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Topic:
Crimes against humanity

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3353rd MEETING

Monday, 8 May 2017, at 3.05 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON, noting that it was the seventy-second anniversary of the end of the Second World War in Western Europe, a war following which the first convictions for crimes against humanity had been handed down at the Nuremberg trials, invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of crimes against humanity (A/CN.4/704).

2. Mr. OUAZZANI CHAHDI, having commended the Special Rapporteur on the quality of his report, said that it was also lengthy, but that given the nature of the topic, it was preferable to have a comprehensive document that could serve as the basis for a thorough debate.

3. He agreed entirely with the proposals made by the Special Rapporteur with regard to extradition, in particular that there was no need to include a dual criminality requirement in the draft articles. He also supported the exclusion of the political offence exception.

4. Chapter IV of the report, on victims' rights and participation in criminal proceedings, raised the important and topical issue of protection of witnesses and whistle-blowers. In Morocco, the reluctance of some individuals to report corruption for fear of endangering themselves had prompted the adoption, in 2011, of a law amending the provisions of the Code of Criminal Procedure on the protection of victims, witnesses, experts and whistle-blowers in relation to corruption, embezzlement and influence peddling, among other offences. It was his belief that the draft articles should contain binding provisions requiring States parties to any future convention to introduce, in their domestic law, measures to protect persons who provided information in relation to crimes against humanity.

5. The monitoring mechanisms discussed by the Special Rapporteur in chapter VII of the report were of great relevance, because without a binding follow-up mechanism, the convention would be difficult to implement. As for

the settlement of disputes concerning the implementation or interpretation of a future convention, the best course would be for them to be referred exclusively to the International Court of Justice.

6. In chapter X, on final clauses, the Special Rapporteur addressed the issue of reservations, the use of which should, in his own view, be strictly limited or prohibited altogether, as in the Rome Statute of the International Criminal Court, even though that might discourage some States from becoming parties to a future convention.

7. Turning to the proposed draft articles, he said that draft article 11 as currently worded was not, *a priori*, problematic, though the reference to a "minimum penalty" in paragraph 6 should be clarified. In draft article 12, paragraph 1, the expression "to territory under the jurisdiction of another State" was likewise unclear. Some of the points raised in draft article 13, which had the semblance of a mini-treaty, should be expressed more succinctly, as pointed out by previous speakers. Regarding draft article 14, he proposed that, in the French text, the words *Chaque État prend les mesures nécessaires pour* ("Each State shall take the necessary measures to ensure that") be replaced with *Chaque État est appelé à prendre les mesures nécessaires pour* ("Each State is called upon to take the necessary measures to ensure that"), which was, in his opinion, more prescriptive. Draft article 16, on federal State obligations, did not belong in the draft articles, in view of the contents of article 29 of the 1969 Vienna Convention. Draft article 17 should not contain provisions on final clauses, as it currently did in paragraphs 3 and 4, and the importance of referring disputes to the International Court of Justice should be underlined; the wording used in the Convention on the Prevention and Punishment of the Crime of Genocide was of interest in that respect.

8. The draft preamble should be expanded to contain additional references, such as to the Rome Statute of the International Criminal Court. The Commission might wish to draw inspiration from the proposals put forward in the draft articles produced by the Crimes Against Humanity Initiative at Washington University's Whitney R. Harris World Law Institute.⁷⁸

9. To conclude, he said that he supported the referral of the draft articles to the Drafting Committee.

10. Mr. VÁZQUEZ-BERMÚDEZ said that he wished to thank the Special Rapporteur for his third report, which complemented the previous two;⁷⁹ it contained draft articles that were based on the provisions of various international criminal law treaties and were underpinned by extensive research and analysis. A matter that informed the draft articles as a whole was the *jus cogens* nature of the prohibition of crimes against humanity, which had been recognized by the Commission itself, by regional and international courts and in domestic jurisprudence. The

⁷⁸ Text available from the website of the Whitney R. Harris World Law Institute: <https://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/convention-text/>.

⁷⁹ *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/680 (first report); and *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/690 (second report).

assertion that the prohibition of crimes against humanity was a *jus cogens* norm should be made explicitly in a pre-ambular paragraph.

11. Turning to the proposed draft articles, he said that, since extradition was a key mechanism for cooperation among States in ensuring the prosecution of crimes against humanity, draft article 11 had to include all the requisite elements for its successful implementation. Some members of the Commission had stated that the references to draft article 5⁸⁰ should be replaced with references to draft article 3.⁸¹ He himself considered that there was an implicit cross reference to draft article 3, since the crimes against humanity mentioned explicitly in draft article 5 were necessarily the acts defined and listed in draft article 3. However, in the interests of total clarity, and to avoid possible problems of interpretation, reference should be made to both draft article 3 and draft article 5. If reference were made only to the former, it would not be clear, for example, whether attempted commission of a crime against humanity or complicity in its commission could lead to extradition.

12. He agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in draft article 11, bearing in mind that, under draft article 5, States had to ensure that crimes against humanity constituted criminal offences under domestic law. However, because there might be cases of non-compliance with that requirement, it should be specified in the commentary to draft article 11 that the fact that an offence had not been criminalized could not justify a State's failure to respond to an extradition request, especially if that prevented cases from being submitted to the national authorities for the purpose of prosecution.

13. He backed the decision not to include the political offence exception to extradition in draft article 11, paragraph 2, in line with various international criminal law treaties.

