

Provisional

For participants only

3 June 2019

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International Law Commission
Seventy-first session (first part)

Provisional summary record of the 3453rd meeting

Held at the Palais des Nations, Geneva, on Monday, 29 April 2019, at 3 p.m.

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Present:

Temporary Chair: Mr. Valencia-Ospina
Chair: Mr. Šturma
Members: Mr. Al-Marri
Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Saboia
Mr. Tladi
Mr. Wako
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Opening of the session

The Temporary Chair declared open the seventy-first session of the International Law Commission.

Election of officers

Mr. Šturma was elected Chair by acclamation

Mr. Šturma took the Chair.

The Chair thanked the members wholeheartedly for the trust they had placed in him and said that it was a privilege to chair such an important body. He would make every effort to deserve that trust and to ensure that the current session was successful and productive.

Mr. Hmoud was elected First Vice-Chair by acclamation.

Ms. Oral was elected Second Vice-Chair by acclamation.

Mr. Grossman Guiloff was elected Chair of the Drafting Committee by acclamation.

Mr. Jalloh was elected Rapporteur by acclamation.

Introductory remarks of the Chair

The Chair said that the current session was likely to be busy and exciting, with a number of topics approaching different stages of conclusion. The Commission was about to embark upon its second reading of the draft articles on crimes against humanity and its first reading of the draft conclusions on peremptory norms of general international law (*jus cogens*) and of the draft principles on protection of the environment in relation to armed conflicts.

The Commission's strength had always lain in its members' intellectual rigour and capacity, their technical knowledge, vision, respect for each other's views, discipline, hard work and collegiality. The Commission was also fortunate to have the assistance of an extremely competent and knowledgeable Secretariat, whose members were well-versed in its working methods.

He wished to pay tribute to his predecessor in the Chair, Mr. Valencia-Ospina, who had set a very high standard, which he himself would do his best to emulate.

Adoption of the agenda (A/CN.4/723)

The provisional agenda was adopted.

Organization of the work of the session (agenda item 1)

The Chair invited the Bureau, the Special Rapporteurs, the Chair of the Working Group on the Long-term Programme of Work, the Chair of the Working Group on Methods of work and the three former Chairs of the Commission present to join him to discuss the programme of work of the current session.

The meeting was suspended at 3.35 p.m. and resumed at 4.30 p.m.

The Chair drew attention to the proposed programme of work for the first three weeks of the Commission's current session, which would begin with the consideration of the Special Rapporteur's fourth report on the topic "Crimes against humanity". Thereafter, the Commission would turn to the topic "Peremptory norms of general international law (*jus cogens*)" and consider the Special Rapporteur's fourth report thereon.

The Drafting Committee on the topic of peremptory norms of general international law (*jus cogens*) would meet to conclude the work left over from the seventieth session, with a view to the Commission taking a decision during the first half of the session on the draft conclusions proposed by the Drafting Committee. Upon completion of that work, the

Drafting Committee on crimes against humanity would commence the second reading of the draft articles on that topic.

During the third week, the Commission would hear the Special Rapporteur's summing up of the debate on *jus cogens* and then begin its consideration of the Special Rapporteur's second report on protection of the environment in relation to armed conflicts. The Drafting Committee on peremptory norms of general international law (*jus cogens*) would probably meet on the afternoons of 15 and 16 May to examine the conclusions proposed in the Special Rapporteur's fourth report. As was the practice of the Commission, the proposed work programme would, however, be applied with the necessary flexibility.

Mr. Park said that the programme of work made no mention of the topic "Immunity of State officials from foreign criminal jurisdiction". Recalling that, the previous year, many members had not had the opportunity to make general comments on the sixth report on the topic, he asked whether members would have the opportunity to comment on the sixth report separately or whether they should do so in conjunction with the seventh report.

The Chair said that, owing to time constraints, the Bureau had not managed to address that issue at its first meeting. Its priority had been to secure agreement on the programme of work for the first three weeks of the session. The Bureau could take up that matter at its next meeting.

Ms. Escobar Hernández said it was her understanding that her sixth and seventh reports on the topic of immunity of State officials from foreign criminal jurisdiction were to be considered jointly during the second part of the session, given their interrelated nature. However, if the Commission considered it more appropriate to consider the sixth report on the topic during the first part of the session and to consider the seventh report during the second part of the session, she would not object.

