12

A. General overview

64. Questions relating to victims and survivors of crimes against humanity were central to the success and legitimacy of the proposed convention. States' written and oral comments in the Sixth Committee were evidence of the great diversity of views on that issue. It was suggested that a survivor-centred approach was important, but it was also noted that that concept needed to be contextualized, given that the definition of "survivor-centred" varied in practice depending on the specific context where it was applied. For example, the Murad Code set out best practices and the minimum international standards for those interacting with victims and survivors, including journalists, donors and criminal investigators. It was therefore suggested that the definition of a survivor-centred approach in the context of an international instrument such as the proposed convention should be considered.

65. First, with respect to the process of drafting a convention, ideally there would be a robust collaborative process between States, civil society organizations and survivors that would examine various national issues, thematic questions, and intersectionality between groups of survivors and types of harm. Yet cost and distance often separated survivors from treaty negotiations. While efforts had been made to bring survivors to the present workshop, it had not been possible.

66. Second, it was noted that it was important to consider whether the text provided substantive and procedural rights to victims and survivors. In that regard, the inclusion of draft article 12, in particular its paragraph 3, which established a right to reparations, were acknowledged as important survivor-centred provisions that demonstrated the progress that had generally been made in international law towards mainstreaming victims' rights and achieving their widespread acceptance. Finally, it was stressed that it was also important to consider not only which rights were included in the draft text, but also to consider whether it provided for procedural avenues through which a victim could meaningfully exercise those rights.

B. Victims, witnesses and others: draft article 12

67. *Key elements of draft article 12*. Draft article 12 (1) (a) provided that any persons alleging that they were victims of crimes against humanity had the right to complain to the competent authorities. Draft article 12 (1) (b) provided that all complainants, and victims, witnesses, relatives, representatives or participants, would be protected against ill treatment or intimidation as a consequence of speaking out. Draft article 12 (2) required States to enable the views and concerns of victims of crimes against humanity to be presented and considered at appropriate stages of criminal proceedings, in accordance with national law. Draft article 12 (3) provided that States should ensure that the victims of crimes against humanity committed by the State or in any territory under its jurisdiction had a right to reparations on an individual or collective basis.

68. *Should the term "victim" be defined in the treaty?* The draft articles currently did not contain a definition of the term "victim". Some participants suggested that the text should contain a definition, to make clear who had the rights set forth in paragraphs 2 and 3 of draft article 12. That could also be necessary as paragraph 1 (b) distinguished between "victims" and "relatives, representatives, or participants". Further, paragraph 2 of draft article 12 provided that "victims" had the right to have their views and concerns heard may be understood to exclude "relatives", potentially also excluding close family members and representatives, individuals that generally fell

within the category of victims under international law. The phrasing of paragraph 1 (b) thus generated a degree of confusion regarding which individuals could exercise the right to have their views and concerns heard.

69. At the same time, some States felt that the definition of victims should be left to national law to preserve flexibility. One possibility was for the treaty to define "victim" but leave most aspects of the procedure governing victims' rights to national systems. The concern was expressed that there could be a regression from international standards if the term "victim" was not defined.

70. *Should "witnesses" be in a separate article of the treaty?* The point was raised that including protection of witnesses and protection of victims in the same article was conceptually confusing, and that it might be useful to create a separate article addressing the rights of witnesses.

71. *Capacity-building and victim assistance*. It was observed that some treaties, such as the Convention on Cluster Munitions, had extensive provisions on victim assistance that might be useful to consider as States considered the draft articles (making reference to article 5 of the Convention on Cluster Munitions). In addition, the Convention on the Rights of Persons with Disabilities provided for extensive regimes to protect distinct categories of victims which might also serve as useful models.

72. *Reparations*. One of the signature elements of draft article 12 was its inclusion of a right to reparations. Participants thought that that provision could be expanded upon further. Other participants felt that the Commission had largely struck the right balance by including five forms of reparations for material and moral damages in draft article 12 (3).

73. The point was reiterated that establishing a right and victims having the capacity to exercise that right were separate questions. In that regard, it was highlighted that, unlike paragraphs 1 and 2, which referred to victims' rights during a criminal proceeding, paragraph 3 referred to a right to reparation from the State, which was not an issue addressed during criminal cases focused on individual criminal liability. Thus, how a victim would be able to exercise that right was unclear based on the text of the draft articles, including what State entity victims should approach and when that right was triggered. Similarly, it would be important to ensure that statutory limitations did not apply to proceedings regarding reparations for victims.