14. Draft article 11, paragraph 4, was innovative, in that it reversed the default rule found in other conventions by stipulating that, if a requested State that made extradition conditional upon the existence of a treaty with the requesting State chose not to use the draft articles as the legal basis for cooperation on extradition, it was not obliged to extradite until it had signed an extradition agreement. It would be preferable to go even further, however, by simply deleting paragraph 4 and, for the sake of legal certainty, replacing the word "may" in paragraph 3 with "shall". Moreover, it should be mentioned in the commentary that, if the requested State did have an applicable extradition treaty with the requesting State, it could choose to implement it.

15. In draft article 11, paragraph 6, the reference to the "minimum penalty requirement for extradition" should be deleted: it was unnecessary in view of the obligation imposed on States in draft article 5, paragraph 6, to ensure that, under their criminal law, crimes against humanity were punishable by appropriate penalties that took into account their grave nature.

16. The Special Rapporteur had not included a paragraph on the non-extradition of nationals, despite addressing, in paragraphs 9 and 10 of draft article 11, scenarios in which the person sought was a national of the requested State. However, it was necessary to add a paragraph similar to article 44, paragraph 11, of the United Nations Convention against Corruption expressly indicating that, if a State refused to extradite an alleged offender solely on the ground that he or she was one of its nationals, it was obliged to submit the case to its authorities for the purpose of prosecution. In contrast to article 44, paragraph 11, however, it should not be asserted that the obligation to prosecute should be discharged at the request of the State seeking extradition.

17. In draft article 11, paragraph 11, the phrase "that compliance with the request would cause prejudice to that person's position for any of these reasons" was not entirely clear and, although found in certain conventions, was so broad as to be unsuitable in the context of fighting impunity for serious crimes.

18. He did not believe that there were obvious reasons for establishing an order of preference when it came to considering multiple, competing extradition requests. It should be left to the requested State to decide, taking into account the particular situation. Prior consultations between the requested State and the requesting State should, however, be encouraged.

19. He agreed with the inclusion of draft article 12 and, in general, with its content. In draft article 13, the Special Rapporteur presented what had been labelled as a mini-treaty, in other words a long version of provisions on mutual legal assistance inspired, in particular, by article 46 of the United Nations Convention against Corruption. Unlike the short version that appeared in several conventions, which was perhaps too general, the long version offered the obvious advantage of providing States with a detailed guide. Certain changes would be necessary to adapt draft article 13 to the context of crimes against humanity, but he generally supported the proposed text, which contained subtitles for ease of reading. True, draft article 13 was longer than the others, which was why consideration might be given to Mr. Park's proposal to move the majority of the text to an annex: paragraphs 1 to 9 could be retained and paragraphs 10 to 28 transposed.

20. In draft article 13, paragraph 3, a new subparagraph (g) *bis* should be inserted, which in Spanish would read: *localizar e inmovilizar activos para su decomiso, su restitución o el cobro de multas* ("locating and immobilizing assets for purposes of forfeiture, restitution or collection of fines"). Similar language was found in the Inter-American Convention on Mutual Assistance in Criminal Matters, in the Treaty on Mutual Legal Assistance in Criminal Matters and in relevant bilateral agreements. Such a provision could prove particularly important in the context of reparation for victims involving not only the individual responsibility of the perpetrators of crimes against humanity but also the liability of legal persons. He was in favour of keeping draft article 13, paragraph 4, on bank secrecy, which was perfectly applicable to investigations into movements of funds linked to the commission of crimes against humanity and might also be useful in the context of reparation for victims.

⁸⁰ *Yearbook ... 2016*, vol. II (Part Two), pp. 151–152 (draft article 5).

⁸¹ *Yearbook ... 2015*, vol. II (Part Two), p. 37 (draft article 3).

21. The inclusion of a draft article on victims, witnesses and others was highly important and reflected the international community's growing concern for the protection of victims of serious crimes and their rights, including the rights to redress and access to justice. The Drafting Committee should be able to refine the text, taking into account, in particular, the International Convention for the Protection of All Persons from Enforced Disappearance.

22. He agreed with the Special Rapporteur that all the traditional types of reparation appeared to be potentially relevant in the aftermath of the commission of crimes against humanity. Some doubts had been expressed about the inclusion of guarantees of non-repetition, but it had to be borne in mind that crimes against humanity were committed pursuant to a State or organizational policy and that, consequently, the State or organization that pursued that policy might be requested by the victims to provide guarantees of non-repetition, which would help to prevent future occurrences of the crime.

23. In proposing draft article 15, the Special Rapporteur had been sensitive to the desire expressed by various States for the draft articles not to conflict in any way with the rights or obligations of States with regard to competent international criminal tribunals. Under the Special Rapporteur's guidance, the draft articles were being drawn up in a manner that was harmonious with the Rome Statute of the International Criminal Court and did not affect the obligations thereunder. However, as it was clearly impossible to anticipate what kind of international, regional or even subregional tribunals would be set up in the future, the best solution might be to include a "without prejudice" clause, as proposed by Ms. Escobar Hernández.

24. It was appropriate to include a draft article on federal State obligations, with language taken from article 41 of the International Convention for the Protection of All Persons from Enforced Disappearance. In the context of a convention on the prevention and punishment of one of the most serious crimes, it was right to avoid disparate obligations within a State and in relation to unitary or non-federal States. It was important not to allow any reservations to draft article 16 in a future convention.

25. While there were already mechanisms to monitor possible cases of crimes against humanity, it should be noted that, for a future convention to fill a gap in international law and prevent and punish crimes against humanity through cooperation among States and with international organizations, monitoring mechanisms should be established to promote effective implementation. In his view, there should be a draft article calling for the creation of two monitoring mechanisms. The first could be a meeting of States parties, held periodically and exceptionally when circumstances so required, with a broad mandate to promote cooperation in the implementation of the convention and to serve as a forum for the discussion of any relevant issues. The second could be a committee of independent experts elected by States parties to make recommendations concerning the fulfilment of obligations under the convention.

