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Summary record of the 3366th meeting

Topic:
<multiple topics>

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102. The CHAIRPERSON, speaking as a member of the Commission, said that his vote was based on procedural considerations. The issue was so important that the Commission should have taken more time and made every possible effort to achieve consensus. In his view, 10 minutes of debate was not enough. For that reason, he had not been in favour of the proposal to close the debate; his vote did not relate to the substance of the original proposal.

103. Mr. RAJPUT expressed support for those comments as the reason for his vote against closing the debate.

104. The CHAIRPERSON said he would take it that the Commission wished to refer draft article 7 to the Drafting Committee, taking into account all the comments made during the debate on the topic.

It was so decided.

Organization of the work of the session (*continued*)*

[Agenda item 1]

105. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of immunity of State officials from foreign criminal jurisdiction was composed of the following members: Ms. Escobar Hernández (Special Rapporteur), Mr. Argüello Gómez, Mr. Cissé, Ms. Galvão Teles, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aureescu (Rapporteur), *ex officio*.

The meeting rose at 1.10 p.m.

3366th MEETING

Thursday, 1 June 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guilloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, 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]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. RAJPUT (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee

on the topic of crimes against humanity (A/CN.4/L.892), said that the Drafting Committee had devoted 10 meetings to the consideration of a draft preamble, draft articles and a draft annex relating to the topic. It had examined the seven draft articles and the draft preamble initially proposed by the Special Rapporteur in his third report (A/CN.4/704), together with a number of reformulations proposed by the Special Rapporteur in response to suggestions made or concerns raised during the debates in plenary meetings and in the Drafting Committee. At the current session, the Drafting Committee had provisionally adopted five draft articles, a draft preamble and a draft annex.

2. The Drafting Committee had studied the draft preamble after examining the substance of the entire set of draft articles and the draft annex. The draft preamble comprised nine paragraphs based on a revised text submitted by the Special Rapporteur. The first and second paragraphs borrowed language from the Rome Statute of the International Criminal Court. The third paragraph, which had been added by the Special Rapporteur further to the plenary debate, reflected the fact that the prohibition of crimes against humanity was a peremptory norm of general international law, as had been recognized by the International Court of Justice in its judgment in *Jurisdictional Immunities of the State*. The fourth paragraph encapsulated the draft articles' primary purpose, namely the prevention of crimes against humanity. The fifth paragraph, which likewise borrowed language from the Rome Statute of the International Criminal Court, linked the prevention of crimes against humanity to the fight against impunity. The sixth paragraph, which had been proposed by the Special Rapporteur, stemmed from the suggestion that the draft preamble expressly refer to the Statute, since the definition of crimes against humanity set forth in draft article 3 reproduced article 7 of the Statute. Although the language of the seventh paragraph was based on wording in the preamble to the Statute, the Drafting Committee had eschewed the phrase "those responsible for" crimes against humanity, since it might conflict with the presumption of innocence. The eighth paragraph referred to national measures and international cooperation, as two further means of ensuring the effective prosecution of crimes against humanity. The ninth paragraph was a reminder that the rights of victims, witnesses, alleged offenders and others must be respected throughout the fulfilment of the obligations set forth in the draft articles.

3. As the Drafting Committee had altered the order of several draft articles, that had affected their numbering. The only change made to draft articles 1 to 4 had been the deletion of the words "or control" from draft article 4, paragraph 1 (*a*), for the sake of consistency with the formulation used for references to territory in all the other draft articles. That was not, however, a substantive modification.

4. The Drafting Committee thought that draft article 12 (*Non-refoulement*) was best placed after draft article 4 (*Obligation of prevention*), since the *non-refoulement* of persons could effectively prevent their exposure to crimes against humanity; this draft article thus became draft article 5. The principle set forth in that draft article was embodied in numerous treaties specifically addressing

* Resumed from the 3363rd meeting.

** Resumed from the 3354th meeting.

other forms of harm. The commentary would explain that paragraph 1 was without prejudice to other *non-refoulement* obligations deriving from treaties or customary international law. The purpose of paragraph 2 was to indicate that the “substantial grounds” referred to in paragraph 1 included the general human rights situation in the territory in question.

5. As the draft article on *non-refoulement* had become draft article 5, what had previously been draft articles 5 to 10 had been renumbered 6 to 11. Throughout the text, the phrase “offences referred to in draft article 5” had been amended to read “offences covered by the present draft articles”. Certain internal cross references had been adjusted owing to the renumbering of those draft articles.