VI. Cooperation: draft articles 7, 9, 13, 14 and draft annex

A. General overview

74. The importance of the draft articles in respect of investigation, extradition and mutual legal assistance was emphasized. The draft articles were comprehensive and needed to be examined in their totality as well as individually as they formed part of a complex matrix. They also provided an excellent basis for further negotiations that should be undertaken. The draft articles had been drafted over a period of years, and accountability and cooperation in respect of atrocities were incredibly important in many regions of the world. The draft articles and their annex could be usefully divided into two categories: prevention (including investigation and deterrence) and cooperation. With respect to the very robust provisions on mutual legal assistance, it was noted that the Commission had borrowed heavily from transnational crime treaties on organized crime and corruption. Those provisions had thus enhanced the effectiveness of the legal regime applicable to core international crimes, like crimes against humanity, following the example of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity.

75. The point was made that the focus of the crimes against humanity treaty was substantive, and it was vitally important to ensure that the gap that came from missing a treaty relating to a core crime was filled. For that reason, the proposed treaty perhaps should be less detailed in terms of its mutual legal assistance provisions. In addition, many States would already have the possibility of cooperating under the recently adopted Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes and bilateral and multilateral agreements.

B. Establishment of national jurisdiction: draft article 7

76. Draft article 7 provided a solid basis to conduct investigations and prosecutions at the national level. Under the provision, States were encouraged to provide a relatively broad base of jurisdiction over crimes against humanity. There was no hierarchy created by draft article 7.

77. Pursuant to draft article 7, a State was required to establish its jurisdiction when the offence was committed in its territory (paragraph 1 (a)) or by a national of that State or a stateless person habitually resident in its territory (paragraph 1 (b)). States were permitted to exercise jurisdiction when the victim of a crime against humanity was a national of their State (under the passive personality principle) if they considered it appropriate (paragraph 1 (c)) and were also required to establish their jurisdiction in cases where the offender was present on their territory if they did not extradite or surrender the person to another State or international tribunal, providing for universal jurisdiction (paragraph 2). Paragraphs 1 and 2 would help reduce the impunity gap by ensuring that States did not become safe havens for the perpetrators of crimes against humanity and were important for prevention and deterrence. As noted by the International Court of Justice, the establishment of jurisdiction by a State (provided for under draft article 7 (2)) was also connected to the obligation to try or extradite (*aut dedere aut judicare*) (provided for under draft article 10_.[9]

78. *Amendments to and opt-out provisions in draft article 7*. There had been proposals to amend draft articles 7 and 10, either to reflect priority for the territorial State or to add the words “under its control” to the territorial scope. However, some felt strongly that because the language in those two provisions was drawn from more than 100 treaties and reflected customary international law, the provisions should be left as proposed by the Commission.

79. During the negotiations of the Ljubljana-The Hague Convention, an opt-out provision (article 8 (3)) had been added to the text, establishing that a State might, under article 92 (3) of the Convention, formulate a reservation for a renewable period of three years, limiting the establishment of its jurisdiction under article 8 (3) and providing for mandatory jurisdiction in cases where the alleged offender was present in any territory under its jurisdiction and it did not extradite or surrender the accused. In addition, one participant noted that although other proposals, including one vesting the primacy of jurisdiction in the territorial State, had been rejected during the negotiations of the Convention, it might be useful to consider incorporating an opt-out provision that enabled States to formulate reservations in order to encourage their broad participation.

80. Other participants thought that that might set a dangerous precedent given that the Commission had used language used in other important treaties, such as the Convention against Torture, which had established the widest possible bases of

[9] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 75.

jurisdiction to combat impunity for international crimes. It was observed that there was a difference between the exercise of jurisdiction and its establishment and that draft article 7 was about establishing jurisdiction.

C. Preliminary measures when an alleged offender is present: draft article 9

81. The three paragraphs of draft article 9 provided for certain preliminary measures to be taken by the State where the alleged offender was found. As noted in the commentary to draft article 9, the General Assembly and the Security Council had recognized the importance of preliminary measures in the context of crimes against humanity. By omitting to undertake preliminary measures, a State might thus be failing its obligations under the Charter. The International Court of Justice had underscored the importance of such obligations under the Convention against Torture.[10]

82. Draft article 9 (1) called upon the State to take the alleged offender into custody based on an examination of the information available to it. That was a mandatory provision: the wording indicated that the State "shall take the person into custody or take other legal measures to ensure his or her presence". Draft article 9 (2) required the State to then "immediately make a preliminary inquiry into the facts" and draft article 9 (3) required 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 was undertaking a preliminary inquiry and indicate whether or not it intended to exercise jurisdiction. Considering the draft articles as a whole, the exercise of preliminary measures under draft article 9 must also comply with the fair treatment standards regarding individuals in custody in draft article 11.