26. He supported the inclusion of the proposed draft article on inter-State dispute settlement, but agreed with

previous speakers that, if a dispute could not be settled through negotiation, it should be referred to the International Court of Justice, without there being an intermediate arbitration stage. Moreover, to promote the widest possible participation in the convention, and bearing in mind that some States would be reluctant to accept compulsory jurisdiction with regard to dispute settlement, it was reasonable to insert an opt-out clause.

27. If there was no consensus on expressly including a provision on the concealment of crimes against humanity, it should be explained in the commentary that the Commission had decided to proceed without one on the understanding that concealment fell within the scope of complicity.

28. The issue of immunity was crucial, and its handling could have a significant impact on the effectiveness of a future convention. The decision not to include a provision precluding immunity from foreign criminal jurisdiction for State officials and members of international organizations should not be misinterpreted as meaning that immunity could be used to block trials, extraditions or even requests for legal assistance. That point should be made clear in the commentary. At the very least, there should be a draft article on the irrelevance of a person's official position in determining his or her criminal responsibility for a crime against humanity, as proposed by Mr. Murase and other members of the Commission. A provision of that kind had been inserted in existing conventions on the most serious crimes and in two instruments developed by the Commission, namely the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal⁸² and the draft code of crimes against the peace and security of mankind.⁸³

29. He did not share the view that the Special Rapporteur appeared to take with regard to amnesties. In his opinion, there was sufficient State practice and national and international jurisprudence to assert that customary international law prohibited amnesties or pardons for the most serious crimes of concern to the international community as a whole. The prohibition of amnesty for crimes against humanity had been recognized in the jurisprudence of international tribunals, such as the International Tribunal for the Former Yugoslavia, regional human rights courts, such as the African Commission on Human and Peoples' Rights, and national courts. It had also been provided for in many national laws, including the Constitution of Ecuador, article 80 of which established that crimes against humanity, among other serious crimes, were not subject to amnesty.

30. In addition, when amnesty had been granted as part of a post-conflict transitional justice process, crimes against humanity and other core crimes under international law had been explicitly excluded, as in the Arusha Peace and Reconciliation Agreement for Burundi.⁸⁴

⁸² *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

⁸³ The draft code adopted by the Commission in 1996 is reproduced in *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

⁸⁴ Arusha Peace and Reconciliation Agreement for Burundi, signed at Arusha on 28 August 2000. Available from: https://peacemaker.un.org/sites/peacemaker.un.org/files/BI_000828_Arusha%20Peace%20and%20Reconciliation%20Agreement%20for%20Burundi.pdf.

31. The most recent example worth citing was the 2016 Colombian peace agreement, which had put an end to the internal conflict in the country.⁸⁵ One of the chapters of the agreement, on the so-called “Special jurisdiction for peace”, expressly provided that no amnesties, pardons or similar measures could be granted for crimes against humanity.

32. In the light of the above, the draft articles should explicitly exclude the possibility of granting amnesty, which might undermine one of the objectives of a future convention, namely to end impunity for the perpetrators of crimes against humanity. The granting of amnesty would also impede the discovery of the truth and the provision of full reparation to victims and their families. Moreover, the *jus cogens* nature of the prohibition of crimes against humanity meant that it could not be derogated from by an amnesty decree or law.

33. He believed that there should be a draft article prohibiting reservations, or that the Commission should at least make a recommendation to States in that regard, in order to safeguard the integrity of a future convention, which was evidently particularly important for the purposes of preventing and punishing crimes against humanity.

34. In draft articles that might be sensitive for States, such as the one on accepting the competence of the International Court of Justice, the Commission could insert opt-out clauses, which would give States flexibility when they became parties to a future convention.

35. As to the future programme of work, it seemed reasonable to attempt to complete the first reading of the draft articles in 2017, but the Commission would need to conduct a careful and unhurried analysis of all the proposed draft articles and the proposals put forward during the debate.

36. To conclude, he said that he supported the referral of all the draft articles to the Drafting Committee.

37. Mr. GÓMEZ ROBLEDO said that a convention on crimes against humanity would undoubtedly fill a gap in international law; however, he did not understand why the drafting exercise did not cover war crimes and genocide. On that point, he did not find the Special Rapporteur’s arguments persuasive. Neither the 1949 Geneva Conventions for the Protection of War Victims together with the Protocols Additional thereto nor the Convention on the Prevention and Punishment of the Crime of Genocide contained demonstrably effective accountability mechanisms. Nor had a specific situation ever been considered by the International Humanitarian Fact-Finding Commission provided for in article 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) or at meetings of the High Contracting Parties provided for in article 7 thereof. That left the application of international humanitarian law entirely in the hands of the depositary, Switzerland, and of ICRC, which were averse to any politicization of that work. As a result, since

the end of the cold war, the Security Council had been the sole guardian of the application of international humanitarian law, with all the attendant disadvantages of that arrangement. The inclusion of war crimes and genocide in the convention would therefore constitute real progress in the prevention and punishment of such crimes.

38. It was impossible to avoid thinking that the purpose of the draft convention was to offer an instrument that was made to measure for those States that had no intention of becoming parties to the 1998 Rome Statute of the International Criminal Court. The draft convention could also have the undesirable effect of discouraging further ratifications of the Statute, especially at a time when two or more States appeared ready to denounce that instrument.

39. The Commission, most unfortunately, was confining itself to its technical role without taking account of the political climate, which had changed radically since 1998. Was it really the best time to send a text to the General Assembly when it was unlikely to promote international cooperation better than the existing treaties on terrorism, transnational organized crime and corruption? Moreover, the Commission had a responsibility to make a recommendation on the matter of a monitoring mechanism—not a minor issue to be addressed in the final clauses, but something that was crucial to the effective implementation of the convention.