The Chair said it was expected that the Planning Group, the Working Group on the Long-term Programme of Work and the Working Group on Methods of work would all have an opportunity to meet during the first part of the session.

He took it that the Commission agreed to the proposed programme of work for the first three weeks of the session.

It was so decided.

Crimes against humanity (agenda item 3) ([A/CN.4/725](#) and [A/CN.4/725/Add.1](#))

Mr. Murphy (Special Rapporteur), introducing his fourth report on crimes against humanity ([A/CN.4/725](#) and [A/CN.4/725/Add.1](#)), said that he wished to recall, by way of background, that the Commission had decided at its sixty-sixth session to include the topic in its programme of work and that its objective, as noted in the syllabus of the topic ([A/68/10](#), annex B), was to draft articles for what would become a convention on the prevention and punishment of crimes against humanity.

The Commission, having already considered his first report on the topic ([A/CN.4/680](#)) at its sixty-seventh session and the second report ([A/CN.4/690](#)) at its sixty-eighth session, had considered the third report ([A/CN.4/704](#)) at its sixty-ninth session and had adopted, on first reading, the draft preamble, draft articles 1 to 15 and the draft annex, with commentaries thereto ([A/72/10](#), para. 45). The first reading text had then been debated in the Sixth Committee in October 2017. Governments and others had been invited to submit written comments thereon by 1 December 2018.

The Commission's task on second reading of the draft articles was not primarily to consider new proposals by the Special Rapporteur or by other members of the Commission based solely on their individual views as to the optimal content of those provisions, but to review carefully the comments received from Governments and others in reaction to the first reading text and to adjust that text as necessary to address those comments. Many of the comments received could and should be addressed through revisions to the commentaries, which he would propose if the Commission so wished.

Having studied carefully the oral and written comments received, he had submitted his fourth report in English to the Secretariat on 15 February 2019. An advance copy had

been circulated to members on 22 February 2019. The final, edited version of the report had been available in all official languages of the United Nations since 17 April 2019. He hoped that the delay in translation had not created any difficulties for members and that they would not find the length of the report, which reflected the exceptionally large number of comments received, to be burdensome. While the advance copy of the fourth report in English was the same in substance as that of the final English version, there were differences in page numbering between the two versions. Consequently, for the purpose of the debate, if references were made to pages of the fourth report in English, members would do better to use the final version, where the page numbers were set out in the table of contents.

The report began with an introduction that outlined the Commission's work on the topic to date. Among other things, it noted that, during the 2017 debate on the topic in the Sixth Committee, a total of 52 Member States had commented on the draft articles that had been adopted on first reading and that oral comments had also been made by the Council of Europe. Their comments had been generally favourable and supportive of the Commission's work.

Since the completion of the fourth report, written comments had been received from 38 States and 7 international organizations or offices thereof. Written comments had likewise been received from one United Nations human rights treaty body, one United Nations working group and a large number of United Nations special procedure mandate holders. The Secretariat had transmitted those comments in their original form to members on 4 January 2019. In line with its practice, the Secretariat had grouped the comments by article in a document bearing the symbol [A/CN.4/726](#) dated 21 January 2019. The three additional sets of comments that had been submitted after that date had also been transmitted in their original form to members and would be published in two addenda to document [A/CN.4/726](#). He was grateful to all Governments, international organizations and others for the written and oral comments that they had submitted over the years, as those comments were the foundation for the analysis contained in the fourth report.

Input on the topic had likewise been received from or on behalf of approximately 700 non-governmental organizations (NGOs) or individuals. Such an outpouring of interest could well be unprecedented in the work of the Commission and highlighted how closely civil society was following its work on the topic. The Secretariat had transmitted those comments in their original form to members on 20 March 2019.

The introduction also set out the fourth report's purpose and structure. It noted that, for most of the draft articles, the comments received had either supported or not addressed the text. However, the comments had also criticized and called for changes to some provisions of the existing draft articles and, in some instances, offered suggestions concerning the commentaries thereto or called for additional draft articles. The report analysed all such comments, assessed whether the suggested changes to the existing text were warranted and, if so, set out proposals for amendments.