83. *Irrelevance of official capacity*. Draft article 6 (5) provided that a person's official position was not a ground for excluding criminal responsibility. The commentary to the draft article provided that, while holding an official position could not be raised as a defence, the provision did not affect whatever procedural immunities a State official might have. A question was raised as to whether the draft article should make it explicit that such immunity does 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 immunity. Although, in its commentary, the Commission suggested that the provision was without prejudice to its work on immunity, there was still the question as to the relationship between the proposed convention and the law of immunity, given that the Commission had suggested that immunity, at least immunity *ratione materiae*, was unavailable to persons who had committed crimes against humanity. The language in draft article 6 (5) relating to the role of official position was different than that used in parallel provisions in other instruments, such as article 27 (1) of the Rome Statute or article IV of the Genocide Convention, which raised the question as to whether the inconsistency meant that draft article 6 (5) had a different meaning than those provisions. Others felt that the draft articles provided a good balance on this question.

D. Extradition: draft article 13

84. Draft article 13, on extradition, was the longest of the draft articles. It was subdivided into 13 paragraphs and addressed the rights, obligations and procedures applicable to the extradition of an individual accused of crimes against humanity.

[10] Ibid., paras. 72–88.

Cooperation among States in the area of extradition of individuals accused of crimes against humanity was a paramount requirement and a core feature of draft article 13, which was linked to draft articles 7, 9 and 10. The Commission had drawn inspiration from the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity and had modelled the text on article 44 of the United Nations Convention against Corruption, which in turn was modelled on article 16 of the United Nations Convention against Transnational Organized Crime. In addition, the commentaries to the draft articles drew attention to General Assembly resolution 3074 (XXVIII) (1973), which highlighted the importance of international cooperation in the extradition of persons who had allegedly committed crimes against humanity, so as to ensure their prosecution and punishment.

85. Draft article 13 included detailed provisions with the aim of providing sufficient legal clarity for States that wished to rely upon it as the basis for extradition from another State with which they had no extradition treaty (paragraph 4). It also required States to deem all offences in draft article 2 as extraditable (paragraph 2). Some parties indicated that the provision was more helpful in situations not already covered by an existing extradition treaty.

86. Draft article 13 (3) made clear that crimes against humanity could not be regarded as political offences and that States could not refuse extradition on those grounds alone. Draft article 13 (8) required States to ensure that their national law was adapted to permit expeditious extradition of individuals accused of crimes against humanity. Draft article 13 (7) allowed States to provide grounds upon which to refuse extradition, although the Commission noted in the commentary to draft article 13 that whatever the reason for refusing extradition, the obligation to submit the case to the competent authorities for prosecution under draft article 10 would remain. In addition, draft article 13 (13) provided that, before refusing extradition, the requested State must allow the requesting State "ample opportunity to present its opinions and to provide information relevant to its allegations".

87. Draft article 13 (10) addressed situations of extradition for purposes of enforcing a sentence when the convicted person was a national of a requested State that refused to extradite its nationals. Under the provision the requested State should consider enforcing the sentence itself. Draft article 13 (11) was a safeguard provision which provided that there was no obligation to extradite if the requested State had "substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are 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". The provision was modelled on article 16 (14) of the Organized Crime Convention, and article 44 (15) of the Convention against Corruption. However, the Commission had made two changes to the wording. First, it had replaced the word "sex" with the word "gender", remaining silent in the commentary regarding the reason for this change. Second, it had included the word "culture" and the phrase "membership of a particular social group" in the provision. Sexual orientation was not explicitly included although it could be argued that it was included by implication or within the concept of "social group", or was simply part of gender identity.

88. *Dual criminality and competing requests for extradition*. The Commission had declined to include a provision on dual criminality and had declined to address the issues of multiple requests for extradition, and had left that issue to be addressed in national law (see the commentary to draft article 13). Many participants observed that the inclusion of a provision on competing requests for extradition would have been useful, and it was noted that article 58 of the Ljubljana-The Hague Convention provided for conflicting requests, as did article 12 of the Proposed International

Convention on the Prevention and Punishment of Crimes Against Humanity, which created a cascade of preferences beginning with the territorial State.

89. *Death penalty and extraordinary courts*. It was noted that proposals had been advanced to amend the provisions to permit a refusal to extradite on the grounds that the accused would be subject to the death penalty or prosecuted before extraordinary courts.