6. In draft article 12 (Victims, witnesses and others), States were called upon to take the necessary measures to protect the rights of victims, witnesses and other persons affected by the perpetration of crimes against humanity. In order to secure greater consistency with draft article 8 (Investigation), in paragraph 1 (a) of draft article 12, the reference to “any individual who alleges that a person has been subjected to a crime against humanity” had been replaced with the phrase “any person who alleges that acts constituting crimes against humanity have been or are being committed”. In paragraph 1 (b), victims had been added to the list of persons to be protected. Members of the Drafting Committee had suggested that elements of article 68 of the Rome Statute of the International Criminal Court be incorporated into the commentary to the draft article. The adjective “Protective” had been added in order to clarify what kind of measures were meant in the final sentence.

7. When discussing whether the term “victims” should be defined in draft article 12, the members of the Drafting Committee had noted that most international instruments dealing with victims contained no definition and, in practice, the term had been construed in different ways, depending on factors such as the nature of the harm, the occurrence of indirect harm, or the connection of family members to the person directly harmed. They had therefore concluded that the question of precisely which persons were victims should be determined by the standards of national legal systems, and the phrase “subject to its national law” had thus been changed to “in accordance with its national law” in paragraph 2. At the same time, they had agreed that the commentary should draw on existing case law and the views of treaty bodies in order to provide guidance as to the range of persons who might be deemed to be victims of crimes against humanity. They were also of the view that it was useful to specify that the reparation referred to in paragraph 3 could be for material and moral damages, a position already reflected in article 24, paragraph 5, of the International Convention for the Protection of All Persons from Enforced Disappearance. The adjective “other” underscored the fact that the list of forms of reparation was only indicative. The expression “as appropriate” had been added in order to emphasize that crimes against humanity might be perpetrated by either a State or non-State actors. As the capacity of a responsible State to provide full compensation to all victims might be limited, particularly if the State was struggling to rebuild itself in the aftermath of a crisis, the

commentary would make it clear that the appropriate type of reparation, whether individual or collective, could be determined only in the light of the context. The Drafting Committee had slightly modified the order of the forms of reparation listed and had added the phrase “cessation and” before “guarantees of non-repetition”, as that was the standard wording for that form of reparation.

8. After debating whether draft article 13 (Extradition) should be modelled on long-form or short-form provisions on extradition, the Drafting Committee had concluded that more detailed provisions, such as article 16 of the United Nations Convention against Transnational Organized Crime and article 44 of the United Nations Convention against Corruption, would provide suitable guidance on all the relevant rights, obligations and procedures in relation to extradition for crimes against humanity, especially as those provisions were well understood by States. The Committee had agreed, however, that certain modifications should be made to the long-form model to tailor it to the context of crimes against humanity, and also that the commentary should make it clear that the entire article was to be read in the light of the *aut dedere aut judicare* obligations laid down in draft article 10. The commentary would likewise provide guidance as to the factors to be taken into consideration by a State when it was confronted with multiple requests for extradition.

9. Paragraph 1 was modelled on the provisions of existing international instruments such as article 8 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Drafting Committee had also discussed whether that paragraph should refer to draft article 3 or 6, or to both, in order to encompass all extraditable offences. As explained earlier, the decision had been taken to use the phrase “offences covered by the present draft articles” throughout the draft articles on the understanding that the commentary would explain that it referred to both the definition of crimes against humanity in draft article 3 and the criminalization of the offences under draft article 6. The exclusion of the “political offence” exception had been retained in paragraph 2. Paragraph 4 (a) had been amended in keeping with the logic of paragraph 3 and with the generally accepted approach taken in the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. Members considered that change necessary in order to provide judges with a clear text when they had to interpret and apply the future convention. Paragraph 4 (b) had been adopted as originally proposed, on the understanding that the commentary would explain its scope. As far as paragraph 6 was concerned, although the members of the Committee had agreed that the reference to the minimum penalty requirement in the original text was inappropriate and unnecessary in the context of crimes against humanity, they had decided to retain the reference to the grounds upon which the requested State might refuse extradition, on the understanding that the commentary would give examples of acceptable and unacceptable grounds for refusal. The original paragraphs 7, 9 and 13 had been deleted as unnecessary for the purposes of the draft article. The text of what had become paragraph 8 was based on the provisions of the United Nations Convention against Transnational Organized Crime

and the United Nations Convention against Corruption. Although the Drafting Committee had noted that nothing in the draft articles actually obliged a State to extradite an alleged offender, paragraph 9 was important because it stressed that States should not comply with any request for extradition made on grounds that were impermissible under international law. The Drafting Committee had altered the list of grounds contained in the Special Rapporteur's original proposal in the light of similar provisions contained in the Rome Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance. The commentary to paragraph 10 would highlight the significance of the expression "where appropriate".

