

Provisional

**For participants only**

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**International Law Commission**  
**Seventy-first session (first part)**

**Provisional summary record of the 3457th meeting**

Held at the Palais des Nations, Geneva, on Friday, 3 May 2019, at 10 a.m.

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Crimes against humanity (*continued*)


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***Present:***

<i>Chair:</i>	Mr. Šturma
<i>Members:</i>	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
	Mr. Zagaynov

***Secretariat:***

Mr. Llewellyn	Secretary to the Commission
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*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)

**Mr. Grossman Guiloff** said that the Special Rapporteur's thorough and rigorous approach to the topic, which was aimed at achieving the right balance between codification and desirable development of the law, had ensured the legitimacy and acceptability of the draft articles on crimes against humanity, the language of which was closely aligned with analogous provisions of widely ratified treaties. The Special Rapporteur had continued that approach in his fourth report, in which he addressed the comments that had been received from Governments, international organizations and others on the draft articles – a noteworthy feat, given the unusually large number of contributions, the wide range of issues covered and the comparatively short period of time between the deadline for submissions and the issuance of the report.

He agreed that there was no need to amend the preamble. In particular, it was fundamental to retain preambular paragraph 3 on the peremptory nature of the prohibition of crimes against humanity. The Commission had previously made clear its position on the matter, for instance, in its report on fragmentation of international law, in which it had characterized such prohibition as a rule of *jus cogens*. The deletion of preambular paragraph 3 could therefore be seen as detrimental to the Commission's work in terms of consistency.

He was in favour of retaining draft article 2 as it stood, for the same reasons set out by the Special Rapporteur in the commentary, namely that the language made clear that crimes against humanity were crimes under international law regardless of their characterization as such under national law. Thus their existence was not left to the discretion of States and their national legislation.

Regarding draft article 3, he agreed with the proposals to delete certain parts of paragraph 2 (*h*), as well as paragraph 3 in its entirety. The deletion of the phrase “or in connection with the crime of genocide or war crime” was necessary. In the present case, the rationale aimed at limiting the jurisdiction of an international criminal tribunal, which had led to the restrictive formulation used in the Rome Statute of the International Criminal Court, was not applicable, since the purpose of the draft articles was to ensure the prevention and punishment of crimes against humanity at the national level.

Under customary international law, acts of persecution did not need to be linked with genocide or war crimes in order to constitute crimes against humanity. As stated by the Commission at the time of its adoption on second reading of the Draft Code of Crimes against the Peace and Security of Mankind, “[t]he definition of crimes against humanity contained in article 18 does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes as in the Charter of the Nürnberg Tribunal. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement.”

There was also merit to the Special Rapporteur's approach, in draft article 3, in requiring a link between persecution and other acts. Although the denial of any human right was a matter of utmost concern, it did not necessarily constitute a crime against humanity. Rather, it did so only when the gravity of the acts involved made it an attack on humankind itself. Therefore, for persecution to fall within the scope of the draft articles, it seemed appropriate to require that acts of persecution should have to have a connection with inhumane acts serious enough as to give rise to a crime against humanity – such a standard was roughly equivalent to the “equal gravity” requirement held by many tribunals.

While he agreed with Ms. Lehto that, for the underlying acts of persecution to be of equal gravity to other crimes against humanity, they did not have to be connected to other crimes, the new formulation proposed by the Special Rapporteur did not appear to require a connection to another independent crime. Rather, it required merely that the acts that gave rise to persecution should have a certain degree of gravity; that would be the case when those acts consisted, at least partially, of any of the conducts listed in draft article 3 (1). Noting that paragraph 1 (*k*) was an open-ended provision that focused on the “equal gravity”

that other unspecified acts might have, he said that the Special Rapporteur rightly asserted in paragraph 99 of his report that the new drafting did not require a connection between persecution and another crime. In the light of the above, the proposal to replace the current text with language on the concept of equal gravity seemed unnecessary; moreover, the current formulation seemed more comprehensive and provided better guidance for States.

He wholeheartedly supported the proposal to delete draft article 3 (3): the compelling comments submitted in that respect by non-governmental organizations (NGOs) and other relevant actors not only demonstrated the need to reflect, in the draft articles, the development of the law, but also the undesirable consequences that might arise should the content of an instrument be perceived as outdated.

Concerning draft article 3 (2) (i), which contained the definition of the term “enforced disappearance”, he was not persuaded by the Special Rapporteur’s arguments in favour of maintaining the phrase “with the intention of removing them from the protection of the law for a prolonged period of time”. While there was general agreement that the overall consistency of the draft articles with the language of the Rome Statute was critical in order to attract the support and interest of States, and to build on existing laws and regulations adopted in line with the Statute, there were cases in which a departure from the Statute might be warranted. The Special Rapporteur himself had acknowledged as much, in relation to other aspects of draft article 3. In any event, it would be for States to decide how to proceed. In his opinion, the inclusion of the phrase “with the intention of removing them from the protection of the law for a prolonged period of time” in the definition of enforced disappearance would constitute a step backwards in the development of international law, especially when compared to the definition provided in the International Convention for the Protection of All Persons from Enforced Disappearance. Such a phrase might hamper the development and crystallization of a customary rule; the Commission should not run that risk.