40. One serious omission from the draft articles was an obligation that States must refrain from committing crimes against humanity. As the Commission itself had pointed out in its commentary to draft article 58 of the text on the responsibility of States for internationally wrongful acts: “Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved.”⁸⁶

41. Similarly, the International Court of Justice had pointed out, in its 2007 judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, that even though article 2 of the Convention did not expressly require States to refrain from committing genocide, it would be paradoxical if States were under an obligation to prevent the commission of genocide by persons over whom they had some influence, but were not forbidden to commit such acts through their own organs: “the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide” (para. 166 of the judgment).

42. Another serious omission was a provision to rule out the use of military courts to try crimes against humanity. As pointed out in 2015 by Amnesty International in its *Initial Recommendations for a Convention on Crimes against Humanity*,⁸⁷ any future convention should stipulate that

⁸⁵ Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, signed at Bogotá on 24 November 2016. Available from: www.peaceagreements.org/view/1845.

⁸⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142 (para. (3) of the commentary to draft article 58).

⁸⁷ Amnesty International, *International Law Commission: Initial Recommendations for a Convention on Crimes against Humanity*, London, 2015. Available from the Amnesty International website: www.amnesty.org/download/Documents/IO4012272015ENGLISH.pdf.

persons suspected of criminal responsibility for crimes against humanity should be tried and sentenced by the ordinary civilian courts, and not, under any circumstances, by military courts or quasi-judicial military bodies. Many countries in Latin America had redefined their systems of military justice to reflect that view, so that military courts were prohibited from hearing any cases involving a civilian victim. The case law of the Inter-American Court of Human Rights was settled on the matter, as reflected in the rulings in *Durand and Ugarte v. Peru* and *Radilla-Pacheco v. Mexico*.

43. Reparation for harm caused by crimes against humanity should take account of the nature of such crimes and their consequences for victims and society as a whole. Victims must have access to full reparation, in line with General Assembly resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law and recent decisions of the International Criminal Court and the Inter-American Court of Human Rights. Reparation must be adequate, effective and prompt, and proportionate and appropriate to the gravity of the crimes committed, the harm suffered and the circumstances of each case. Adequate reparation for such crimes should include both individual and collective reparations, in line with the March 2017 ruling of the International Criminal Court in *The Prosecutor v. Germain Katanga*. Furthermore, there should be no question of choosing between “one or more” of the various forms of reparation in draft article 14, paragraph 3, since, with the exception of restitution, all the other forms should be granted in all cases where crimes against humanity had been committed. The phrase “one or more of the following forms” should simply be replaced with “the following forms”, and the conjunction “and” inserted before the last item in the list, “guarantees of non-repetition”. The problem had already been addressed in article 75 of the Rome Statute of the International Criminal Court, which talked of “restitution, compensation and rehabilitation”.

44. At the same time, the following wording from paragraph 16 of the aforementioned Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law could usefully be included in the draft articles: “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.”⁸⁸ The Special Rapporteur might find it useful to look at recent Mexican legislation, which established a very thorough system of reparation for victims.

45. It was understandable that the Commission was finding it difficult to make a consensus recommendation to the General Assembly on a monitoring mechanism. There was no single model, there were clear risks of duplication with existing treaty monitoring mechanisms and, perhaps especially, all States, big or small, were experiencing a

sort of “treaty body fatigue”. However, a convention on crimes against humanity without a monitoring mechanism would be a dead letter from the start. It was wrong to claim that the issue was so political that it would be better dealt with by the General Assembly itself. The Commission could discuss the issue, on the basis of the excellent memorandum by the Secretariat,⁸⁹ and perhaps propose something on the lines of a meeting of scientific experts, as had been done for the topic of protection of the atmosphere. Among the new members of the Commission were human rights experts who would surely have much to offer in such a discussion.

46. Perhaps a provision on federal State obligations was not actually needed; however, not all individual States in a federal State were well versed or even interested in international law, and it was very important to find a way to harmonize federal legislation. That was no easy task: in Mexico, for example, the Constitution and legislation had had to be constantly amended to ensure a consistent approach throughout the country to the crimes of torture and enforced disappearance.

47. Lastly, he said that all the draft articles in the report should be forwarded to the Drafting Committee.

48. Mr. GROSSMAN GUILOFF, after commending the Special Rapporteur on the quality of his third report and the thoroughness of his research, said that, in the absence of a universal treaty on extradition, it was imperative to ensure that the rules on crimes against humanity were incorporated in domestic legislation and to enhance international cooperation in that area.

49. Among the many valuable provisions contained in the draft articles was the exclusion, in draft article 11, paragraph 2, of political offences as justification for refusing extradition. Politics could be blamed for many things, but not for condoning crimes against humanity. In the Western hemisphere, before the concept of crimes against humanity had been fully developed, the political offence exception to requests for extradition had been used as a means of protecting from persecution in their countries of origin people who had taken certain political stances. That said, there could be no excuse for granting impunity for such crimes.

50. Another valuable provision was contained in draft article 11, paragraph 9, which permitted the extradition by a State of one of its own nationals on certain conditions. The prohibition of the extradition of nationals was incompatible with the interconnected nature of the contemporary world. He also welcomed the inclusion of the *aut dedere aut judicare* principle in draft article 9⁹⁰ and the establishment of rules on mutual legal assistance in draft article 13.

51. The draft articles drew on two main conceptual sources: the rich legal traditions of international criminal law and international human rights law. The latter was “victim centred”, while criminal law had more of a focus on accountability. However, the two traditions overlapped

⁸⁸ General Assembly resolution 60/147, annex, para. 16.