Chapter I was the longest of the report's chapters. The first section addressed the general comments and observations received with respect to the topic. Subsequent sections dealt with the draft preamble and the comments and observations made on specific draft articles. For each draft article, the text as adopted on first reading was reproduced, the comments and observations received in that connection analysed and possible changes to the draft article and to the commentaries thereto noted. In each case, he made a recommendation as to whether, in the light of the comments received, any changes should be made to the draft articles or to the Commission's commentaries. The proposed changes were also set out in annex I to the fourth report.

Members might wish to note that, as mentioned in paragraphs 16 to 19 of the report, there was general support for the Commission's methodology in developing the draft articles. States considered it appropriate for the Commission to build upon the types of provisions found in existing treaties on crimes, with which they were already familiar. Further, several States had also noted with approval that the draft articles were concise and limited to essential matters. Lastly, paragraphs 22 to 29 of the report set forth general comments from States indicating support for a future convention on crimes against

humanity, support that should be borne in mind when the Commission came to consider chapter III of the report.

A second aspect of chapter I to which he wished to direct members' attention related to section E. The section concerned draft article 3, on the definition of crimes against humanity. As a general matter, the comments received by the Commission indicated that States and others generally favoured the Commission's use in draft article 3 of a near-verbatim reproduction of the text of article 7 of the Rome Statute of the International Criminal Court. However, there had also been an extraordinarily high concentration of comments from States and others calling for changes to two of the provisions of draft article 3.

Many of those comments called for changes to be made to the last clause of draft article 3 (1) (*h*), which related to whether there must be a connection between persecution and certain other elements in order for the persecution to be an act that constituted a crime against humanity. The Commission itself had indicated on first reading that the language might need to be revisited. Comments received in that regard were dealt with in paragraphs 62 to 65 of the report. In paragraphs 91 to 100, he explained his proposal for the deletion of the last clause of paragraph (1) (*h*), which read "... or in connection with the crime of genocide or war crimes."

Many of the comments submitted called for the deletion of draft article 3 (3), which set out a particular meaning of the term "gender"; paragraphs 80 to 86 of the report dealt with the comments received in that regard. Then, in paragraphs 101 to 103, he explained why, in his view, the Commission should delete paragraph 3.

Other comments had been received in respect of draft article 3, for example, on the definition of "enforced disappearance of persons" in paragraph 2 (*i*), but the greatest call for changes related to the two aforementioned provisions.

Regarding chapter I, section F, comments received by Governments suggested concern about the open-ended nature of draft article 4 as currently drafted and supported making more explicit the obligation of States not to engage in acts that constituted crimes against humanity. To address those concerns, he proposed, in paragraphs 117 to 119 of the report, to reverse the order of paragraphs 1 and 2 of the draft article and to add, at the beginning of what would then become paragraph 1, a new sentence that would read: "Each State undertakes not to engage in acts that constitute crimes against humanity." Additional changes to paragraph 2 were proposed to clarify the preventive steps envisaged.

Regarding chapter I, section H, the most salient comments concerning draft article 6, on criminalization under national law, related to the issue of command responsibility; in particular the Commission's extensive use, in paragraph 3 of the draft article, of verbatim text from the Rome Statute had been called into question. He proposed that the Commission should follow the approach used for other paragraphs of draft article 6, in which it set forth a general standard to which States should mould their national laws, rather than a highly prescriptive standard that was appropriate for the statute of an international court, but which might prove difficult for States to implement with regard to their national laws. The report dealt with the comments received in that regard in paragraphs 141 and 142; his proposal for a more streamlined version of the command responsibility standard, which drew on Protocol I additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts and the *Customary International Humanitarian Law* study of the International Committee of the Red Cross, appeared in paragraphs 158 to 162.

Regarding chapter I, section N, the comments received expressed concern that paragraph 3 of draft article 12, on victims, witnesses and others, was too open-ended as to which State must take reparation measures. In other words, paragraph 3 might be read as requiring all States worldwide to adopt a reparation scheme for conduct that had no connection with that State. Paragraphs 229 and 230 of the fourth report dealt with the comments received in that regard, and paragraph 232 contained his proposal for the insertion of a clause in draft article 12 (3) that indicated that the State or States that must address the issue of reparation were the State that committed the acts that constituted

crimes against humanity and the State in which the crimes occurred – which could in fact be the same State.