Furthermore, the “without prejudice” clause in draft article 3 (4) did not address the problem of providing a restrictive definition for those States that were not parties to the International Convention for the Protection of All Persons from Enforced Disappearance or another instrument with an analogous formulation. Under the draft article, as currently formulated, such States would be bound to incorporate provisions reflecting the “intention” referred to draft article 3 (2) (i) in their national laws criminalizing enforced disappearance: that was a deviation from the path of the development of the law since the adoption of the Rome Statute. In sum, he supported the proposal made by the Office of the United Nations High Commissioner for Human Rights and some States that the last phrase in draft article 3 (2) (i) should be deleted.

Draft article 4, on the obligation of prevention, could benefit from some redrafting. He agreed with the Special Rapporteur and Ms. Lehto that an express obligation on States to refrain from committing crimes against humanity should be included. It was important to add that prevention of such crimes did not mean merely refraining from committing them; it also covered actions such as the establishment of crimes against humanity as crimes in national law. He was in favour of including additional examples in draft article 4 (2) for the benefit of States, for example, the training of officials, the fulfilling in good faith of an obligation to investigate, compliance with the obligation of *aut dedere aut judicare* and the establishment of an effective mechanism for complaints and investigations into crimes against humanity, with a view to deterring further acts. It would also be advisable to add, in draft article 4 (2), that States undertook to prevent crimes against humanity in an appropriate and effective way. He proposed that an express reference to the obligation of due diligence should be introduced in draft article 4 rather than in the commentary. Lastly, he recalled that, in its 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice had clarified that the obligation to prevent constituted a legally binding provision, with extraterritorial reach, and thus also had articulated an autonomous obligation for third States to prevent genocide. However, the Netherlands Advisory Committee on Issues of Public International Law had established that such an obligation did not entail a unilateral and unauthorized right or duty to use force. He

would be in favour of incorporating a reference to that effect in the commentary to the draft articles.

Regarding draft article 5, he agreed with the views set out in paragraph 123 of the report, on the inappropriateness of using a “territorial” formula in respect of *non-refoulement*. However, echoing the concern expressed by Mr. Hassouna, he said that the deletion of the whole phrase “territory under the jurisdiction of” would be misleading, since the provision could be interpreted as precluding only transfers to the physical territory of a State. Therefore, he too would be in favour of retaining the word “jurisdiction”. It should be borne in mind, however, that States sometimes engaged in conduct that was not within their legal scope of jurisdiction, situations in which the rule of *non-refoulement* of draft article 5 should also apply. Accordingly, he proposed that, in paragraph 1, the phrase “No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State” should be replaced with “No State shall expel, return (*refouler*), surrender or extradite a person to the jurisdiction or control of another State”.

He did not agree with the proposed deletion of the measures laid down in draft article 6 (3). If those measures were not made explicit, there would be no clear rule for establishing the criminal responsibility of a military commander or superior or person effectively acting as a military commander with regard to the acts of others. The deletion would therefore weaken the draft article. He agreed with Mr. Rajput that the subparagraphs under draft article 6 (3) needed to be retained; he was not convinced by the argument that the provision in question, taken from the Rome Statute, did not have sufficient support to be considered customary international law. Additionally, it had already been established in the commentary that the standard had begun influencing the development of “command responsibility” in national legal systems, both in the criminal and civil contexts. Furthermore, retaining the subparagraphs would encourage harmonization of national legislation on the issue.

Regarding draft article 10, while he welcomed the Special Rapporteur’s proposal that the language should be more closely aligned with the “Hague formula”, there was a gap that remained to be addressed. The draft article, as adopted by the Commission at its sixty-ninth session, asserted that the State in which the alleged offender was present was obliged to submit “the case” for the purpose of prosecution. Hence, when the provision later referred to the alternatives of extradition and surrender, it was clear that such options had to be related to “the case” on crimes against humanity mentioned in the first part of the draft article. The most recent formulation proposed by the Special Rapporteur would, in his view, give the State in which an alleged offender was present a broader scope of alternatives. In fact, the provision would seem to allow such a State to extradite or surrender that person for any kind of offence, even one unrelated to a crime against humanity, and suggested that the obligation to submit “the case” for the purposes of prosecution arose only if extradition or surrender did not take place. The negative effects of such an understanding were obvious. According to the principle of speciality that usually governed extradition treaties, a State requesting the extradition of a person could try the latter only for those crimes specifically included in the request. Therefore, if the alleged offender of a crime against humanity was extradited or surrendered for unrelated offences, the receiving State would not be able to try that individual for the crimes referred to in the draft articles, thereby fostering conditions of impunity.

Accordingly, the Commission should reflect on whether draft article 10 should be modified in order to make clear that extradition would be in line with the obligation set out in the draft article if it was granted for the purpose of prosecuting the alleged crimes against humanity. He proposed that the first sentence of the draft article should be redrafted to read: “The State in the territory under whose jurisdiction an alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal tribunal for any of the offences defined in draft article 3, submit the case to its competent authorities for the purpose of prosecution.”