10. Moving on to draft article 14 (Mutual legal assistance), he explained that the Special Rapporteur had suggested that the text originally proposed be restructured to take account of the views expressed by Commission members during the plenary debate. For that reason, the original draft article had been divided in two and the sub-headings had been removed. The first half of the original text had been retained. It dealt with the general obligations in respect of mutual legal assistance that were binding on every State, irrespective of whether it had a mutual legal assistance treaty with the requesting State. The second half, which had been turned into a draft annex, applied when a request for mutual legal assistance was made and the two States in question were not bound by a mutual legal assistance treaty.

11. In paragraph 2 of the draft article, the Drafting Committee had decided to add "and other" after "judicial" to reflect the possibility of initiating administrative proceedings against legal persons, as contemplated in draft article 6, paragraph 7. The Drafting Committee had agreed with the Special Rapporteur's proposal to include in paragraph 3 elements that had been mentioned during the plenary debate, such as testifying by videoconference, obtaining forensic evidence and identifying and locating alleged offenders, victims, witnesses and others. In paragraph 3 (a), the term "as appropriate" had been added in order to address the privacy concerns of victims and witnesses. Paragraph 4 had been adopted as originally proposed, on the understanding that the commentary would explain that "bank secrecy" also meant the secrecy of similar financial institutions. Paragraph 7 had been deleted on the grounds that it was unnecessary and that its content would serve as the basis for the commentary to paragraph 6. In the new paragraph 7, the Drafting Committee had added the phrase "except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance" so as to leave no room for doubt that the instrument offering the highest level of assistance should apply.

12. In paragraph 8, which addressed the relationship between draft article 14 and the draft annex, minor drafting changes had been made for the sake of clarity. In the last sentence, the word "strongly" had been deleted in order to avoid placing too much emphasis on recourse to the application of the draft annex.

13. The draft annex itself consisted of 20 paragraphs, namely a new introductory paragraph and paragraphs 10 to 28 of the original draft article 13. Paragraph 1 established

that the provisions of the draft annex applied to requests made pursuant to draft article 14 by States that were not bound by a treaty of mutual legal assistance. The remaining paragraphs of the draft annex, which addressed the various stages of the request procedure, had been adopted without substantive amendment, although the references to the "instrument of ratification, acceptance or approval of or accession to the present draft articles" had been deleted from paragraphs 2 and 3, since it was the Commission's practice to leave such formulations to be added by States at a later stage. Furthermore, paragraph 6 had been adopted on the understanding that the commentary to the draft annex would emphasize that States must act in good faith when executing requests, and paragraph 8 had been adopted on the understanding that the commentary would clarify the scope of the various grounds on which mutual legal assistance could be refused.

14. During the plenary debate, several Commission members had proposed the deletion of the original draft article 15, which addressed the event of a conflict between the rights or obligations of a State under the draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal. The Special Rapporteur and the Drafting Committee had agreed that the draft article was not necessary, for several reasons: no actual conflict had been identified; concerns had been raised about giving blanket priority to obligations arising with respect to all future international criminal tribunals; a rule that gave priority to international proceedings might conflict with the principle of complementarity, which provided for some deference to national proceedings; and the standard conflict rules under international law could be applied in the unlikely event of a conflict. For those reasons, the Drafting Committee had decided not to retain the provision.

15. The Drafting Committee had also decided not to retain the original draft article 16, which addressed federal State obligations. Although such a provision could be found in a number of treaties, the issue was already covered by article 29 of the 1969 Vienna Convention. Furthermore, the issue was related to that of reservations to treaties, which, the Commission had decided, should be addressed in the final clauses of the future convention to be negotiated and adopted by States.

16. The Drafting Committee had debated whether it was appropriate for the Commission to propose a provision on dispute settlement. While the Commission usually left dispute settlement clauses to be drafted by States, it had previously proposed such clauses when engaged in the preparation of a draft convention, notably in the case of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.²⁵¹ The Drafting Committee had concluded that, in view of the nature of the topic, the proposal of a dispute settlement clause was appropriate; that clause appeared as draft article 15 (Settlement of disputes).