As for chapter I, section O, on draft article 13, several States, while expressing support for the basic scheme establishing criminal jurisdiction in any State where an alleged offender was present and imposing an obligation upon that State to extradite or prosecute, had expressed a desire that consideration should be given to the extradition of the alleged offender back to the State in which the crimes had occurred. Further, some States had called for the inclusion of a provision that appeared in modern extradition treaties calling on States, generally, to expedite their extradition procedures and to simplify their evidentiary requirements. Paragraphs 167 and 238 to 241 of the report dealt with the comments received in that regard; his proposal for a new paragraph 1 to be added to draft article 13 to address those comments appeared in paragraphs 252 to 256 of the report.

Regarding chapter I, section P, on mutual legal assistance, the United Nations Office on Genocide Prevention and the Responsibility to Protect had proposed that language should be added to draft article 14 to facilitate the cooperation of States with international mechanisms established by the intergovernmental bodies of the United Nations, with a mandate to conduct criminal investigations on crimes against humanity, as such language “might encourage States to make standing provisions for such cooperation at the national level”. Although, to his knowledge, it had no antecedent in treaty law, the proposal seemed apt, and so he had recommended adding a new paragraph 9 to draft article 14. Paragraphs 272 and 273 of the fourth report dealt with the comment received in that regard and his proposal to add a new paragraph 9 to draft article 14 appeared in paragraph 278.

Chapter II of the report covered proposals for the inclusion of additional draft articles. In most instances, the comments in question echoed views that had been expressed by Commission members in advance of its first reading of the draft articles and thus had been considered previously. Nevertheless, it seemed appropriate to refer to those issues in the light of the comments received from States and others, in order to ensure that the Commission fully considered the points raised. In his view, new articles – or new provisions within existing articles – on those issues were not warranted, with one exception.

The exception in question concerned expressly addressing the situation of the transfer of sentenced persons, which, for reasons set out in paragraphs 295 to 299 of the report, might merit a new draft article, which he had proposed as draft article 13 *bis*. Although only one State – Switzerland – had raised the issue in its comments, the case for including such a provision was strong. The Office on Genocide Prevention and the Responsibility to Protect had noted: “it is increasingly common for criminals involved to be convicted and sentenced in foreign countries. International transfer of sentenced prisoners not only facilitates the fair treatment and social rehabilitation of prisoners, but is also a tool of international cooperation”. Furthermore, such a provision existed in contemporary treaties that were widely adhered to and that addressed inter-State cooperation on crimes, such as the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption.

Chapter III of the report dealt with a separate initiative led by a core group of States, specifically Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia. Launched in 2011, the initiative was aimed at drafting a treaty that would cover not just crimes against humanity, but also the crime of genocide and war crimes, and possibly other crimes as well.

The Commission had discussed, at the outset of its project, whether it should consider a wider range of crimes, but had decided to keep its focus on crimes against humanity. The central reason for doing so, in his view, had been the existence of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and of the Protocols additional to the Geneva Conventions of 12 August 1949, which already covered those other crimes and which were widely adhered to by States. While there might be an argument for modernizing those conventions, the legal complexity of doing so in a single instrument, especially in relation to war crimes, and the political difficulty of doing so without guidance from States parties to those conventions, had led the Commission to focus

on the area of national law that was not already regulated by a convention, namely crimes against humanity.

Virtually since the beginning of the Commission's work on the topic of crimes against humanity, the States' separate initiative had seemed relatively quiet; in October 2018, however, the core group of States had produced a draft treaty and circulated it to other States. The draft treaty had been formally transmitted to him in December 2018 by the chair of the group, Mr. Arie IJzerman, a special adviser on international affairs at the Dutch Ministry of Justice and Security. The draft treaty had also been appended to the comments submitted by the Government of the Netherlands on the Commission's draft articles, which in turn had been distributed electronically to the members in February 2019. He had met with representatives of that other initiative over the past several years in Geneva, The Hague and New York. Most recently, he had attended a meeting in The Hague in February 2019 and a meeting by teleconference in March 2019. In all respects, the meetings had been very cordial and mutually supportive, with all participants striving for the same general goal of improving the system of international justice.

As indicated in the fourth report, the draft treaty went well beyond what was typically found in a mutual legal assistance treaty, whether bilateral or multilateral. A table in the report (para. 329) listed the topics that were addressed in the draft treaty and the Commission's draft articles. While the two initiatives had basically the same objective, they differed in focus, with the Commission's project addressing solely crimes against humanity and the other initiative considering genocide and war crimes as well.