Regarding draft article 11 (1), he did not support the deletion of the phrase “, including human rights law”, as proposed by the Special Rapporteur in paragraph 218 of his report. Although human rights law was clearly included in the more general reference to international law, its inclusion in draft article 11 served to emphasize its particular role in

the treatment of alleged offenders and their right to a fair trial; deleting it would not send a positive message to the international community. He would support the proposal made by other members of the Commission to include a reference to international humanitarian law in order to address the concerns of the Special Rapporteur. However, since that legal order was applicable in a limited range of situations, he suggested adding, in paragraph 1, after the words “including human rights law” the phrase “and, as appropriate, international humanitarian law”.

With regard to the comments made by several States regarding draft article 11 in favour of a much longer draft article that would cover a wider array of rights, he supported the Special Rapporteur’s statement in paragraph 212 of his report that the Commission wished to make clear that persons who were alleged to have committed offences of crimes against humanity were entitled to the same rights as any person alleged to have committed a crime. However, he would suggest inserting in paragraph 1, after the words “including a fair trial”, the phrase “by an independent and impartial tribunal”, in order to stress the importance of the independence and impartiality of tribunals.

With regard to draft article 12, on victims, witnesses and others, the definition of victims should not be left to States’ discretion. In his view, for the draft article to address the issue in a comprehensive manner, it should include the definition of “victim” and cover comprehensive reparations, the rights of victims that must be recognized and the protection of victims and witnesses. In that sense, he supported providing a basic definition of the term “victim”, which could then be incorporated into States’ national legislations. Such a definition had long been the subject of development under international law, from protection in investment law to international human rights law and international humanitarian law. Leaving it to States to establish a definition under national law could have serious consequences. It could not be assumed that all States had established a basic definition of the term “victim” or that they treated all individuals on an equal basis. Moreover, the elements of such a definition were firmly grounded in the international law of responsibility for harm to nationals of other States. Many States and the human rights treaty monitoring bodies had developed ample practice in that area.

It was worth recalling the discussion in the drafting of the Rome Statute, during which great support had been expressed for the definition used in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, where the term “victims” was understood in the same way as in general comment No. 3 of the Committee against Torture. However, in the end, a broader definition proposed by Japan had been adopted in order not to exclude anyone: in rule 85 of the Rules of Procedure and Evidence of the International Criminal Court, a victim was defined as natural persons who had suffered harm. He would recommend adding a general definition of the term “victim”, on which there was international consensus, for example, “victims means natural persons who have suffered harm as a direct result of the commission of any offence covered by the present draft articles”.

Draft article 12 (3) valuably provided a list of different forms of reparation; however, it was of some concern that the choice between them was left to the discretion of States. As it was currently drafted, the draft article allowed the State not to provide comprehensive reparation, potentially leading to tremendous instability, particularly in transitional situations. He proposed that paragraph 3 might be redrafted to read: “The right to obtain reparation covers material and moral damages and, where appropriate, other forms of reparation, such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.” In the commentary, the Commission might wish to state that various factors were taken into account in the assessment of reparations. The words “where appropriate” provided flexibility.

He supported the proposal by Mr. Nguyen that, in draft article 12 (3), the right to obtain reparation must be extended to the victim’s family members or their legal representatives in cases where the victim had died. He also agreed that the omission of the phrase “right to know the truth” was detrimental. The Commission might consider incorporating the phrase “each victim has the right to know the truth”, enshrined in article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance.

Turning to chapter II of the report, he said that he supported the proposal to establish a new provision on the transfer of sentenced persons, if only to encourage States to conclude treaties on the matter. In doing so, the Commission should take, as a basis, sources such as the Convention on the Transfer of Sentenced Persons, which provided that each and every request for transfer required the agreement of three different subjects: the requesting State, the requested State and the person to be transferred.

He had expressed his views on the issue of amnesties during the Commission's debate on the third report, in which he had stated that amnesties for crimes against humanity were prohibited under international law. It was useful to mention, in that regard, the recent decision of Pre-Trial Chamber I of the International Criminal Court in the case of *The Prosecutor v. Saif Al-Islam Gaddafi*, in which it had asserted that "granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes". The granting of amnesties therefore violated one of the core obligations set out in draft article 2.

If it was not possible to include a provision prohibiting amnesties in the draft articles, two considerations were important. The first was that the Commission should not distinguish between "acceptable" and "unacceptable" amnesties, as doing so would pave the way for all amnesties to be deemed acceptable, particularly in the absence in the draft articles of binding provisions on an independent monitoring mechanism. He would prefer, in that case, to leave the prohibition of amnesties out of the draft articles altogether, as it would then continue to be governed by general international law and relevant human rights instruments.

The second consideration was that care would need to be taken in the commentaries to ensure that they could not be interpreted as favouring the permissibility of amnesties. He was particularly worried about two elements of the commentary to draft article 10 that could be interpreted in that sense and thus provoke a negative reaction from States that had expressed a strong position on the issue of amnesties. The first element concerned the opening phrase of the first sentence of paragraph 8 of the commentary, which read: "The obligation upon a State to submit the case to the competent authorities may conflict with the ability of the State to implement an amnesty...". The phrase, which was unnecessary, implied that States had the "ability" to grant amnesties, which was unacceptable if the Commission wished to attract wide support from States. The second element concerned the last sentence of paragraph 11, which read: "Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others." The sentence could, in his view, be strengthened.