17. Paragraph 1 of the draft article had been retained as originally proposed, as it was a provision that could

²⁵¹ *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, pp. 312 *et seq.*, chap. III, sect. B.

be found in a number of existing treaties, including the United Nations Convention against Corruption. However, the Drafting Committee had decided not to retain the Special Rapporteur's original proposal for paragraph 2, which had given precedence to arbitration over dispute resolution by the International Court of Justice and had been considered inappropriate in the context of crimes against humanity. The text ultimately adopted was a new formulation that was not found in existing treaties but was based on article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 2 stipulated that a State could submit a dispute that was not settled through negotiation directly to the International Court of Justice without first submitting it to arbitration. Nevertheless, since the draft articles encompassed a very broad range of obligations that could give rise to very different types of dispute, the parties to a dispute could still submit it to arbitration, if they so agreed. The provisions of paragraphs 3 and 4, which were common in existing treaties, such as the United Nations Convention against Corruption and the International Convention for the Protection of All Persons from Enforced Disappearance, allowed States to opt out of the dispute settlement provision contained in paragraph 2, and thus might be of particular interest if States ultimately decided not to allow reservations to the substantive provisions of a future treaty.

18. In his summing-up of the plenary debate, the Special Rapporteur had noted that the dominant view in the Commission was that the issue of amnesty should not be addressed in the draft articles, at least for the time being, but that it should instead be addressed in the commentary. As the draft articles had been referred to the Drafting Committee on that basis, the Special Rapporteur had provided the Drafting Committee with four proposed paragraphs for the commentary to be associated with draft article 10 (*Aut dedere aut judicare*). Several members of the Drafting Committee had suggested improvements to those paragraphs, and all members had been invited to provide further input prior to the submission of those paragraphs for editing and translation. The possibility of requesting the Secretariat to conduct a study on the issue had been discussed, but it had been decided that the matter should not be pursued at the current stage.

19. The Special Rapporteur had also noted in his summing-up that there were conflicting views in the Commission with regard to whether and how to address the issue of immunity in relation to the topic. The Special Rapporteur had suggested that the issue be discussed in the Drafting Committee to see whether a consensus could be reached. Regrettably, owing to a lack of time, the Drafting Committee had been unable to consider the issue in substance. However, it had noted that the issue was currently being discussed in the context of the topic of immunity of State officials from foreign criminal jurisdiction and had expressed the view that it would be prudent to avoid any conflict with that topic. The issue would be discussed further during the second part of the current session.

20. Mr. HMOUD said that, in considering the *non-refoulement* obligation set out in draft article 5, paragraph 1, the Drafting Committee had discussed the distinction between the wording “to another State” and

“to territory under the jurisdiction of another State” and had decided to retain the latter wording, as originally proposed in the Special Rapporteur's third report.

21. Mr. GROSSMAN GUILOFF said that he would appreciate clarification regarding the decision not to request the Secretariat to conduct a study on the issue of amnesty, as he did not recall that the Drafting Committee had taken that decision.

22. Mr. MURPHY (Special Rapporteur) said that, according to his recollection, Mr. Grossman Guilloff had been in favour of requesting the Secretariat to conduct a study on the issue of amnesty, but some other members of the Drafting Committee had not wished to request such a study at the current time. Although no formal vote had been held, he believed that the Chairperson of the Drafting Committee had indicated that the Committee would not recommend that the Commission make such a request.

23. Mr. GROSSMAN GUILOFF said that, in the light of Mr. Murphy's helpful explanation, it could perhaps be noted in the statement by the Chairperson of the Drafting Committee that some members had not been in favour of requesting the Secretariat to conduct such a study and that the Chairperson, not the Drafting Committee, had consequently decided that the matter should not be pursued at the current time.

24. Mr. RAJPUT (Chairperson of the Drafting Committee) said that, as far as he recalled, the decision not to request the Secretariat to conduct a study on the issue of amnesty at the current stage had been the outcome of the discussion held in the Drafting Committee. However, if necessary, a sentence could be added to his statement to explain that, while one member had insisted that the Secretariat be requested to conduct such a study, the Drafting Committee had ultimately decided otherwise.

25. Mr. JALLOH said that it had been the Commission's intention that the issue of amnesty be discussed in the Drafting Committee. The members of the Drafting Committee had indeed been presented with and invited to react to relevant paragraphs proposed for the commentary, and a number of members had made suggestions on those paragraphs. However, there had ultimately been insufficient time in which to consider the issue. Moreover, he did not recall a decision having been taken with regard to a study by the Secretariat. The issue of immunity had not been discussed at all in the Drafting Committee, but some members had discussed it in informal consultations with the Special Rapporteur. The view had been expressed that sufficient time should be set aside for the Commission to discuss the issue during the second part of the current session.