He had been informed that participants at the most recent meeting, hosted by the Netherlands in mid-March 2019, had included the representatives of 50 States, 2 international organizations and 9 non-governmental organizations. At that meeting, possible rules of procedure for a diplomatic conference had been discussed, but not adopted. Further, there had been disagreement regarding the scope of the treaty, with some States supporting the October 2018 draft and other States advocating for a return to a "pure" mutual legal assistance and extradition treaty, which would not seek to define the crimes at issue or require the establishment or exercise of national jurisdiction. The core group of States was hoping to convene a diplomatic conference during the first half of 2020.

The question that arose in the light of the above was how the Commission should now proceed. Its current approach had garnered considerable support among States; it should also be emphasized that the Commission's topic had unfolded within the United Nations system, allowing all States to help shape the draft articles since its work had begun in earnest in 2015. Moreover, the representatives of the core group of States had informed him that those States were fully supportive of the Commission's initiative and wished to be actively engaged in the outcome of its work. Therefore, it was his view that the Commission should continue on its current path and present to the General Assembly, at its seventy-fourth session, draft articles along the lines of those it had adopted on first reading. In doing so, of course, it could take into account any aspects of the core group's 2018 draft treaty that it found useful for its work. For example, his proposal to add a new article 13 *bis* on the transfer of sentenced persons had been inspired in part by the fact that that issue had been addressed by the States' initiative, but not by the Commission's draft articles.

In his opinion, it was unlikely that States would choose to develop two treaties – one against crimes against humanity and one on crimes against humanity, genocide and war crimes – unless the latter was a "pure" mutual legal assistance and extradition treaty. Without wishing to prejudge the Commission's recommendation to the General Assembly, it was for States to decide, ultimately, what type of treaty, if any, they wished to develop.

Chapter IV addressed the final form of the draft articles and the Commission's recommendation to the General Assembly. There seemed to be no doubt that the Commission should continue to characterize its project as a series of draft articles, rather than draft conclusions or draft principles, for instance. Assuming that the Commission concluded its second reading of the draft articles at the current session, the more significant issue would then be how to formulate the recommendation to be made to the General Assembly. Chapter IV indicated both the formal aspects of the Commission's statute in that

regard and the Commission's actual practice over time. While he would welcome comments by the other members during the course of the debate, he wished to note that, assuming that the Commission's work proceeded as hoped during the first part of its current session, he had asked the Secretariat to make arrangements for members to meet informally to discuss the recommendation during the second part of the session.

Annex I set out the entire set of draft articles adopted by the Commission at first reading, with any changes clearly marked. Annex II, in the addendum to the report (A/CN.4/725/Add.1), consisted of a table that set forth, for each draft article adopted on first reading, previous treaty provisions that had been considered by the Commission when crafting the draft article in question.

Before concluding, he wished to note that there continued to be considerable interest in the topic from outside the Commission. He was regularly approached by Governments, international organizations, treaty bodies, non-governmental organizations and scholars who were keen to learn more about the topic and share their views.

In August 2017, at a meeting in New York with members of delegations to the Sixth Committee, he had explained the outcome of the Commission's first reading on the topic and had responded to questions. In December 2017, he had moderated a panel on "Prospects for a Convention on the Prevention and Punishment of Crimes Against Humanity" at the sixteenth session of the Assembly of States Parties to the Rome Statute in New York.

In May 2018, during the first part of the Commission's seventieth session in New York, he had given a presentation on the topic at a panel on "The International Law Commission and the Fight Against Impunity". In October 2018, he had explained the Commission's work on the topic at an informal meeting of legal advisers of ministries of foreign affairs at United Nations Headquarters in New York, and had received some useful feedback. In November 2018, at the suggestion of Mr. Grossman Guiloff, and with the assistance of Mr. Vázquez-Bermúdez and the Government of Ecuador, he had presented the Commission's work on the topic to the Permanent Council of the Organization of American States.

In 2017 and 2018, he had briefed the International Committee of the Red Cross on the Commission's work as part of the Commission's engagement with the Committee. He had also continued to participate in regional workshops attended by government and non-governmental representatives, other practitioners and academics in order to raise awareness of the Commission's work and generate new ideas for improving it. He had also seized opportunities to lecture on the topic in academic settings, which had enabled him to speak to audiences in different regions of the world.