Regarding the mutual legal assistance initiative, he concurred with other members of the Commission, including the Special Rapporteur, and had nothing to add other than an expression of his full support.

He supported the referral of all the draft articles to the Drafting Committee.

**Mr. Cissé** said that the Special Rapporteur's fourth report was of excellent quality in both style and substance, and that minor concerns over its length could be addressed by condensing the sections devoted to comments and observations.

During debates in the Commission and the Sixth Committee, a number of speakers had argued against the inclusion of a reference to *jus cogens* in the third preambular paragraph. He, on the other hand, was in favour of the idea. Since a preamble was technically considered to be an integral part of a legal instrument and to carry the same legal weight, he saw no obstacle to recalling, in the draft preamble, core issues to be examined in the body of the draft articles. Moreover, the fact that it was not stated explicitly in the Rome Statute of the International Criminal Court that the prohibition of crimes against humanity was a *jus cogens* norm did not mean that the matter should not be mentioned in a possible future convention on crimes against humanity, either. There was, in

any event, an implicit reference to *jus cogens* in the Rome Statute, as noted by the Commission itself in the past.

The reference, in the sixth preambular paragraph, to the definition of crimes against humanity set forth in article 7 of the Rome Statute was, in his view, appropriate, as it was helpful to recall that no new definition of crimes against humanity could contradict the one laid down in the Rome Statute, which over 120 States had already incorporated into their domestic legal orders.

Draft article 12, as it stood, contained no mention of the obligations of witnesses in domestic and international criminal proceedings or of the consequences of giving false testimony, which, though punishable under domestic criminal codes, should be the subject of specific provisions of the draft articles. If the issue could not be dealt with in a new draft article 12 *bis*, it should, at the very least, be examined in the commentaries. The taking of evidence, and, by extension, the impartiality and credibility of witnesses before international criminal courts lay at the heart of efforts to establish a framework for the punishment of crimes against humanity. As a result, the collection, preservation and integrity of evidence were of paramount importance in the construction of an international criminal justice system that was credible, transparent and effective in combating impunity.

Witnesses and their testimonies had to be above suspicion, as was clear from the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* before the International Criminal Court, in which false testimonies and evidentiary inconsistencies appeared to have raised a reasonable doubt on the part of the Court and had led to the issuance of an order for Mr. Gbagbo's conditional release. Thus, after a civil war that had claimed some 3,000 lives, and an eight-year trial before the Court, it looked likely, pending the outcome of the appeals procedure, that a lack of evidence would result in a finding that no one was responsible for the crimes committed in Côte d'Ivoire.

To conclude, he wished to congratulate the Special Rapporteur on the quality of his report, his unrelenting commitment and determination to complete the consideration of what was a challenging topic, and the transparency that he had showed by requesting comments from all stakeholders. He recommended the referral of the report in its entirety to the Drafting Committee.

**Mr. Petrič** said that he wished to congratulate the Special Rapporteur on his excellent fourth report and oral presentation thereof. The report was a masterpiece of clarity and logical argumentation, with a good theoretical foundation. The addendum in document [A/CN.4/725/Add.1](#) and the compendium of comments from States and international organizations in document [A/CN.4/726](#) were very useful and important.

The topic of crimes against humanity was sensitive, and legal and political in nature. It formed part of humankind's efforts to prevent the most heinous crimes, which negated human dignity and destroyed the values of civilization. Such crimes posed a threat to peace and normal life, and were simultaneously the cause and result of hatred and violence. The conclusion of the Commission's work on the topic, and the possible future adoption of an international convention on the prevention and punishment of crimes against humanity would mark a historic step forward for the rule of law and, by extension, peace, security and well-being.

From the outset, the aim of the Commission's work, which had never been called into question by States or the Commission itself, had been to produce draft articles for a future international convention. Accordingly, the Special Rapporteur had drawn on existing international legal instruments. From a methodological standpoint, his approach was correct, as it reflected the level of development of international law with regard to the prohibition of crimes against humanity and thus made the draft articles more acceptable to States. In all its work on the topic, the Commission had followed the Rome Statute whenever possible and relevant, much to the appreciation of States. It should thus continue to do so at the second reading stage. In line with comments made by Mr. Rajput, it might be helpful, in the commentaries, to make even clearer which international legal instruments each draft article was based on, and why. However, he agreed with Australia that "the draft articles draw from, and build on, a wide range of international conventions covering not only [genocide,



war crimes, and torture] but also ... corruption, terrorism, transnational serious and organised crime, trafficking of illicit drugs, extradition and mutual legal assistance.”

Since the Commission’s goal was to draft a future convention, it was of the utmost importance to pay attention to the comments of States, especially as the level of interest in the topic from States, international organizations and non-governmental organizations was unique. It was not easy for the Special Rapporteur and the Commission to strike the right balance and successfully incorporate suggestions into the draft articles or the commentaries thereto. Some States had specified that their accession to any future convention would be contingent on their consenting to the draft articles; that understandable position should be borne in mind by the Drafting Committee when it came to finalize the draft articles and commentaries. All comments, including those that had been submitted after the deadline, should be taken into account, as a future convention would have a genuine impact only if it was generally accepted by States. In that connection, he appreciated the Special Rapporteur’s readiness to explain, in the commentaries, that basic legal principles and standards, though not mentioned explicitly in the draft articles, were respected therein.