⁸⁹ *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/698.

⁹⁰ *Ibid.*, vol. II (Part Two), p. 166 (draft article 9).

to some extent, as in their rejection of impunity. The principles that should guide the Commission in drafting a convention like the present one, where the two traditions were interwoven, included effectiveness and balance. It should see which rules from one or the other tradition were the most appropriate and then ensure that the text as a whole drew in a careful and balanced way from both traditions. In the preamble especially, the emphasis could perhaps be more on sources from international human rights law and international humanitarian law.

52. Concerning the absence of a provision on the obligation to provide training, he said that both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance included specific rules on that subject, with generally positive results. Many judicial authorities, prosecutors and members of security forces had received training on national rules and there was far greater awareness of treaty rules among both officials and civilians. In general, there was something of a “prevention gap” in the draft as a whole; that problem could be addressed by referring to training and capacity-building in the preamble and elaborating further on international cooperation within the text of the instrument.

53. He had seen no rule saying that in terms of protection, it was a floor rather than a ceiling that was being proposed, meaning that if any other treaty or piece of domestic legislation established rules that went further than the convention, they would take precedence. Generally speaking, human rights treaties contained a provision indicating that the rules they contained were without prejudice to the provisions of other international instruments that offered greater protection; article 16, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or article 29 of the American Convention on Human Rights: “Pact of San José, Costa Rica” could be cited as examples.

54. He realized that the dual criminal and humanitarian nature of the draft might pose a challenge to its adoption. He had also taken note of the complications pointed out by some members of the Commission regarding draft article 15. It would be interesting to see how the Drafting Committee resolved such problems while retaining rules to ensure fulfilment of the convention’s objectives.

55. It would be helpful to add some language to paragraphs 7, 9 and 10 of draft article 11 to state that domestic legislation on extradition must be consistent with the obligations under international law. Moreover, it did not make sense to limit the reasons for affording protection to those listed in paragraph 11 of the draft article. A phrase such as “or any other status” could be added, or discrimination could be explicitly prohibited. Also, some provision could be included so as to afford protection not just on the basis of one’s status, but also on the basis of one’s actions, in cases where people were seeking to avail themselves of the protection offered by obligations under a treaty.

56. On the question of *non-refoulement*, covered in draft article 12, he said that given the nature of the crime in question—namely, a widespread attack on the

civilian population—it would be a good idea to add a general prohibition referring to existing prohibitions in international law. Proving the existence of a widespread attack on a civilian population for the purposes of compliance with the principle of *non-refoulement* could be problematic. Perhaps a reference to military courts could be included, as Mr. Gómez Robledo had suggested, and as could effective guarantees of due process for individuals in *refoulement* cases. The problems arising from the use of military courts had been thoroughly addressed in the jurisprudence at the regional level and that of several United Nations treaty bodies, and the topic could perhaps be mentioned in the draft.

57. In view of the objectives of the future convention, it was essential to include adequate rules on victims that at the very least did not detract from the existing rules in international law. To that end, four issues had to be fully addressed: the definition of a victim; reparations; the rights of victims; and the protection of victims and witnesses.

58. Draft article 14 did not define victims, but the elements of such a definition were firmly grounded in the international law of responsibility for harm to nationals of other States. The human rights treaty monitoring bodies had developed ample practice in that area. Moreover, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law covered the various ramifications of that right. It therefore did not seem sufficient to leave the definition of victims to national law, as draft article 14 did. The “fourth instance formula” alluded to by previous speakers did not offer States any margin of appreciation for determining who was a victim where gross violations of human rights were concerned. Neither had any of the human rights treaty bodies ever left such a definition to national law, as a careful reading of general comment No. 3 (2012) of the Committee against Torture⁹¹ clearly showed. Rule 85 of the Rules of Procedure and Evidence⁹² of the International Criminal Court did include a definition of victims, although it was a fairly terse one.

59. The meaning of “reparation” was likewise well established in international law. In view of the gravity of crimes against humanity, the Special Rapporteur had correctly included in draft article 14, paragraph 3, references to reparation on both an individual and a collective basis and to guarantees of non-repetition. However, stronger wording was needed, in order to emphasize the need for “effective” reparation. Other important aspects of reparation that merited inclusion were the actual availability of judicial remedies and legal aid, the enforceability of court decisions and the right to the truth. Draft article 14, paragraph 1, should include a reference, not only to individuals, but also to groups of individuals who were subjected to a crime against humanity.

⁹¹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44 (A/68/44)*, annex X, p. 254.

⁹² Rules of Procedure and Evidence of the International Criminal Court, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (ICC-ASP/1/3 and Corr.1, United Nations publication, Sales No. E.03.V.2, Part Two, sect. A), p. 52.

60. Turning to amnesty, he said that the Special Rapporteur had cited a great many instruments and rulings, and he himself could suggest several more, which specifically indicated that there could be no amnesty for crimes against humanity. The human rights treaty bodies had firmly upheld that position and in some cases had extended the prohibition of amnesty to cover grave and systematic violations of human rights. It would be worth providing in the commentary to the draft articles a comprehensive analysis of the situation with regard to amnesty.

61. Concerning reservations, he said that he would prefer to see reservations excluded; otherwise, if no consensus existed in the Commission, a mixed, restricted system could be envisaged. As to the relevance of official status, he thought that some mention should be made of it, if not in the draft articles, then in the commentary. It did not seem to him that conditions were right for establishing a new body for monitoring the implementation of the future convention—for economic and other reasons. Perhaps the most pragmatic approach would be to set up an assembly of States parties to carry out peer review.

62. In conclusion, he said that he supported the referral of all the draft articles to the Drafting Committee and hoped that the extremely important work thereon would be concluded expeditiously.