He looked forward to hearing the views of other members of the Commission on his fourth report, and hoped that, after the debate, the Commission would decide to refer the draft preamble, draft articles and draft annex to the Drafting Committee for consideration of his proposed changes and any necessary tidying up.

Mr. Murase said that he wished to thank the Special Rapporteur for his comprehensive fourth report and oral introduction thereto, and that he appreciated the Special Rapporteur's efforts to accommodate the views of States and other entities. In that regard, he wondered why the Government of the United States of America had waited until only a few days previously – long after the deadline of 1 December 2018 – to submit its written comments on the first reading text. He found the comments, in which the Government had bluntly stated that it had no intention of becoming a party to the proposed convention, to be unfriendly, and even humiliating for the Commission and the Special Rapporteur, whom he wished to congratulate for demonstrating his independence.

Turning to the draft preamble, he said that the reference to article 7 of the Rome Statute of the International Criminal Court in the sixth preambular paragraph might need to be amended if the Special Rapporteur's proposed changes to draft article 3 were accepted by the Commission.

Regarding draft article 2, he agreed with the comment submitted by New Zealand to the effect that the title of the provision, namely "General obligation", was inconsistent with

its formulation, which addressed the general nature of crimes against humanity. The problem could be rectified either by reformulating the provision as proposed by New Zealand or by changing the title to “General nature of crimes against humanity”.

He also agreed with the concern expressed by a number of States about the term “crimes under international law”. In his opinion, it should be replaced with the term “the most serious crimes of concern to the international community as a whole”, in line with the fourth preambular paragraph. The term “crimes under international law” had specific meanings in different conventions. In any event, the meanings of both terms should be clarified in the commentary, bearing in mind relevant instruments.

With respect to draft article 3 (2) (i), it was essential to take into account the concern raised by the United Kingdom of Great Britain and Northern Ireland that, if the Commission opted to use the definition of “enforced disappearance of persons” found in the International Convention for the Protection of All Persons from Enforced Disappearance, rather than the one set out in the Rome Statute, the 123 States parties to the Statute “would potentially be required to amend their national legislation implementing the Statute to give effect to a future convention based on the draft [a]rticles”.

He agreed with the point made by several States that some of the definitions contained in the draft article did not reflect the practice that had been developed since the adoption of the Rome Statute in 1998. While he was largely in favour of using the same definitions as those laid down in the Statute, as had been decided by the Commission in 2015, he would prefer to allow room to reflect developments since 1998 and any future developments in international law.

He shared the concern expressed by Estonia over the so-called “policy element” contained in draft article 3 (2) (a), and, like Estonia, wondered whether it was appropriate to retain the concept in the draft articles. The International Tribunal for the Former Yugoslavia had explicitly denied the customary status of the “policy element” in the case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, stating that “there was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes [against humanity]”, and that “the existence of a policy or plan ... is not a legal element of the crime”. Furthermore, the “policy element” was not provided for in the Statute of the Special Court for Sierra Leone, the Statute of the Special Panels for Serious Crimes in East Timor or the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, although all three instruments had been concluded after the adoption of the Rome Statute. In paragraph 92 of his fourth report, the Special Rapporteur mentioned, in relation to a clause in draft article 3 (1) (h), that “such a clause ... is [not] used as a jurisdictional threshold for other contemporary international criminal tribunals. Rather, such tribunals have indicated that the Rome Statute ... is not reflective of customary international law”. He personally was of the view that the same reasoning should probably be applied to the “policy element”.

He fully agreed with Estonia that the definition of gender in draft article 3 (3) did not reflect current international human rights law and that any future convention should protect “transgender and intersex persons”. Lesbian, gay, bisexual, transgender and intersex persons had been the victims of frequent attacks and required special protection. The definition of gender as referring to “males and females” was outdated, and the term “within the context of society” was far from satisfactory. The last sentence of draft article 3 (3) was also problematic, and would prove an obstacle to the future development of international law on the issue of gender. Having read carefully many of the comments submitted by relevant non-governmental organizations and listened to the views of academics who had stressed the importance of the gender issue in the context of the topic, he supported the Special Rapporteur’s proposal to delete draft article 3 (3). Such a move should be viewed not as a negative response from the Commission, but as a positive action aimed at removing any obstacles to the healthy future development of international law on the issue of gender. While it would be desirable to amend, rather than delete, the provision, the issue was an evolving one, and the Commission should perhaps wait to see how it developed. He hoped that an appropriate commentary would be provided in that regard.