The time had come for the Drafting Committee to decide on the title of the proposed convention, although the final decision in that regard would be made by States. He was in favour of the title “Convention on Prevention and Punishment of Crimes Against Humanity”.

The third, fourth and eighth preambular paragraphs, in particular, indicated the purpose of the draft articles and gave an idea of the thinking behind them, and would, hopefully, be three major pillars of a future international convention. It could be claimed, as explained in paragraph 35 of the fourth report, that the prohibition of crimes against humanity was a peremptory norm of general international law. The view that such crimes should be prevented and punished was generally accepted not only by States but also by society at large, which indicated that the prohibition of such crimes no doubt qualified as a *jus cogens* norm. Consequently, he supported the retention of the third preambular paragraph, and the recommendation made by the Special Rapporteur in paragraph 40 of his report. The suggestion from Brazil to address the obligations of States to refrain from the use of force against, and ensure non-intervention in, other States, should be dealt with in the commentaries, with due consideration given to the implications of the concept of responsibility to protect. The argument that crimes against humanity should not be subject to any statute of limitations should also be reflected in the commentaries, and not in the preamble.

Concerning draft article 1, he fully agreed with the views expressed by the Special Rapporteur in paragraphs 44 and 45 of his report, including that the principle of *nullum crimen sine lege* should be addressed in the commentary. He also supported the position adopted by the Special Rapporteur, in paragraphs 52 and 53 of his report, with regard to draft article 2.

As to draft article 3, he agreed that the Commission’s definition of crimes against humanity should be basically identical to that found in the Rome Statute. Any attempt to innovate would create serious difficulties, particularly if the draft articles became a convention. He therefore agreed with the Special Rapporteur that only minimal changes should be made to paragraph 1 (*h*), that the somewhat outdated paragraph 3 should be deleted, and that an adjustment should be made to paragraph 4.

He was in favour of the changes to draft article 4 proposed in paragraphs 117 to 120 of the report. The addition of a new first sentence in draft article 4 (1) was of crucial importance. However, he did not consider it useful to include a specific reference to “education and training programmes” in draft article 4 (2).

He agreed with the views expressed and changes proposed by the Special Rapporteur with regard to draft articles 5, 7, 8 and 9. He also agreed with the proposal to align draft article 6 with Protocol I additional to the Geneva Conventions of 1949 and the statute of the International Tribunal for the Former Yugoslavia, and that the proposed changes to draft article 10 helped to align it with the standard “Hague formula”.

Regarding draft article 11, he was not in favour of the deletion of the words “including human rights law” at the end of paragraph 1. As had already been noted, human rights law was of exceptional and particular importance in the context of the fair treatment of alleged offenders. While it was true that the phrase “applicable national and international law” covered human rights law, the inclusion of an explicit reference was advisable, given the difficulty of ensuring fair treatment for alleged offenders in cases involving crimes against humanity, which tended to draw strong reactions and were influenced by political interests and pressures. The insertion of a reference to “humanitarian law” was, in his opinion, acceptable.

Concerning draft articles 12 and 13, he shared the views put forward by the Special Rapporteur. The addition of a new paragraph 1 in draft article 13 was important. However, he considered the proposed new draft article 13 *bis* to be unnecessary. The assertion that States “may consider entering into bilateral or multilateral agreements” had no real meaning, as States could always consider entering into agreements on any topic, provided that they respected *jus cogens* norms. As a result, the assertion would be better made in the commentaries. He shared the Special Rapporteur’s views on draft article 14, though the proposed new paragraph 9 was also better suited to the commentaries.

The issue of settlement of disputes in draft article 15 should be dealt with by States during the drafting of the proposed convention. He agreed that negotiations should be prioritized as a means of settling disputes, since they offered a degree of flexibility and the best chance of success, but considered that, with major disputes, particularly those concerning responsibility for crimes against humanity, differences in States’ power and importance could be detrimental. It had been seen, in the past, how powerful States pushed for negotiations, while weaker ones tended to prefer other means. It was clear, in any event, that the approach taken in proceedings before the International Court of Justice would depend on the will of the parties in dispute. The best solution, in his view, would be for States parties to any future convention to negotiate and draft an optional protocol on dispute settlement.

No new draft articles should be suggested on amnesty, reservations or institutional supervisory mechanisms which, although important, were subjects which should be left for States themselves to deal with at a codification conference. Since amnesty was a sovereign act of mercy, not a matter for the judiciary to decide, the introduction of a draft article on amnesty might prompt some adverse reactions from States. Permitting reservations to a convention on crimes against humanity might result in more ratifications but, if any reservations were allowed, they should be confined to practical issues and not concern core provisions. That again was an issue which should be decided by States.

