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Held at the Palais des Nations, Geneva, on Thursday, 2 May 2019, at 10 a.m.

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Present:

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. Valencia-Ospina
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Crimes against humanity (agenda item 3) (*continued*) (A/CN.4/725 and A/CN.4/725/Add.1)

Ms. Galvão Teles, thanking the Special Rapporteur for his excellent fourth report (A/CN.4/725 and A/CN.4/725/Add.1), oral introduction and ongoing outreach efforts, said that the debates in the Sixth Committee and the extensive comments and observations received from Governments, international organizations and others had confirmed the extreme importance of the topic and the desirability of filling the gap in the existing treaty regime. The Commission should seek to maintain that positive momentum.

A future convention on crimes against humanity would be a cornerstone of the edifice that the international community was constructing to promote accountability and prevent impunity for the most serious international crimes. It would also represent a further contribution of the Commission to international criminal law, following the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court, and would demonstrate the continued vitality and relevance of the Commission's work more than 70 years after its establishment.

In general, States had commented favourably on the Commission's methodology in drafting the articles and on the consistency of the draft articles with the Rome Statute of the International Criminal Court. It had been noted that a future convention could facilitate national prosecutions, thereby strengthening the complementarity provisions of the Rome Statute, and that the Commission's work would help to close a gap in the existing international legal framework, as the Rome Statute did not concern the prevention and punishment of crimes against humanity at the national level.

With regard to the title of the draft articles, she agreed with Mr. Nolte, Mr. Tladi and Sir Michael Wood that the wording proposed by Sierra Leone, namely "Draft articles on the prevention and punishment of crimes against humanity", merited serious consideration by the Drafting Committee, as it would clarify the purpose and the added value of the Commission's project.

Although she understood the rationale for many of the proposals made by States with regard to the draft preamble, she believed that the Special Rapporteur's decision not to recommend any changes to the text was the right one. The comments and observations received in that regard could be addressed in the commentary.

She also agreed with the Special Rapporteur's decision not to recommend any changes to draft article 1. However, as some States had expressed support for the addition of a non-retroactivity clause, the Commission might wish to clarify in the commentary that the rules of customary international law would continue to govern questions not regulated by the draft articles. The same language was included in the preamble to other conventions originally prepared by the Commission, including the 1969 Vienna Convention on the Law of Treaties and the United Nations Convention on Jurisdictional Immunities of States and Their Property.

With regard to the definition of crimes against humanity set out in draft article 3, the overarching concern of the Commission and States had been to follow article 7 of the Rome Statute. However, as Ms. Lehto had explained, there were good reasons to omit from that draft article the definition of "gender" set out in the Rome Statute, and the Special Rapporteur's proposal that paragraph 3 should be deleted was a pragmatic solution in that regard. She also supported the Special Rapporteur's proposal that the "without prejudice" clause in draft article 3 should be expanded to include any broader definition of crimes against humanity provided for in customary international law.

Although the Commission had decided, on first reading, not to define the term "victim", given the need to reflect differing approaches at the national level, the commentary to draft article 12 should include some indication of which persons should be considered victims, based on existing international practice and case law.

She understood the rationale for the Special Rapporteur's recommendation that a new draft article entitled "Transfer of sentenced persons" should be added, in accordance with a suggestion made by Switzerland. However, it seemed logical to place such an article after draft article 14 rather than after draft article 13, as the transfer of sentenced persons was relevant to both extradition and mutual legal assistance.

She supported the Special Rapporteur's decision not to include a provision prohibiting amnesties, which was an option supported by some States and opposed by others. However, she agreed with Mr. Tladi that, as Sierra Leone had suggested, a distinction should be drawn in the commentary between blanket amnesties, which were prohibited, and amnesties that were narrow and conditional. She also supported the suggestion made by Chile that the first sentence of paragraph (8) of the commentary to draft article 10 should be rephrased to state that the obligation upon a State to submit the case to the competent authorities precluded the possibility of implementing an amnesty in relation to crimes against humanity.