26. Mr. GROSSMAN GUILOFF said that he would prefer not to be described as having insisted that the Secretariat be requested to conduct a study on the issue of amnesty. He was concerned simply that the statement by the Chairperson of the Drafting Committee did not accurately reflect the events of the meeting at which the matter had been discussed. He proposed that the passage relating to the decision not to request the Secretariat to conduct such a study be deleted from the statement.

27. Mr. PARK said that, according to his recollection, it had been decided in the Drafting Committee that, owing to a lack of time, the consideration of the paragraphs proposed for the commentary would be continued during the second part of the current session.

28. Ms. ESCOBAR HERNÁNDEZ said that there had been insufficient time in which to discuss the issues of amnesty and immunity in the Drafting Committee. With regard to amnesty, she did not recall that a decision had been taken on the possibility of requesting a study. Indeed, the issue of amnesty had not been discussed at all: the Special Rapporteur had simply proposed relevant paragraphs for the commentary and had invited the members of the Drafting Committee to offer suggestions, which some members had done. With regard to immunity and the irrelevance of official capacity, she did not recall that the question of the need to avoid a conflict between the topic of crimes against humanity and the topic of immunity of State officials from foreign criminal jurisdiction had been raised in the Drafting Committee. Towards the end of the meeting in question, she had asked how the issue of immunity would be dealt with going forward, but no substantive discussion had taken place. Nevertheless, the Chairperson of the Drafting Committee had noted that the work of the Committee would be continued during the second part of the current session, and the Special Rapporteur had made great efforts to find a mutually acceptable solution.

29. Sir Michael WOOD said that it was for the Chairperson of the Drafting Committee to amend his statement as he saw fit, if at all, before it was uploaded to the Commission's website.

30. Mr. TLADI said that, while he agreed in principle that it should be the Chairperson of the Drafting Committee who decided whether to amend the statement, it was especially important to ensure the accuracy of such statements now that they were uploaded to the Commission's website.

31. The CHAIRPERSON asked whether, as a way of resolving the problem, the Chairperson of the Drafting Committee might consider deleting the sentence referring to the question of whether the Secretariat should conduct a study on the issue of amnesty.

32. Mr. RAJPUT (Chairperson of the Drafting Committee) said that he would have to consider that request carefully, as he wished to avoid setting a precedent whose effect would be to impinge on the prerogatives of future chairpersons of drafting committees. The wording of his statement clearly indicated that the issue of immunity with respect to the topic of crimes against humanity, which the Drafting Committee had not had time to consider during the first part of the current session, would be discussed in detail during the second. Although that paragraph of the statement noted that it would be prudent to avoid any conflict with the topic of the immunity of State officials from foreign criminal jurisdiction when considering that issue, that did not mean that the adoption of such an approach would preclude the consideration of the issue in the Drafting Committee.

33. Mr. SABOIA said that it was slightly contradictory for the statement to say that the issue of immunity could not be considered in substance in the Drafting Committee, while subsequently indicating that a substantive point relating to that issue had been noted in the Committee. He did not recall that this substantive point had been raised at the Drafting Committee meeting in question, and in any case it was unclear why that particular point was cited.

34. Ms. ESCOBAR HERNÁNDEZ said that at no time during the meetings of the Drafting Committee had any discussion been held on the issue of immunity in relation to crimes against humanity or on the relationship between that issue and the topic of immunity of State officials from foreign criminal jurisdiction.

35. Mr. RUDA SANTOLARIA said that he could confirm that the Drafting Committee had had time for only a brief discussion of the draft commentary submitted in connection with the pending issue of amnesty, and had not had time to discuss immunity. The issue of immunity was very important, as shown by the references in the plenary debate to the question of the irrelevance of official status to the accountability of State officials for crimes against humanity.

36. Mr. JALLOH said that a dozen or so Commission members—of whom some were interested in immunity and some were interested in the irrelevance of official capacity—had held informal consultations and reached agreement on a specific proposal. The proposal, which did not relate to immunity *per se*, had been shared informally with the Special Rapporteur, and it was the understanding of the members involved that it might be possible to set aside time during the second part of the current session in order to discuss the proposal in the Drafting Committee.

37. Mr. GROSSMAN GUILOFF said that he had only wanted account to be taken of the concern he had raised, which amounted to no more than a detail, and that the Commission should move forward on the substance of the topic at hand.