The Commission should complete its work on the draft articles in the first part of the session and then hold an informal discussion of the separate mutual legal assistance initiative in the second part. The two initiatives relating to crimes against humanity were evidence of great international interest in preventing and punishing such crimes. The Commission should therefore adopt a positive approach to the initiative and, with the Secretariat’s assistance, try to achieve complementarity and avoid overlapping.

He was in favour of referring all the draft articles, except 13*bis*, to the Drafting Committee.

He hoped that the Commission would succeed in producing a draft convention in the current quinquennium and that he would live to see the adoption by States of a convention on the prevention and punishment of crimes against humanity.

**Mr. Saboia** said that he wished to thank the Special Rapporteur for his carefully prepared fourth report, in which close consideration was given to all the comments, observations and proposals received from Governments, international organizations and others.

As he broadly agreed with the proposals contained in the report, he would restrict his comments to a few issues on which he had a different opinion or that he wished to highlight.

While he did not see any need to alter the title of the whole draft text, he supported the idea of making the phrase “prevention and punishment of crimes against humanity” the title of the preamble.

Regarding the preamble itself, he endorsed the Brazilian Government’s proposal to add two paragraphs to the preamble on the prohibition of the threat or use of force against the territorial integrity or political independence of any State and on the obligation to refrain from intervening in an armed conflict or in the internal affairs of any State. The language of the proposed two draft paragraphs, which were taken from the Rome Statute, had been used previously in other United Nations instruments, in particular the Declaration on Principles of Friendly Relations and Cooperation among States, which was generally considered to reflect customary international law. The Special Rapporteur’s reasons, set out in paragraph 38 of the report, for not including an explicit reference to two principles of such paramount importance were unpersuasive.

Noting Mr. Petrič’s mention of the emerging concept of the right to protect, he said that the Commission should take a cautious approach in that regard, as it was a concept which must be invoked and applied, if ever, in a peaceful and diplomatic way; any attempt to apply it by force would be counterproductive and end in tragedy.

Also regarding the preamble, he supported the inclusion of the paragraph that affirmed that the prohibition of crimes against humanity was a peremptory norm of general international law.

Turning to the draft articles themselves, he said that he supported the deletion, in draft article 3 (1) (h), of wording referring to a connection between persecution and genocide or war crimes. Ms. Lehto and Mr. Reinisch had argued in favour of eliminating any connection with other crimes against humanity, on the grounds that doing so would bring the text more into line with customary international law. It was, however, to be feared that deleting the requirement of a specific connection between persecution and other crimes against humanity might excessively broaden the scope of the definition of persecution. Perhaps the Drafting Committee could consider the expression “acts of equal gravity”, which had been used by the International Criminal Tribunal for the Former Yugoslavia and other international criminal tribunals, as a possible middle ground solution.

He supported the proposal to delete draft article 3 (3), on the definition of gender, which was taken from the Rome Statute. Deletion was the most pragmatic – though not ideal – solution. As had been pointed out by Mr. Murase, the deletion of the definition of a term required a proper explanation in the commentary; that explanation must take into account concerns that existed in most societies regarding the situation of lesbian, gay, bisexual and transgender persons.

He did not propose any changes to the definition of enforced disappearances contained in draft article 3 (2) (i) since, notwithstanding criticism from some quarters, including Amnesty International and Human Rights Watch, that the phrase “with the intention of removing them from the protection of the law for a prolonged period of time” introduced an element of subjectivity and a temporal dimension, it met with the approval of, among others, the Committee on Enforced Disappearances. However, he was concerned that those elements might render characterization of the crime more difficult. He hoped that his concern and those of the aforementioned non-governmental organizations, could be dealt with in the commentary.

A different point regarding the same issue related to a statement of the Special Rapporteur in paragraph 77 of the report. In that paragraph, the Special Rapporteur compared the goals of the International Convention for the Protection of all Persons from Enforced Disappearance and those of the prospective convention on crimes against humanity in a manner that seemed infelicitous. The Special Rapporteur affirmed therein that “draft article 3, paragraph 2 (i), addresses exclusively a widespread or systematic attack against a civilian population in the form of enforced disappearances, meaning enforced disappearances conducted pursuant to or in furtherance of a State or organizational policy to commit such an attack”. He then added: “in such circumstances, the significance of including or not including the ‘intention’ language with its temporal element appears to be quite different than in the context of an instrument that seeks to address *inter alia* just one

or a few incidents of enforced disappearance”. The use of the words “addresses exclusively”, an expression that did not appear in the chapeau of draft article 3, might therefore make the threshold of the crimes more stringent. In his view, the threshold in the chapeau must be seen from the perspective of each act and how it was perpetrated. The text covered situations of armed conflict and peacetime. In the latter situation, a dictatorship could little by little engineer the enforced disappearance of thousands of political opponents over a lengthy period. Surely that amounted to a crime against humanity? At least the commentary should contemplate such circumstances.

He accepted the changes to draft articles 4 to 10 proposed by the Special Rapporteur. In draft article 11, he wished to retain a reference to human rights law and would like the addition of a reference to international humanitarian law.

With regard to draft article 12, he urged the Drafting Committee to carefully consider Mr. Grossman Guiloff’s interesting proposal for a text on reparations for victims. He accepted the changes proposed to draft articles 12 to 15.