63. Mr. RAJPUT said that the length of the report on crimes against humanity was understandable, considering the variety of issues that had to be handled. Since the objective was to prepare a convention, the Special Rapporteur had a large amount of discretion to select an approach to the topic and to make policy choices. The procedural aspects discussed in the report thus represented policy preferences rather than the position of law. However, he would have liked to have seen more analysis of the reasons for choosing one treaty over others, and, in particular, for the choice of the United Nations Convention against Corruption as a model for the provisions on extradition and mutual legal assistance. That instrument was very different from the future convention on crimes against humanity. Nevertheless, the provisions on extradition that it contained were procedural in nature; they were not inseparably linked to the crime of corruption. They thus provided a robust framework for ensuring that extradition took place and for obviating technical legal problems, and they served the purpose of preventing perpetrators of crimes against humanity from hiding under the veil of the technicalities of bilateral extradition treaties.

64. Referring to paragraph 26 of the report, he said that although no provision to address multiple requests for extradition was envisaged, he thought that multiple requests would inevitably arise, due to the prospect of prosecution in multiple forums. Some method of prioritizing them should be proposed, based on the place of commission of the offence, the presence of victims or witnesses, the nature of domestic criminal law and the criminal adjudication system.

65. The dual criminality rule was primarily a creation of treaty practice and should not be included in the proposed convention. However, the reason should be, not that crimes against humanity would automatically be

criminalized in all States, as suggested in paragraph 35 of the third report, but that issues of temporality could create problems. He saw no need for paragraph 1 of draft article 11, urging States to include extraditable offences in every treaty that they concluded. It stated the obvious and could be used to argue that if a bilateral extradition treaty did not contain a reference to crimes against humanity, then the requirements under that treaty, which might be less strict than those in the future convention, should apply. He endorsed draft article 11, paragraph 2, because offenders might try to defend their actions as political in nature, thereby creating an obstacle to extradition.

66. He favoured a long-form provision on mutual legal assistance. Such a provision should be detailed, because it would make the conduct of trials effective and efficient, the objective being not merely to put the accused on trial but also to achieve results based on credible and incriminating evidence. Treaty negotiations on detailed provisions were tedious, but it was better to have them, subject to their subsequent alteration by contracting parties based on the peculiarities of the domestic laws.

67. He did not agree with the Special Rapporteur's suggestion that no definition of victims be included in the draft articles, in order to give States latitude to determine the definition based on their national laws. Some clarification needed to be provided, if not in the draft articles, then in the commentary. For example, if a victim was defined solely as a person subjected to a crime against humanity, the chances of his or her being alive were rare; however, the category of victim must not be too broad so as to include persons who were unduly remote from the individuals who were actually the victims. The term "reparation" had a specific meaning in international law that might limit the amount of compensation that could be awarded to victims. An alternative might be to use the standard wording in some investment treaties: "prompt, adequate and effective compensation".

68. He agreed with the criticisms of the Special Rapporteur's proposal regarding inter-State dispute settlement. In situations involving crimes against humanity, the compulsory jurisdiction of the International Court of Justice should be provided for as a fast means of dealing with disputes about enforcement of the convention or concurrent requests for extradition and prosecution.

69. As to amnesty, it was one of the tools for achieving peace; although it might be prone to abuse, that did not mean it was consistently abused, and if it was, then monitoring and dispute settlement procedures under the future convention could be brought into play. He would like to see a pragmatic approach taken to amnesty, with a case-by-case analysis. Amnesty should not be completely ruled out, but he agreed with the Special Rapporteur that the convention should say nothing about it, leaving it to States to select an appropriate approach when negotiating the text.

70. In the earlier discussion about amnesty, reference had been made to a so-called "United Nations policy" and the practice of some treaty bodies. Amnesty had been used in the past by several States, and it was very difficult to see how the policy or practice of an international organization

could supersede the practice of States, as noted in draft conclusions 4 and 12 on identification of customary international law and the commentaries accompanying those draft conclusions.⁹³

71. He did not support the view expressed by some members that the proposed convention on crimes against humanity should have an explicit reference to exclusion of immunities, along the lines of article 27, paragraph 2, of the Rome Statute of the International Criminal Court. There was a difference in the structure and, most importantly, the object of the proposed convention and the Statute. The former aimed at the creation of a “diffused network” permitting prosecution in various domestic courts, and the latter at the establishment of a single international tribunal. He strongly supported the creation of a “diffused system”, under which an alleged offender would be precluded from escaping from one system, rather than a system centred on a single institution, which made some serious international crimes subject to institutional limitations. That reasoning was supported by the fact that the Convention on the Prevention and Punishment of the Crime of Genocide also did not make a provision on immunity because it, too, followed the scheme as contemplated under the proposed convention on crimes against humanity. In addition, the inclusion of immunity in the proposed convention would overlap with the ongoing discussion under the topic “Immunity of State officials from foreign criminal jurisdiction”.

72. Some members had suggested that the Special Rapporteur address the question of reservations, because States ought not to be able to opt out of provisions that dealt with important international crimes. Although he understood their wish not to weaken the impact of the proposed convention, he did not agree with them. The extensive provisions on mutual legal assistance, monitoring and dispute resolution were all indispensable for an effective enforcement mechanism, but some of them might require reservations to be permissible, to ensure that the obligations under the proposed convention were compatible with domestic law, particularly in relation to capital punishment. If States wished to ratify the proposed convention subject to reservations, which might alter procedural aspects without interfering in any way with their core obligations, it would be a small price to pay for achieving greater acceptability of the future convention. Enhancing its acceptability did not reduce its value; on the contrary, it strengthened the regime. Far more forums for prosecution would be opened up, making the fight against crimes against humanity more efficient and successful.