Draft article 3 (4) was closely related to draft article 6 (1), in the commentary to which it was stated that “deviations from the exact language of draft article 3, paragraphs 1 to 3 ... should not result in qualifications or alterations that significantly depart from the meaning of crimes against humanity”. He believed that the same principle applied to draft article 3 (4), and thus that the same sentence should be added to the commentary thereto.

Regarding the Special Rapporteur’s recommendation for a new paragraph 2 (a) of draft article 4, he noted the preference expressed by Austria and Chile for using the words “jurisdiction or control”. Although the Special Rapporteur explained that the phrase “territory under [a State’s] jurisdiction” referred not only to a State’s own territory but also to other territory under its jurisdiction, such as occupied territory, the phrase excluded ships and aircraft flying the State’s flag. Consequently, there was an inconsistency between draft articles 4 and 7. While draft article 7 (1) (a) referred to offences “committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State”, new draft article 4 (2) (a) did not include the words “or on board a ship or aircraft registered in that State”. He proposed that the language should be inserted.

As to draft article 6 (1), he wished to draw attention to the suggestion from Greece to add the words “as defined in the present draft articles” at the end of the paragraph. Although the Special Rapporteur noted that such a cross reference appeared unnecessary, it was explained in the commentary that it was advisable to “avoid possible discrepancies between the crime as defined in the [draft articles] and the crime as it is addressed in national law”. The proposal by Greece therefore seemed worthy of consideration.

Furthermore, according to the commentary, “the term ‘crimes against humanity’ used in draft article 6 [...] does not include the ‘without prejudice’ clause contained in draft article 3, paragraph 4. While that clause recognizes the possibility of a broader definition of ‘crimes against humanity’ in any international instrument or national law, for the purposes of these draft articles the definition of ‘crimes against humanity’ is limited to draft article 3, paragraphs 1 to 3”. In his opinion, the exclusion of the “without prejudice” clause in draft article 3 (4) should be clarified in the provision itself, and he therefore proposed the insertion, after the words “crimes against humanity”, of either the phrase “as defined in draft article 3, paragraphs 1 to 3[2]” or the phrase “referred to in draft article 3, paragraphs 1 to 3[2]”.

While he supported the Special Rapporteur’s proposal to adjust draft article 10 so as to align it more closely with the text of the standard “Hague formula”, he wished to draw attention to the comment made by Chile regarding the principle of *ne bis in idem*. The Special Rapporteur’s understanding appeared to be that the principle fell under international human rights law and, by extension, draft article 11. However, as was apparent from article 20 of the Rome Statute, the principle addressed not only the need to guarantee the human rights of alleged offenders but also the issue of “sham” proceedings, which could contribute to a culture of impunity. Since draft article 10 governed “horizontal relationships” among States, the possibility that criminal proceedings had been carried out for the purpose of shielding a suspect from genuine prosecution in a different forum was relevant and was not covered by draft article 11. As a result, the Commission should consider the incorporation of the *ne bis in idem* principle in draft article 10, in line with article 20 (3) of the Rome Statute.

With regard to draft article 11, it was worth bearing in mind the comment from Sierra Leone to the effect that fair treatment was to be accorded even prior to a person being accused. The draft article was modelled on article 17 of the Convention on the Safety of United Nations and Associated Personnel, yet the term “investigations” in the latter was absent in the former. Since the draft articles dealt not only with “preliminary measures” (draft article 9) but also “investigation” (draft article 8), the words “investigations and” should be included before the term “proceedings” in draft article 11 (1).

He agreed with the idea of creating a new draft article 13 (1). The proposed paragraph should, however, be split into three or more subparagraphs, in keeping with article 44 of the United Nations Convention against Corruption, on which it was modelled, and which had separate subparagraphs for each of the issues that it addressed.

Lastly, he was in favour of the non-substantive changes to draft article 14 proposed by the Special Rapporteur. In order to clarify the distinction between natural and legal persons mentioned by the Special Rapporteur in paragraph 261 of his report, he would insert the words “against natural persons” after “investigations, prosecutions and judicial proceedings” in draft article 14 (1).

The meeting rose at 5.55 p.m.