E. Mutual legal assistance: draft article 14 and draft annex

90. Article 14 (1) provided that States should afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings for crimes against humanity. The provisions of draft article 14 drew inspiration from the Organized Crime Convention and the Convention against Corruption. Draft article 14 (3) set out the reasons for which mutual legal assistance might be requested, and draft articles (4) to (9), as well as the draft annex, elaborated on these elements. The key was to enhance State cooperation by providing sufficient detail for States to have clarity and understand what was required of them, and to establish the necessary legal framework. The Commission had departed from the Convention against Corruption and the Organized Crime Convention in certain respects, for example, by including assistance in identifying victims, witnesses and offenders, in draft article 14 (3) (a).

91. *Relationship of the draft articles to other mutual legal assistance treaties*. Draft article 14 (7) stated that the provisions of the draft article would not affect the obligations of a State under other treaties that might govern mutual legal assistance. It was observed that paragraph 19 of the commentary to the draft article was potentially contradictory as it provided that if particular paragraphs of draft article 14 required the provision of a higher level of assistance than was provided for under another mutual legal assistance treaty, then the obligations set forth in those paragraphs should apply as well. That said, as a general matter, the idea was that States should be able to choose among various options as needed.

92. *Rationale for the draft annex*. Draft article 14 (8) provided that the draft annex applied to requests if the States in question were not already bound by a mutual legal assistance treaty and encouraged States to apply the provisions of the draft annex if it facilitated cooperation. The addition of the draft annex was line with the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity. The draft annex facilitated the incorporation of the complex provisions of mutual legal assistance into the crimes against humanity framework, without overburdening the text of the proposed convention so that it became difficult to read and understand. The simplicity of the Genocide Convention was one of its great strengths, giving the educated lay reader a clear idea of what genocide entailed and what obligations States undertook by ratifying the convention. A new treaty on crimes against humanity would ideally function similarly.

93. The draft annex functioned like a mini model mutual legal assistance treaty, providing details of what mutual legal assistance should look like, including the creation of a centralized authority, request procedures, grounds for refusal, etc. It was observed that the draft articles were aimed at filling a legal gap in respect of 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 Commission, the draft annex was meant to be used as a tool by States if they thought it would be useful, it was probably not an indispensable element of the convention. Thus, it might make more sense to omit the draft annex from the proposed convention and leave States to deal with mutual legal assistance issues separately.

94. *Relationship of the Ljubljana-The Hague Convention to the draft articles*. Participants observed that the Ljubljana-The Hague Convention, elaborated outside the United Nations system by a group of States, including Belgium, the Kingdom of the Netherlands, Slovenia and Argentina, had been recently adopted and would be open for signature on 14 February 2024. That treaty addressed 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 in respect of atrocity crimes. At the same time, State representatives would have to provide opinions to their Governments concerning the reasons why their States should enter into the ratification of multiple treaties.

95. The point was made that the draft articles and the commentaries thereto covered crimes against humanity in terms of substance, as opposed to the Ljubljana-The Hague Convention, treaty which was extraordinarily detailed regarding the mechanics of mutual legal assistance. Some participants found draft article 14 and the draft annex to be overly detailed, given the considerable number of existing treaties between States and their experience with extradition and mutual legal assistance. Others found the provisions useful, noting that different States had different requirements and considerations with respect to mutual legal assistance. Some States had bilateral treaties and national laws in place, in which case the draft annex could offer value as a model for cooperation or for implementation of national laws.

96. *Cooperation with international mechanisms and international organizations*. Draft article 14 (9) was an important part of the regime set out in the draft text, encouraging States to cooperate with and enter into arrangements with international mechanisms and organizations. At the same time, it would be useful to have more clarity on what was required of States in terms of such cooperation. Many of the participants' comments focused on that provision, and further development of the concept was requested. Thus, more useful detail might be added to the text, though perhaps not so much that it would hamper the elaboration of the convention, which should stand the test of time and remain relevant in 20 or 25 years.

97. *The need for a central authority*. The provisions on the central authority were found in paragraph 2 of the draft annex. Some felt that that provision would be more useful if it were included in draft article 14.

VII. Process for the resumed session of the Sixth Committee in April 2024 and beyond

A. General overview

98. For two days, the workshop had focused on the substance of the draft articles. The final session, however, had been devoted to discussing the process of considering the draft articles during the upcoming second resumed session of the Sixth Committee and what to expect during the session, looking back at the first resumed session held in April 2023 and looking forward to October 2024 and beyond. General Assembly resolution 77/249 provided the framework for those discussions, and participants in the workshop had been fortunate to have the three co-facilitators of the resumed session present. The co-facilitators noted that they were looking forward to building upon the contributions already received, and were considering ways to ensure that the process continued to be as inclusive as possible, including by providing further opportunities for States to engage with the draft articles.