73. A number of members had expressed concern regarding misuse of reservations, but under contemporary international law the right to formulate reservations was by no means absolute. The International Court of Justice had made it clear in its advisory opinion in *Reservations to the Convention on Genocide* that a reservation had to be in conformity with the object and purpose of the treaty from which reservations are sought to be made. The Commission itself had dealt extensively with the regime of

reservations in its 2011 Guide to Practice on Reservations to Treaties,⁹⁴ draft guideline 4 of which addressed the legal effects of reservations, indicating that reservations to a treaty reflecting a *jus cogens* norm were invalid.

74. He supported the referral of all the draft articles to the Drafting Committee and commended the Special Rapporteur for addressing the procedural aspects of combating crimes against humanity, in the absence of which substantive provisions might not help to achieve the goal of combating crimes against humanity.

75. Mr. HMOUD said that he did not agree with Mr. Rajput’s argument that the use of amnesty by several States opened the door to amnesty for crimes against humanity, superseding any prohibition under customary international law. While such practice might exist in certain States, he strongly doubted that it could be said that it was general and comprehensive practice by the international community constituting customary international law, particularly when it came to crimes against humanity.

76. Mr. RAJPUT said that in order to determine whether a principle existed in international law, the principle from the *Case of the S. S. “Wimbledon”* of *expressio unius est exclusio alterius* would operate, whereby a rule would not exist unless it had been established that it did not. He had not stated that a practice of amnesty existed with regard specifically to crimes against humanity, but rather that amnesty in broad terms existed. Only if it was established that such a practice did not exist in customary international law could it be said that amnesty could not apply to crimes against humanity. It would be necessary to provide sufficient evidence that it was not merely a treaty practice but also represented the psychological readiness of the State to accept it as a customary international law principle. Such principles could not then be superseded by the policy or practice of the United Nations or of an international organization.

77. Mr. HMOUD said that the issue was whether amnesty for crimes against humanity was not actually prohibited under international law. The answer was in the negative, as evidenced by the writings of authors and jurists. When the international community identified the prohibition of a crime as *jus cogens*, as was the case with crimes against humanity, then the removal of the element of punishment for the crime, as amnesties would do, would be a violation of *jus cogens*.

78. Mr. GROSSMAN GUILOFF said that such a complex topic deserved thorough and objective discussion. He agreed with Mr. Rajput that a simple resolution of the General Assembly or a regional body did not supersede State practice. However, did decisions by international courts that had been applied by States not constitute State practice? Perhaps at a later stage the Commission should examine the numerous examples of amnesty laws, particularly those in the publication on *Rule-of-Law Tools for Post-Conflict States* by the Office of the United Nations

⁹³ See *Yearbook ... 2016*, vol. II (Part Two), p. 66 (draft conclusion 4) and p. 76 (draft conclusion 12).

⁹⁴ The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq.* See also General Assembly resolution 68/111 of 16 December 2013, annex.

High Commissioner for Human Rights.⁹⁵ The argument that the thinking had evolved on the issue of amnesties should not be regarded as an extreme position.

79. Mr. JALLOH said that he agreed that such an important issue should be dealt with deliberately and cautiously, taking into account the practice of States at the national level, as well as the practice of international institutions, including international tribunals set up by the United Nations and regional human rights courts and commissions. The final text of the peace agreement in Colombia excluded amnesties and pardons for crimes against humanity and war crimes as defined under the Rome Statute of the International Criminal Court. He supported the proposal that the Secretariat prepare a memorandum on the issue.

80. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Mr. Hmoud's remarks. In his earlier statement, he had given examples of State practice, including national legislation and jurisprudence, as well as international jurisprudence that supported the existence of a principle of customary international law that prohibited amnesty in cases of crimes against humanity, especially when they constituted violations of *jus cogens*. He had also referred to post-conflict agreements, including the Colombia peace agreement, which expressly excluded amnesties and pardons for crimes against humanity.

81. Mr. RUDA SANTOLARIA said that he also agreed with Mr. Hmoud concerning violations of *jus cogens*. The Commission should not disregard the possibility that amnesties could be used for certain crimes in the context of transitional justice, but not for crimes against humanity. He agreed that the Commission should have more time to discuss the issue and should request the Secretariat to prepare a memorandum.

82. The CHAIRPERSON said that it had been his understanding that the question of amnesties would be discussed in the Drafting Committee, which would then decide whether to request a memorandum by the Secretariat.

83. Speaking as a member of the Commission, he said that by drafting a successful convention on crimes against humanity, the Commission would provide an essential missing element for the system of international criminal justice. The Commission had a responsibility to do what it could to ensure that the future convention was ratified by as many States as possible. However, in the current climate, it could not be taken for granted that this would happen. In recent years, there had been a marked slowdown in the conclusion and ratification of multilateral treaties in other areas, and there had even been challenges to some existing treaties. Many were of the view that if the Rome Statute of the International Criminal Court were to be negotiated and submitted to ratification today, it would not be nearly as successful as it had been 15 years earlier. There were a number of specific issues about which States were sensitive or having second thoughts, which might cast doubt on their readiness to ratify a convention on crimes against humanity.

84. The Commission could, of course, say that if States were reluctant to accept certain obligations, they could still modify the Commission's text when they negotiated it among themselves. The text of the Commission, however, would set the terms of the debate and would receive the support of a core group of States, even if others considered that it went too far; however, any treaty on crimes against humanity needed to be supported and ratified by more than just a core group. A convention on crimes against humanity needed to reach a number of ratifications similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide or the 1949 Geneva Conventions for the Protection of War Victims. It would send a very unfortunate signal if the future convention were ratified only by a simple majority or even less. The Commission should therefore aim to reduce as far as possible the number of potential difficulties for States, even if that meant that some worthy aims were not fulfilled.