Turning to chapter II, he said that the introduction of a new draft article 13 *bis* on transfer of sentenced persons was unnecessary, as its absence would not prevent States from concluding agreements on that matter. He agreed with the solutions proposed by the Special Rapporteur to the issues dealt with in paragraphs 300 to 314 of the report and, in particular that it would be better to make no mention of amnesty.

Moving on to chapter III, he said that it was regrettable that the separate mutual legal assistance initiative, which at first had seemed to be compatible and complementary to the Commission’s draft text, had developed into a much more ambitious project in the form of a – potentially overlapping – draft treaty, a state of affairs which could well lead to confusion. It was up to States to decide how to proceed. At all events, the Commission should pursue its work on its own text. Like Mr. Petrič, he hoped that a means of reconciling the two initiatives could be found. As to the final form of the draft articles, he was in favour of recommending that the General Assembly should advocate the conclusion of a convention.

He supported the referral of all the draft articles to the Drafting Committee.

**Ms. Oral**, after thanking the Special Rapporteur for his excellent and very comprehensive fourth report, said that the draft articles and commentary thereto would, as noted by the Netherlands in its comments, indeed help to strengthen the international legal framework for the prevention, detection, prosecution and adjudication of crimes against humanity. The draft articles, once adopted and, it was to be hoped, eventually as a convention, would fill a gap in the existing international legal framework, enhance accountability and fight impunity for the most serious international crimes. They achieved a delicate balance between simply adopting provisions from existing instruments and adapting such provisions to current needs. The fact that they had attracted much attention from States, international organizations, non-governmental organizations and other groups not only because of their significance and but also because of the Special Rapporteur’s active engagement with those actors, demonstrated the importance of such Commission outreach to the broader international community.

Reflecting on the parallel track of the mutual legal assistance initiative, which had mutated into an alternative draft convention, she emphasized that the Commission’s draft articles were the product of extensive consultations with States, international organizations and civil society. They had passed through an extensive vetting process and rested on in-depth research. They had therefore attained standard-setting quality, as had been noted by Ms. Lehto, and should not be weakened at the finalization stage.

She agreed that it might be advisable to revisit the title of the text, as proposed by Sierra Leone, to correspond better to the substance of the draft articles. She supported the wording of the preamble as it stood, including the retention of a reference to peremptory norms of general international law in the third paragraph. In draft article 3, it was wise to delete paragraph 3 concerning “gender”, since the definition of the term was outdated. As the draft article should cover sexual orientation and other lesbian, gay, bisexual and transgender issues, it would be better to insert wording on sexual orientation, gender

identity and sexual characteristics as grounds of persecution. The draft articles should reflect current realities and therefore be flexible enough to allow for the evolutive process of international law. For example, the definition of crimes against humanity drawn from the Rome Statute might not take account of new concerns about the destruction of the environment. For that reason, she was in favour of inserting a “without prejudice” clause that would encompass customary international law, as proposed by Ms. Galvão Teles, in what would become a new paragraph 3.

She supported sending all the proposed draft articles to the Drafting Committee.

**Ms. Escobar Hernández** said that she wished to extend her thanks and sincere congratulations to the Special Rapporteur for his fourth report and the oral introduction thereto. As was his wont, he had prepared a readable, carefully drafted report that provided a systematic overview of the many comments and observations submitted on the Commission’s work. While it was true that the document was long, its length should not be considered a blemish on the work that had been accomplished. At the current stage, the Commission required a broad and systematic view of the reactions that its work had provoked within the international community in order to take a considered decision on the draft articles on second reading. The Special Rapporteur had achieved that objective and, furthermore, had made clear recommendations as to what, in his view, the Commission’s response to those comments should be.

Since the purpose of the current debate was the adoption, on second reading, of the draft articles, the debate should focus on the proposed amendments to the text that had already been adopted on first reading and should not reopen discussions on issues of substance which, while important and interesting, had already been addressed in depth previously. For that reason, she would refer only to those recommendations made by the Special Rapporteur that she considered to be of particular importance, especially when they concerned changes or additions that, in her view, would introduce substantive changes to the draft articles adopted on first reading.

In that connection, she wished to draw attention to a recurring feature of the report, namely proposals not to introduce amendments to the 2017 text or, in other words, not to address the suggestions, comments or observations of States, international organizations or non-governmental organizations (NGOs), all the while stating that it could be useful to revise or update the commentaries to various draft articles as a means of addressing and responding to the concerns expressed by those who had made such comments and observations. While, in principle, she had nothing against such an approach, she wished to make clear at the outset that the current plenary debate was devoted exclusively to consideration of the Special Rapporteur’s fourth report, in the light of the comments and observations submitted by States, international organizations and NGOs. As for the amendments and additions to the commentaries that had already been adopted by the Commission on first reading, it would be remiss of her not to point out that, as the content of those amendments and additions was still unknown, it would be difficult to debate them at the current stage. Therefore, she wished to make clear that her statement concerned only the fourth report and that she reserved the right to return to any amendment to the commentaries once the Commission had before it an official document setting them out, something that would very likely occur only during the second part of the session.