Concerning the possible establishment of an institutional mechanism, she agreed with the Special Rapporteur's decision not to change the approach that the Commission had taken on first reading. The matter would be left for States to decide if and when they negotiated a future convention on crimes against humanity and if and when they considered the separate State-led initiative for a convention addressing crimes against humanity, genocide and war crimes. In her view, if such a mechanism was established, it should also cover the crime of genocide and perhaps war crimes as well.

With regard to the separate initiative itself, she agreed with the Special Rapporteur's approach, as outlined in his fourth report, and with the comments made by other Commission members. The Commission should focus on completing the second reading and producing the best possible draft articles on the prevention and punishment of crimes against humanity. She hoped that States would make use of the eventual outcome of the Commission's work on the topic and of the separate initiative in a manner that furthered their common goal of providing additional tools for promoting accountability and preventing impunity for the most serious crimes of international concern.

She agreed that the final form of the Commission's work on the topic should be a set of draft articles that could serve as the basis for a future convention. In that connection, she welcomed the Special Rapporteur's suggestion that consultations should be held at the current session regarding the recommendation to be made to the General Assembly in accordance with article 23 (1) of the Commission's statute. Careful consideration was required in order to find the best way of reconciling the Commission's work with the separate initiative for a convention addressing crimes against humanity, genocide and war crimes, although States would ultimately decide on the matter.

She was in favour of referring all the draft articles to the Drafting Committee and supported the Special Rapporteur's aim of completing the second reading at the current session.

Mr. Hmoud, thanking the Special Rapporteur for his comprehensive fourth report, said that the volume and depth of the reactions from States to the Commission's work on the topic of crimes against humanity, whether expressed by delegations in the Sixth Committee or submitted to the Commission as comments and observations, demonstrated the great importance that the international community attached the topic and to the Commission's work on it. In recent years, the Special Rapporteur had made tremendous efforts to raise awareness of the project internationally and to ensure that the outcome of the Commission's work would enjoy the widest possible acceptance. The Special Rapporteur was to be commended for his focus on developing a convention on the prevention and punishment of crimes against humanity that would fill a gap in the existing international legal framework and help to fight impunity for such crimes, while avoiding any expansion of the project to include issues that could undermine the acceptability of a future convention.

The draft articles involved both the codification and the progressive development of international law. As the intended outcome of the Commission's work would take the form of a legal instrument, the draft articles should not be solely or largely reflective of State

practice, but should create new obligations while remaining consistent with other international conventions on criminal and humanitarian law. The wording of the draft articles would ensure that no conflicting obligations would be imposed on States parties to a future convention.

The Special Rapporteur's reports and the draft articles proposed for adoption on first reading had largely succeeded in assuaging the concern originally expressed by some States that the topic and the outcome of the Commission's work on it might undermine the Rome Statute and the jurisdiction of the International Criminal Court. The draft articles did not affect the ability of States parties to the Rome Statute to cooperate effectively with the Court and were not at variance with the principle of complementarity in the Rome Statute. In fact, the obligation to criminalize crimes against humanity at the national level would fill a gap in national legislation, which would assist the Court in achieving its goal of preventing impunity.

The Commission had previously taken the view that the prohibition on crimes against humanity was a peremptory norm of general international law (*jus cogens*), and the same position could be inferred from the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. He was not persuaded by the argument that, as the consequences flowing from such a status were not discussed in the project, a reference to the peremptory nature of the prohibition should not be included in the draft preamble. The Commission could consider the matter in greater detail as part of its work on the topic of peremptory norms of general international law (*jus cogens*). Moreover, the peremptory nature of the prohibition was pertinent to the object and purpose of a future convention and the application of rules of interpretation.

He saw no need to add a reference in the draft preamble to the principles of non-intervention and non-use of force, as nothing in the draft articles suggested that they were at variance with those obligations, but he would not object to the insertion of such a reference if other Commission members thought that it was necessary.