85. He understood that the Special Rapporteur had tried to meet that challenge by proposing certain well-known and proven models and by leaving out certain potential sticking points. That was a generally wise approach, but certain models that might be appropriate in other contexts might be less so when applied to crimes against humanity. For example, he had doubts as to whether the draft articles on extradition and on mutual legal assistance should follow the long-form model of the provisions in the United Nations Convention against Corruption. He would favour the short-form model that appeared in treaties whose subject matter was more closely related to crimes against humanity. The Special Rapporteur argued that the provisions of the United Nations Convention against Corruption had been widely ratified and tested in practice, which was a strong argument. From that perspective, the long version seemed to offer the requisite solutions to practical problems. On the other hand, the greater the level of detail, the greater the risk that a provision would raise questions or become outdated.

86. Given that several members had expressed their preference for shorter versions of the provisions on extradition and mutual legal assistance, he proposed that the Special Rapporteur submit to the Drafting Committee both short and long versions so that it could choose which to use as the basis for its work. That approach could also help in making a distinction between the main text of the proposed convention, which would contain a short version of the basic rules on extradition and mutual legal assistance, and an annex which might contain more detailed provisions, as had been proposed by several members. Such an annex would also allow for different rules regarding the possibility of future amendments that might become necessary in the light of experience under the convention. Regardless of which form the Commission chose to pursue, it was important to leave States considerable freedom to keep or enact national legislation regarding possible limitations on cooperation.

87. He agreed that there was no need for a political offence exception but that it was necessary to ensure that a State did not extradite an alleged offender if a requesting State was pursuing the extradition on account of the individual's political opinions. He was in favour of adding the

⁹⁵ Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (United Nations publication, Sales No. E.09.XIV.1).

words “or membership in a particular social group” at the end of the list of factors in draft article 11, paragraph 11, as was done in the International Convention for the Protection of All Persons from Enforced Disappearance. He would go even further in providing human rights safeguards, in line with article 33 of the Convention relating to the Status of Refugees.

88. He generally agreed with draft article 14 on victims, witnesses and others, and with the explanations given by the Special Rapporteur. That was an important area, but one in which national legal traditions regarding criminal procedure and possible forms of compensation differed widely. He therefore supported the approach taken by the Special Rapporteur to leave room for the definition of “victim” in national law and of the possible forms of reparation, in particular for cases of mass atrocities. Otherwise, there was a serious risk that States would hesitate to ratify the future convention.

89. In his view, the Special Rapporteur had given a very good reason for not including a provision on immunity. Any attempt to declare immunity irrelevant, along the lines of article 27 of the Rome Statute of the International Criminal Court, would need to be explained, either as creating a new legal rule or as reflecting existing international law. In the present inter-State context, if the Commission were to say that a provision along the lines of article 27 created a new rule, many States might hesitate to ratify the future convention. If, on the other hand, the Commission said that such a provision reflected existing customary international law, then it would pre-empt the debate on the immunity of State officials from foreign criminal jurisdiction. Of course, the Commission could avoid prejudicing that debate by making it clear that the inclusion of a rule like that in article 27 of the Statute would be without prejudice to the status of that rule under customary international law. States would then be alerted and could freely choose whether to take the risk of binding themselves further than was now the case under customary international law. If the only concern was for consistency in international law, he would favour such a transparent solution, which would force States to show whether they believed that under no circumstances should they be entitled to claim immunity for their officials when crimes against humanity were alleged to have been committed. However, that was likely to make many States hesitant about ratifying the draft convention.

90. The same concerns applied with regard to the inclusion of a provision on amnesties. It would be helpful to know how many States would support a blanket prohibition or some form of prohibition of amnesties, but he would advise not risking the success of the draft convention by burdening it with that question, important as it was.

91. The question of reservations raised the same concern. He saw a deep irony in the fact that the Commission was now discussing whether to exclude or to seriously restrict the possibility of formulating reservations, as set out in articles 19 to 23 of the 1969 Vienna Convention. After all, it had been the objective of ensuring that as many States as possible ratified the Convention on the Prevention and Punishment of the Crime of Genocide that had originally led the International Court of Justice to

recognize the liberal rules on reservations that were contained in the 1969 Vienna Convention.

92. In conclusion, he said that if a convention on crimes against humanity was not widely ratified, or if the ratification process languished for a long time, it might affect the working and perception of international criminal justice more generally. The Commission had no option but to make the project a success.

The meeting rose at 6.05 p.m.

3354th MEETING

Tuesday, 9 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Aureescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Sturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. MURPHY (Special Rapporteur), summing up the discussion on his third report on crimes against humanity (A/CN.4/704), said that he wished to thank the members of the Commission for the comments and suggestions that they had contributed to what had been an exceptional debate. Although, in his summing-up, he would not be able to address each and every one of them, he had paid close attention to and recorded all the views that had been expressed.

2. With regard to the general issues raised during the debate, Mr. Murase had reiterated a view that he had expressed in 2016, at the Commission's 3296th meeting, to the effect that the Commission was potentially overstepping its “usual mandate”⁹⁶ by drafting a new convention. The Special Rapporteur's view, as he had noted in 2016, was that the Commission could, if it wished, pursue a topic by formulating draft articles with the intention of using them to form the basis of a convention. Article 16 of the statute of the International Law Commission allowed for the possibility of a referral by the General Assembly of a proposal along those lines, but article 17 expressly contemplated the drafting of conventions without such a referral. Given that the Commission had proceeded in that

⁹⁶ See *Yearbook ... 2016*, vol. I, 3296th meeting, p. 47, para. 42.