B. Resumed session of the Sixth Committee of April 2023

99. The co-facilitators noted that the workshop presented an excellent opportunity to maintain the momentum of the Sixth Committee as the second resumed session approached. They noted that they were honoured to serve as co-facilitators, and that the resumed sessions were historic as they represented the first time that the Sixth Committee had been given a clear mandate to discuss the substance of the draft articles. It was observed that resolution 77/249 had two purposes: discussion of the draft articles and consideration of the Commission's recommendation.

100. The first resumed session had been successful; it had included the active participation of the entire membership of the Sixth Committee and had offered extensive opportunities to discuss the draft articles. The session had exceeded expectations. Member States had offered comments on the draft articles, which had been divided into five clusters. The three co-facilitators had been committed to conducting a transparent and inclusive process, which had allowed the first resumed session to be successful. Participants noted that the co-facilitators' contributions had been crucial to inviting and encouraging representatives of Member States to take the floor. From the perspective of the co-facilitators, another positive feature of the first resumed session had been the "mini debates" conducted during the general debate, which had facilitated open and frank discussion of specific points. In addition, informal consultations with representatives of Member States had proved useful and informative.

101. The oral report of the co-facilitators, which had been issued at the close of the first resumed session, reflected the comments of States during the session. While written comments and recommendations had also been received in the latter half of 2023, Member States should be aware that even if they had not submitted written comments or participated in earlier meetings, all Member States could and should participate in the second resumed session.

C. Resumed session of the Sixth Committee of April 2024

102. For the April 2024 resumed session, the co-facilitators would again issue an oral report. One difference, however, was that the Chair of the Sixth Committee would also prepare a Chair's summary that would take into account the oral reports of both sessions. The Sixth Committee would convene one day after the week-long session to adopt the written summary, which would include a technical introduction about the session, and an annex containing the Chair's summary.

103. The Sixth Committee would then meet in October and November 2024 during the seventy-ninth session of the General Assembly to consider further the Commission's recommendation (see A/74/10, para. 42) that a convention on crimes against humanity be elaborated on the basis of the draft articles either by the General Assembly or by an international conference of plenipotentiaries. States should be aware that after April 2024, there would be no formal meetings to discuss the draft articles until October 2024, when the Sixth Committee would take a decision on the matter. Thus, it was important to benefit from the April session and also to keep the discussion alive through workshops like the present one and other side events.

D. Discussion

104. It was suggested that guiding questions to focus the attention of States during the resumed session could be useful, to prevent it from becoming repetitive. That might also be helpful for smaller delegations. The co-facilitators noted that the plan was to use, at the second resumed session, the same thematic clusters of the draft

articles that had been used during the first resumed session, for consistency and organizational purposes, but that the organization of work could be adjusted and guiding questions could be formulated.

105. Some States suggested that the mini debates were a challenging format, as delegates generally required clearance for their remarks before commenting in a formal setting. The mini debates took time away from the formal sessions and also cut into the time left for informal sessions, during which representatives could engage in a freer manner. Others, however, noted that the mini debates provided an excellent opportunity to engage and respond to colleagues with different positions. In that way, they contributed to a richer dialogue.

106. In terms of the plans for the seventy-ninth session of the General Assembly, it was suggested that an event during the high-level week could be planned while ministers were in New York, and International Law week could also serve as a productive time to engage with officials based in capital cities.

107. The difficulties experienced by members of civil society were highlighted, as many were not from organizations that had consultative status with the Economic and Social Council. In addition, it was generally agreed that more engagement with non-governmental organizations from different regions was critical.

VIII. Conclusion

108. The workshop ended on a confident note. Considerable time and effort had gone into planning and carrying out the meeting, demonstrating a commitment to and engagement with the process established by General Assembly resolution 77/249. The four pillars of a new treaty on crimes against humanity emerging from the draft articles – prevention, punishment, normative development and capacity-building – and the comments of States had been clarified. Through the hard work undertaken over the past year, considerable progress in discussing and engaging with the draft articles had been made.

109. It was hoped that the second resumed session in April 2024 would be as successful as the first. All participants expressed their gratitude to the co-facilitators for their excellent work and noted that they were looking forward to April. The co-facilitators emphasized that all Member States should participate and engage in the second resumed session so that the process would again be interactive, transparent and inclusive.

110. In closing, Mr. Hasenau called on all participants to continue the dialogue with a view to finding agreement on a mandate for treaty negotiations. He thanked all those who had contributed to the organization of the workshop.