38. Mr. MURPHY (Special Rapporteur) said that the point made by Mr. Tladi and Sir Michael concerning the posting of the statement by the Chairperson of the Drafting Committee on the Commission's website was important to bear in mind. The question of whether the statement should indicate that it had been decided not to pursue the matter of a Secretariat study on amnesty should perhaps be left to the discretion of the Committee Chairperson.

39. Mr. RAJPUT (Chairperson of the Drafting Committee) said that he would alter his statement in the two places in which its wording had posed a problem for certain Commission members, although he still held the view that, in principle, Drafting Committee chairpersons should have full discretion as to the content of their statements.

40. The CHAIRPERSON invited the Commission to adopt the texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading (A/CN.4/L.892).

Draft preamble

The draft preamble was adopted.

Draft articles 1 to 13

Draft articles 1 to 13 were adopted.

Draft article 14

41. Mr. PETER said that, in his view, draft article 14, without the draft annex introduced by paragraph 8, was sufficient; paragraph 8 and the draft annex should therefore be deleted. Indeed, the draft annex was so extensive that it risked overshadowing the main topic of the future convention. Moreover, some of the provisions it contained might be perceived by sovereign States as intrusive, and the level of detail of those provisions might dissuade States from ratifying the future convention. To his mind, the wording of a convention should be more general.

42. In the event that the Commission wished to retain the draft annex, he would like to point out that he was uncomfortable with its paragraph 12 (b), which stipulated that a State could provide a foreign State with information that was not available to its own people. In addition, in paragraph 20 of the draft annex, he objected to the provision according to which the costs of executing a request should be borne by the requested State; in his view, it was the requesting State that should bear those costs.

43. Mr. MURPHY (Special Rapporteur) said that there had been a robust discussion in the plenary debate regarding the relative merits of the long-form versus the short-form provisions in relation to both extradition and mutual legal assistance. Members in the Drafting Committee had gravitated towards the long-form approach, considering it to be of great value to the many States that did not have bilateral treaties on mutual legal assistance and therefore lacked guidance on such questions as where to direct a request for mutual legal assistance, how such a request should be formulated and how the receiving State should react to the request.

44. Mr. Peter's concern seemed to relate to the way in which the draft articles might be perceived, yet part of the rationale for placing those more detailed provisions in an annex had been to separate them from the main draft articles, thereby addressing that concern. Moreover, although some States might be put off by the inclusion of such an annex, there was, in fact, a reasonable possibility that many States would be attracted by it, as there was widespread agreement on the need to develop extradition and mutual legal assistance procedures in the context of crimes against humanity. Nevertheless, if the draft articles were submitted to a diplomatic conference, States would always have the option of deleting the draft annex and draft article 14, paragraph 8, if they so wished. In his view, it would be easier for States to delete those provisions than to devise procedures along the lines of those set forth in the draft annex. Consequently, he considered the text as it currently stood to be appropriate.

45. Paragraph 12 (b) of the draft annex reproduced a provision that appeared in several international conventions, such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, and was a useful provision in the context of crimes against humanity. He was aware of a situation in which one State had transmitted to

investigators from another State who were looking into possible crimes against humanity classified information in the form of satellite imagery and high-altitude aerial photographs, which had ultimately allowed the investigators to find the remains of a large number of victims. That process might have been delayed if the information had had to be declassified and made public. If subparagraph (b) was deleted, there was a risk that States might not consider the possibility of providing such assistance to each other. That would be unfortunate because such assistance could prove to be extremely valuable.

46. With regard to paragraph 20 of the draft annex, the Drafting Committee had been provided with a list of treaties that contained provisions similar to the one set out in that paragraph. The reason that the requested State was, by default, required to absorb the ordinary costs of executing a request for mutual legal assistance was that such requests tended to be processed through States' regular police and judicial authorities—in other words, through existing institutional infrastructures for serving documents or receiving and transmitting information. Trying to calculate the cost of those relatively routine tasks could become complicated in the context of ordinary requests for mutual legal assistance. On the other hand, if those expenses were of a substantial or extraordinary nature, States were required to consult each other in order to determine the terms and conditions under which the request would be executed and the manner in which the costs would be borne, leading perhaps to some form of burden-sharing between the two States. It was a standard provision and should not prove problematic.

47. Mr. PETER said that he could agree to retaining paragraph 12 (b), since it did not compel requested States to provide classified information but left it to their discretion to do so if they deemed it appropriate. However, he was still concerned about paragraph 20, which was too categorical in assigning the costs of executing a request to the requested State, thus making the receipt of a request appear burdensome. Perhaps a less direct formulation could be found.

