



**Statement on
behalf of South Africa**

by

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at the

**Department of International Relations and
Cooperation of the Republic of South Africa in
the Sixth Committee of the General Assembly**

under Agenda Item

“Crimes against Humanity”

23 October 2017

Mr Chairman

My delegation congratulates the Special Rapporteur, Mr Sean Murphy, on his report and commends him for the noteworthy progress that has been made on the topic of crimes against humanity. We thank the International Law Commission for the job well done on this topic "Crimes against Humanity" and for adopting the entire set of draft articles on crimes against humanity on first reading as well as the commentaries to the draft articles. Closer cooperation between States is growing evermore necessary in an increasingly globalised world. The draft articles present a mechanism through which to strengthen cooperation in order to ensure accountability for crimes against humanity. Whilst international courts serve an important role in this regard, it is essential, in keeping with the principle of complementarity, that States remain the first line of defence in the investigation and prosecution of international crimes. And the draft articles present an opportunity for States to strengthen their domestic capacity in this regard.

Mr Chairman

South Africa was amongst several States in 2013 to issue a joint statement emphasising the need for a treaty to allow for inter-state cooperation in the investigation and prosecution of international crimes. In this regard, South Africa would have liked to see the inclusion of war crimes and genocide within the parameters of the draft articles. The delegation notes that there are steps underway to develop a multilateral convention focused on mutual legal assistance and extradition for all serious international crimes. Although States have been assured that the two initiatives are separate and distinct, it is important that the two initiatives should not conflict with one another. The draft articles are in various respects modelled on the UN Convention against Corruption and the Convention against Transnational Organized Crime. Having ratified both Conventions, South Africa is thus by and large supportive of the draft articles.

Mr Chairman

The draft articles require States to criminalise crimes against humanity under national laws. South Africa has indeed done so through its Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which criminalised, crimes against humanity, together with war crimes and genocide. South Africa's Extradition Act 67 of 1962 follows a broad approach by allowing extradition for "any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more." It does, however, restrict an extraditable offence to those under ordinary criminal law and not military law. In this regard, we recognise and appreciate that draft Article 6 requires States to ensure that offences related to crimes against humanity are incorporated specifically under their criminal laws. The Implementation Act provides South Africa with wide jurisdiction, in section 4, and includes jurisdiction over citizens, persons ordinarily resident in or merely present in South Africa, as well as those who have committed a crime against a South African citizen or person ordinarily resident in the country.

Mr Chairman

My delegation notes with concern that draft article 9(3) seems to place a disproportionate burden on a State which takes into custody a person alleged to have committed an offence under the draft articles. Draft article 9(3) requires such a State to immediately notify all States that have jurisdiction over the offence in terms of draft article 7(1) that the person is in custody and ultimately inform those States whether it wishes to exercise jurisdiction. In the commentary to draft article 9(3), it is acknowledged that situations may arise where a State that has taken a person into custody may not be aware of all other States that have established jurisdiction. Accordingly, "the feasibility of fulfilling the obligation may depend on the circumstances". The current wording of draft article 9(3) seems perhaps too unconditional for an obligation that is highly dependent on circumstances.

Mr Chairman

South Africa does not necessarily require the existence of a treaty in order to extradite, as the Extradition Act enables the President, in certain instances, to consent to extradition in the absence of a treaty. South Africa's International Cooperation in Criminal Matters Act 75 of 1996, similarly does not necessarily require a treaty to be in place for mutual legal assistance. Notwithstanding, we appreciate the flexible approach in providing that the draft articles may also serve as a legal basis for extradition and mutual legal assistance in the absence of a treaty for those States that require the existence of such a treaty. Draft article 14(8) does, however, present some concerns in that it renders the annex applicable by default, unless a treaty on mutual legal assistance is present, in which case the treaty will prevail. Mutual legal assistance is in many instances done on an informal basis or in terms of a non-binding arrangement. Draft article 14(8) will thus make States subject to the annex even in the aforementioned instances, which may negate the purpose of an informal request.

Mr Chairman

The draft articles do not contain provisions on dual criminality for either extradition or mutual legal assistance. The reasoning provided is that draft article 6 mandates States to include offences of crimes against humanity in their domestic law. As a result, dual criminality is automatically satisfied. Whilst such a reasoning appears to be sound, it overlooks the actual wording of draft article 6 which requires States to "take the necessary measures to ensure criminalisation of crimes against humanity. It may thus happen that a State requesting extradition is doing so in relation to one that has not yet completed criminalisation in its domestic law. Nonetheless, this line of argument does not necessarily mean that under South Africa law dual criminality is required.

Mr Chairman

With regard to decisions not to extradite, South African law will not allow extradition to countries where a person may be subjected to a crime against humanity which is in line with the principle of non-refoulement as contained in draft article 5. The Constitutional Court in *Mohamed and another v President of the Republic of South*

Africa and Others (Society for the Abolition of the Death Penalty in South Africa and another intervening) 2001 (3) SA 893 (CC), made it clear that where there is a real risk that a person's basic human rights will be violated, such a person cannot be extradited. The Extradition Act additionally allows for a request for extradition to be refused where "the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion" which similarly appears in draft article 13(9).

Mr Chairman

The delegation notes that there were extensive discussions surrounding the question of whether to include references to immunity from jurisdiction and amnesty in the draft articles. In this regard, crimes against humanity occur in times of instability and it is important to be cognisant of the intricacies of each situation. One must be cautious in laying down blanket preclusions that ignore these intricacies and the sensitivity with which each situation must be approached which could ultimately hamper the attainment of lasting stability.

Mr Chairman

South Africa looks forward to the observations and comments to be submitted by States and international organisations by December 2018.

I thank you for your attention.