There was no need to alter the material scope of the topic, which was the prevention and punishment of crimes against humanity. With regard to the temporal scope, although the non-retroactivity of treaty obligations was a well-settled principle, as the International Court of Justice had attested, it would be useful to include a draft article to that effect or to stipulate that the criminalization of the acts concerned was non-retroactive. Such a provision would help States to navigate situations in which mutual legal assistance or extradition requests concerned acts that had occurred prior to the entry into force of the convention for the requested State.

With regard to the general obligation set out in draft article 2, the replacement of the words "crimes under international law" with "the most serious crimes of international concern" would not be appropriate, as the draft preamble already indicated that crimes against humanity were the most serious crimes of concern to the international community as a whole. More importantly, such a reference would be out of place in draft article 2, the main purpose of which was to clarify that crimes against humanity gave rise to obligations under international law for the States concerned.

The definition of crimes against humanity in draft article 3 closely mirrored the one contained in the Rome Statute; the few changes that had been made were necessary either for the specific purposes of a future convention or to reflect recent developments. Those changes did not interfere with the obligations of States parties to the Rome Statute to cooperate with the Court in the performance of its functions. Nevertheless, he supported the Special Rapporteur's recommendations regarding the reference to "persecution" in paragraph 1 (*h*) and the deletion of paragraph 3 on gender.

While plausible arguments had been made by Ms. Lehto and others, such as Amnesty International, in support of removing the requirement of a connection between persecution and the other acts referred to in the draft article, without such a connection the term "persecution" was overly broad and could give rise to conflicting interpretations by different national legal systems. In any case, persecution as a crime against humanity was almost always associated with murder, torture, sexual violence, enforced disappearance or other crimes referred to in draft article 3. In his view, there was no loophole whereby

perpetrators of crimes against humanity involving persecution could enjoy impunity based on the current text of the definition under draft article 3. However, he supported the proposed deletion of the clause "or in connection with the crime of genocide or war crimes" in paragraph 1 (*h*).

Persecution of any group on any ground that was impermissible under international law in connection with crimes against humanity should be criminalized. Given that the limitations in paragraph 3 in relation to the categorization of gender would thus be both inoperable and unjust, he was in favour of deleting that paragraph.

In his view, the proposed addition of a reference to customary international law in the "without prejudice" clause in paragraph 4 was not warranted. While it was reasonable to provide that the definition of crimes against humanity under draft article 3 was without prejudice to a broader definition under other instruments or national laws, there was no reason to extend that provision to customary international law. He did not see the relevance of making a statement that the current definition did not prejudice any broader future definition under customary international law, given that such a definition might be developed in any event, as the formation and amendment of rules of customary international law was a separate process.

Regarding the obligation of prevention in draft article 4, he did not consider it necessary to add the proposed wording "Each State undertakes not to engage in acts that constitute crimes against humanity", as that undertaking was already implicit in the obligation of prevention under draft articles 2 and 3. To his mind, such a reference would be more appropriately placed in the preamble, where it could serve as an umbrella undertaking in respect of the obligations contained in the text and could facilitate the interpretation of obligations under the future convention. He welcomed the clarification by the Special Rapporteur that the language recognized that States themselves did not commit crimes and that crimes were committed by persons, even though the State might incur responsibility for acts committed by its agents.

With respect to draft article 5 on *non-refoulement*, he had previously expressed the opinion that the text constituted progressive development of international law, as there was currently no obligation of *non-refoulement* under the rules of customary international law. Nonetheless, he did not oppose the inclusion of the draft article or the deletion of the phrase "territories under the jurisdiction of", provided that the commentary made clear that *refoulement* was prohibited in cases where the territory in question was one where the individual involved faced a real danger of being subjected to crimes against humanity. When ratifying or acceding to the future convention, States could make interpretative declarations to define the scope of that issue.

With regard to draft article 6 on criminalization under national law, although the Special Rapporteur recommended a more concise version of paragraph 3 on command responsibility, his own preference was to retain the long version contained in the current text, which distinguished between military commanders and civilian superiors with regard to the conditions in which they could be held criminally responsible. Nonetheless, if the Commission opted for the concise version, clarification of the factual distinction between those two categories in terms of command responsibility would be warranted in the commentary. In addition, the "had reason to know" formula introduced in the concise version should take into account "the circumstances at the time" of the crime, an element contained in the current version that was necessary to protect the rights of the accused. The question of whether that element should be included in the text or in the commentary could be discussed in the Drafting Committee.