48. Mr. MURPHY (Special Rapporteur) said that the exact same wording was found in conventions such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, and had not caused any problems for the thousands of requests that had been sent and received by States under those conventions. He would prefer to retain that language, as it was well known to the government bodies concerned, and any changes might introduce uncertainty and confusion. It should be borne in mind that the Commission was adopting the draft articles on first reading; any concerns expressed by Governments could be taken into account in the Commission's second reading of the draft articles.

49. Mr. HASSOUNA said that one way to address Mr. Peter's concern about the wording of paragraph 20 might be to change the word "shall" in the first sentence to "should", to make the provision more flexible.

50. Mr. MURPHY (Special Rapporteur) said that he was reluctant to use the word "should" because it was not

used elsewhere in the draft articles. It would represent a substantive change, since it would mean that the issue of cost was not resolved in the draft articles. Moreover, it would imply that a State could refuse to fulfil a request for assistance unless it received funding from the requesting State; that would be inappropriate and could impair the provision of mutual legal assistance.

51. Sir Michael WOOD said that he, too, had initially found it surprising that the assisting State was expected to bear the costs, but had discovered that this was the usual practice; for example, the British authorities had borne considerable costs in connection with the *Pinochet* case. The provision on costs was standard and had many precedents, but was also flexible, as it concerned only ordinary costs and allowed States to agree on a different arrangement if they so wished.

52. Mr. CISSÉ said that the wording of paragraph 20 was very clear. Any problems concerning costs were forestalled by the inclusion of the phrase “unless otherwise agreed by the States concerned” in the paragraph.

53. The CHAIRPERSON suggested that the cost question addressed in paragraph 20 be raised separately from the question of adopting draft article 14 as a whole.

It was so decided.

Draft article 14 was adopted.

Draft article 15

54. Ms. ESCOBAR HERNÁNDEZ said that, while she had joined the consensus on draft article 15 in the Drafting Committee, she had serious reservations about paragraphs 3 and 4 of the draft article. In her view, the Commission should not propose an optional jurisdiction clause of the kind contained in those paragraphs.

Draft article 15 was adopted.

Draft annex to the draft articles

55. Mr. OUZZANI CHAHDI proposed that wording be added to indicate that the draft annex was an integral part of the draft articles.

56. Mr. MURPHY (Special Rapporteur), recalling that this proposal had been made in the Drafting Committee, said that the Committee had decided that the wording of paragraph 1 of the draft annex, “This draft annex applies in accordance with draft article 14, paragraph 8”, was sufficient to establish a direct connection between the draft annex and the draft articles themselves.

57. Mr. CISSÉ said that he shared Mr. Ouazzani Chahdi’s view. Paragraph 1 of the draft annex indicated that the draft annex applied in accordance with draft article 14, paragraph 8, but did not expressly link the draft annex to the draft articles as a whole. There should be an indication, perhaps in a preamble, that the draft annex had the same status as the draft articles themselves.

58. The CHAIRPERSON, speaking as a member of the Commission, said that the wording of draft article 14,

paragraph 8, “The draft annex to the present draft articles shall apply to requests made pursuant to this draft article”, strongly connected the draft annex to the draft articles. The Drafting Committee had been mindful of the need to separate the material in the draft annex from the main body of the text to ensure that technical matters would not overshadow the substantive provisions of the future convention, in line with the concerns expressed by a number of Commission members.

59. Mr. HASSOUNA said he agreed with Mr. Ouazzani Chahdi and Mr. Cissé that the status of the draft annex should be clarified somehow, either in the commentary or elsewhere.

60. Mr. MURPHY (Special Rapporteur) said that all the Commission members agreed that the draft annex applied in the context of requests arising in respect of the draft articles. Paragraph 1 of the draft annex referred to draft article 14, paragraph 8, which clearly stated that the draft annex applied to requests made pursuant to that draft article, and draft article 14, paragraph 1, referred to mutual legal assistance “in relation to the offences covered by the present draft articles”. The draft annex was thus strongly connected to the draft articles as a whole. He would nevertheless be willing to draft language for inclusion in the commentary that would clearly spell out the connection between paragraph 1 of the draft annex, draft article 14, paragraph 8, and the draft articles as a whole, as proposed by Mr. Hassouna.