Concerning draft article 7 on the establishment of national jurisdiction, a crucial component of the project, he agreed with the Special Rapporteur that no changes were needed. He was not in favour of adding a provision that would give priority to one form of jurisdiction over another, as States exercised their sovereignty when they established any form of jurisdiction recognized under international law. Nonetheless, the proposed new paragraph in draft article 13 setting out States' obligation to give due consideration to extradition requests from States in whose territory the alleged offences had occurred would be helpful in resolving that aspect of jurisdictional conflicts. The language in that paragraph

could be improved upon, especially since the State of nationality of the victims or of the perpetrators could, in certain situations, have the dominant interest.

Regarding the proposed amendment to draft article 9 (3) to the effect that the findings of a preliminary inquiry would only be promptly reported to the States of jurisdiction "as appropriate", he was not entirely convinced by the Special Rapporteur's argument that the amendment would reflect the need for caution in reporting on investigations into crimes against humanity. Treaties on counter-terrorism dealt with comparable situations, and the crimes involved were highly sensitive in terms of national security, yet they did not contain such a limitation. The Drafting Committee should consider a less discretionary term while taking into account the legitimate interests of the reporting State. Language such as "without undue delay" might achieve that goal.

He had no objection to the proposed amendment to align draft article 10 on *aut dedere aut judicare* more closely with the language of article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague formula"). While it was understood that States parties must carry out their obligations in good faith, the commentaries, whether to that article or to other relevant articles, should reiterate that a State would incur international responsibility for violation of its obligations under the convention if it conducted sham investigations intended to shield its officials or other citizens from criminal responsibility.

On draft article 11, while he agreed with the Special Rapporteur that the phrase "including human rights law" was not necessary, the inclusion of that explicit reference would, as others had mentioned, send a clear message to States that they had to respect the human rights of alleged offenders. To address the concerns raised, he would support the addition of a reference to international humanitarian law in the same sentence.

He had no objection to the proposed amendment to draft article 12 (3) under which the obligation to ensure the right to obtain reparation would be limited to the State in whose territory the acts had been committed and the State to which the acts were attributable. However, the commentary should clarify that that provision was without prejudice to the right of other interested States, such as the State of nationality of the victim, to do the same.

He did not have strong views on the remaining proposed amendments. In his opinion, draft article 13 *bis* on the transfer of sentenced persons was an improvement. He also supported the deletion of the last phrase of paragraph 7 of draft article 14 on mutual legal assistance, as the phrase could create uncertainty when States had to decide which treaty obligations took precedence. Lastly, he welcomed the new paragraph 9 of draft article 14, as it provided for cooperation with international mechanisms established by United Nations bodies that had a mandate to collect evidence with respect to crimes against humanity.

While he would have supported the inclusion of a specific provision on amnesties, his view was that the application of amnesties was in any case not compatible with States' obligations under the draft articles, including the obligations of criminalization and punishment. Similarly, although there was no provision on immunities, it seemed clear that a State that invoked the immunity of its officials to avoid their prosecution for crimes against humanity would be violating its obligations under draft article 6 (5) on criminalization and draft article 10 on *aut dedere aut judicare*, among others.

With regard to the separate State-led initiative on crimes against humanity, genocide and war crimes, the Commission unfortunately faced a situation in which the outcome of its years of work on the topic might conflict with that initiative, and the two overlapping projects might undermine each other, to the detriment of their common goal of ending impunity for the most serious crimes of concern to the international community. It might thus be prudent for the Commission, including the Special Rapporteur, to hold consultations with the sponsors of the initiative to try to find a satisfactory solution that preserved the integrity of the Commission's project while achieving the common aim of bringing about the adoption of an effective legal instrument. Of course, the existence of the separate initiative would affect the Commission's recommendation to the General Assembly in respect of the final form of the draft articles and the next steps to be taken. He

therefore proposed that the Commission should set aside time to discuss the best course of action.