61. Mr. RUDA SANTOLARIA said he agreed that the connection between the draft annex and draft article 14, paragraph 8, was clear. It should be recalled, however, that wording to the effect that an annex was an integral part of a convention was normally included in the final provisions of the convention. The Commission had left the drafting of final provisions to be carried out by States, in line with its usual practice. States could thus decide at a subsequent stage to include such wording in the final provisions of the future convention.

62. Sir Michael WOOD said that he agreed with Mr. Ruda Santolaria. For example, the final clauses of the United Nations Convention on Jurisdictional Immunities of States and Their Property included a statement that the annex to the Convention formed an integral part of the Convention. For the moment, the Commission could include appropriate wording in the commentary, as it did not deal with final clauses.

63. Mr. PETER said that he was pleased to hear from the Special Rapporteur that there might be another opportunity to raise the issue of costs. It could easily be foreseen that, if a request for legal assistance was sent to a developing country of modest means, the prospect of providing cooperation and bearing the costs would be unattractive to that country. In paragraph 20 of the draft annex, he would prefer the wording “The costs of executing a request shall be agreed upon by the States concerned”. However, he would not insist on that wording.

64. Mr. VÁZQUEZ-BERMÚDEZ said that international legal cooperation was based on the principle of reciprocity between States, which informed their day-to-day actions.

States that fulfilled requests for assistance in one context might submit such requests in another. As part of that practice, the ordinary costs of such cooperation were borne by the requested State. Cases involving exceptional situations would require agreement between the States concerned.

65. Mr. JALLOH said that, while Mr. Peter had raised a significant concern about developing countries, the Commission must also be aware of the usual State practice. In the commentary, it might be desirable to acknowledge the challenges faced by some States and to reiterate that paragraph 20 of the draft annex made allowance for alternative arrangements agreed upon between the States concerned.

66. Mr. GROSSMAN GUILLOFF said that he shared Mr. Peter's concern, and pointed out that the United Nations engaged in capacity-building in order to prepare developing countries to fulfil requests for legal assistance. He also recognized, however, that paragraph 20 of the draft annex reflected a practice that had not caused problems. It was important to acknowledge that "ordinary costs" might be politically difficult for some countries to meet and that those costs varied from one country to another, depending in part on the size and complexity of each country's legal system. However, the provision operated as part of the effort to ensure that countries had the will to undertake proceedings for the crimes addressed in the draft articles. As currently worded, paragraph 20 preserved countries' sovereignty to have an adjudicatory process that was not tainted by "foreign money", although requests of an extraordinary nature would require consultations on the question of costs.

67. The CHAIRPERSON said that the wording of the second sentence of paragraph 20 did not present a great risk, as it referred to "expenses of a substantial or extraordinary nature", which were defined by each State according to its own criteria. If a State considered such expenses to be substantial, it could opt to negotiate a different arrangement for meeting them.

The draft annex to the draft articles was adopted.

68. The CHAIRPERSON said he took it that the Commission wished to adopt, as a whole, the texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading (A/CN.4/L.892).

It was so decided.

69. Mr. PETER asked whether the Commission's adoption of the draft would preclude any further changes to the draft articles or the draft annex.

70. Mr. MURPHY (Special Rapporteur) said that the Drafting Committee would resume its discussions on the issue during the second part of the sixty-ninth session. The main objective was to discuss the matter of immunity and official capacity, as the matter of amnesty had already been addressed. Members would have the opportunity to provide input on the commentary, and it was possible that the Drafting Committee would decide to include new text.

71. Mr. LLEWELLYN (Secretary to the Commission) said that when the Commission adopted draft texts in the absence of commentaries, the adoption was understood to be provisional. The draft articles in final form, incorporating any changes made during the second part of the session, and the commentary would be adopted definitively at the end of the second part of the session, when the Commission adopted its report to the General Assembly.

Programme, procedures and working methods of the Commission and its documentation (*continued*)* (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

72. Mr. HASSOUNA (Chairperson of the Working Group on methods of work) said that the Working Group on methods of work was composed of the following members: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Nolte and Mr. Valencia-Ospina as Chairperson and Vice-Chairperson, respectively, of the Commission.

The meeting rose at 12.45 p.m.

3367th MEETING

Friday, 2 June 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, 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.

Protection of the atmosphere (*concluded*) (A/CN.4/703, Part II, sect. B, A/CN.4/705, A/CN.4/L.894)**

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the third report of the Drafting Committee, on the topic "Protection of the atmosphere", as contained in document A/CN.4/L.894.

* Resumed from the 3354th meeting.

** Resumed from the 3359th meeting.