In conclusion, he recommended that the full set of draft articles contained in the fourth report should be referred to the Drafting Committee.

Mr. Reinisch said that, while he shared the concerns that some members had expressed about the length of reports, in the current case a lengthy report seemed justified, given that it represented the final step in the preparation of a future convention and took into account a broad range of comments made by a variety of stakeholders.

Concerning the specific changes proposed, although the Special Rapporteur had made a vigorous case for deleting the phrase "or in connection with the crime of genocide or war crimes" from draft article 3 (1) (*h*), arguing that the requirement that persecution must be linked to genocide or war crimes would be overly restrictive and that the remaining language requiring a "connection with any act referred to in this paragraph" would be sufficient to ensure that only acts of a certain gravity could constitute crimes against humanity, he shared the concern voiced by Ms. Lehto that the connection with other acts constituting crimes against humanity might also be unduly restrictive. In addition to her suggestion that the words "any act referred to in this paragraph" should be replaced with a reference to acts of "equal gravity", another solution would be to delete the entire second half of paragraph (1) (*h*) – "in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes" – as proposed by some States. The Special Rapporteur had cautioned that such an approach could result in an overly broad definition of the crime, but even if the additional element of a "connection with any act referred to in this paragraph" was deleted, any prosecution would still require that the acts in question should have been committed as part of a widespread or systematic attack. Thus, the perceived broadening effect might not be as significant as feared.

The Special Rapporteur had made a convincing case for deleting draft article 3 (3) on the meaning of the term "gender". Although that definition was identical to the one found in the Rome Statute, and he was generally in favour of adhering as closely as possible to the wording of that instrument, he supported the deletion for the reasons advanced by the Special Rapporteur.

Regarding draft article 5 on *non-refoulement*, he agreed with the Special Rapporteur that the words "territory under the jurisdiction of" should be deleted in order to ensure that the *non-refoulement* obligation was not unduly restricted to a specific territory, but applied whenever a person was handed over from one State to another. Nonetheless, like Mr. Park, he was concerned that the proposed deletion might again introduce an implicit emphasis on territory. He thus supported Mr. Park's proposal that only the words "territory under", and not "the jurisdiction of", should be deleted.

As many States had criticized the overly prescriptive nature of draft article 6 (3) on command responsibility, he supported the Special Rapporteur's proposal for more concise and flexible language.

He was not in favour of the proposed deletion of the words "including human rights law" in draft article 11 (1). He understood the Special Rapporteur's reasoning that human rights law should be regarded as forming part of international law and that highlighting it only in draft article 11 (1) and not in the other places where international law was mentioned might have adverse implications. However, in the context of ensuring fair treatment of persons suspected of having committed crimes, human rights guarantees of a fair trial were particularly important. Sometimes stating the obvious had its merits. To address the concern that explicitly mentioning only human rights law might be seen as downgrading the importance of international humanitarian law, both branches of law should be mentioned, as proposed by several members.

He was not convinced of the need to include draft article 13 *bis* on the transfer of sentenced persons, given that it seemed to address an issue that might also apply to many other crimes in addition to those covered by the draft articles. Although he acknowledged Ms. Lehto's view that the proposed additional draft article was a standard feature of modern

criminal law conventions, he did not see why such a provision should be included in the current context.

Concerning the separate initiative for a convention addressing crimes against humanity, genocide and war crimes, he shared the concern expressed by some members that the initiative might not be entirely mutually supportive and complementary to the Commission's draft article 14 on mutual legal assistance. He agreed with the Special Rapporteur that the pursuit by States of both projects simultaneously might be inefficient and confusing.

As to the final form of the draft articles, he agreed with the Special Rapporteur that they should form the basis for a convention to be ultimately adopted by States. In conclusion, he recommended that the draft articles should be referred to the Drafting Committee and expressed the hope that the Commission would be able to complete its work on the topic at the current session.

The meeting rose at 11 a.m.