She would divide her statement into three parts, first commenting on the amendments and additions proposed to the draft preamble and to the draft articles already adopted by the Commission and then addressing the new draft articles and new subjects discussed by Mr. Murphy in his fourth report. Lastly, she would address issues relating to the future of the draft articles, which in her view went beyond the final form of the Commission’s work and the recommendation to be made to the General Assembly.

With regard to the preamble, the reference to the prohibition of crimes against humanity as a preemptory norm of general international law (*jus cogens*) should be maintained, even though such a reference had not been included in other international instruments relating to crimes under international law. As had already been pointed out by other members of the Commission, international practice on that issue left no doubt that the matter was governed by *jus cogens* rules. In her view, including such a reference in the

preamble helped to underscore the importance of the prevention and punishment of crimes against humanity in contemporary international law. With respect to the proposal to include in the draft preamble a reference to the principles of the prohibition of the use of force and of non-intervention, while she concurred with Mr. Reinisch that it was not necessary to include such a reference, she would not object if a majority of members was in favour of doing so in the manner described by Mr. Saboia and other colleagues.

Turning to draft article 3, on the definition of crimes against humanity, she recalled that, from the outset of the Commission's work on the topic, she had expressed her firm belief that the draft articles should follow as closely as possible the provisions of the Rome Statute of the International Criminal Court, particularly in terms of defining such crimes. However, that belief did not prevent her from admitting that it might be useful, or even necessary, to introduce some changes that took into account the special nature of the draft articles, developments in certain categories or even the fact that certain provisions of the Rome Statute had been adopted in a very specific context, which explained why certain expressions appeared in the Rome Statute, despite not enjoying broad support in the international community.

She supported unequivocally the deletion of paragraph 3, in which the concept of gender was defined. Recent developments had shown that definition, already the subject of criticism at the time of its adoption, to be totally baseless and out of step with current social reality and the legislation of a good number of States that had a different understanding of the concept of gender. In any case, she understood that defining the concept of gender at the current time would be an enormously difficult and, in a sense, pointless task, bearing in mind, for example, the gradual addition of new concepts to the original categories of lesbian, gay and transgender persons to encompass lesbian, gay, bisexual, transgender, intersex and gender diverse persons. She therefore fully supported the Special Rapporteur's proposal to simply delete paragraph 3 and the references thereto in paragraph 1 (*h*) of the same draft article.

She also supported the proposal to delete the reference to the crime of genocide or war crimes from paragraph 1 (*h*), albeit for different reasons. However, as Ms. Lehto had already pointed out and for the same reasons, the reference to other crimes against humanity should also be deleted from that paragraph and replaced with a reference to equal gravity.

Lastly, the Commission should give serious consideration to the comments made by various NGOs and human rights bodies in relation to the definition of the crime of enforced disappearance. Given the limited time available, she would simply refer members to the detailed arguments put forward by Mr. Grossman Guiloff on that subject, which she fully supported.

As for draft article 4, she supported the Special Rapporteur's proposal to change the order of the paragraphs so as to place greater emphasis on the State's obligation to prevent the commission of crimes against humanity and to include new wording at the beginning of new paragraph 1, which, in her view, added special value. She supported unequivocally the deletion of the word "including" in new paragraph 2; if retained, that wording could cause confusion as to the obligation of the State to bring its conduct into conformity with international law for the purpose of preventing crimes against humanity.

Regarding draft article 5, she agreed with the Special Rapporteur's proposal to delete, in the first paragraph, the phrase "territory under the jurisdiction of", on the understanding that the expulsion, return (*refoulement*), surrender or extradition of a person "to another State" covered all the circumstances in which such situations might arise and that they would, therefore, be covered by the rule of *non-refoulement*. In any event, the issue should be sufficiently explained in the commentaries so as to avoid unwanted interpretations of the deletion of the term "territory" and, more importantly, deletion of the term "jurisdiction".

With respect to draft article 6, she preferred, for the reasons stated by other members of the Commission, the new version of paragraph 3, on the responsibility of commanders and superiors, proposed by the Special Rapporteur. The new version was perhaps better adapted to the spirit and special nature of the draft articles; she therefore saw no difficulty

in not following the wording of the Rome Statute on that occasion. As for paragraph 5, on the irrelevance of official position, some States in their comments and observations had mentioned the desirability of taking into consideration or even including a reference to the non-applicability of immunity from prosecution for crimes against humanity. In that connection, some members of the Commission, including Mr. Tladi, had again referred to that issue, which had already been raised during the Commission's previous debates on the subject and which, it was fair to say, related to the Commission's work on the topic of "Immunity of State officials from foreign criminal jurisdiction".

In that connection, she noted that in his fourth report the Special Rapporteur had taken the same position as in his third report, namely to draw a distinction between the irrelevance of official position as a substantive defence, which was inadmissible in the case of crimes against humanity, and immunity as a procedural barrier, which would not affect the question of the responsibility of the alleged perpetrators of such crimes and which would therefore be subject to rules and principles that were different from those contained in the draft article in question. At the current stage of the Commission's work, she certainly did not wish to reopen a debate that had already taken place and that would now be unproductive. However, it would be remiss of her not to draw attention to the importance of the question of the applicability, or otherwise, of immunity from criminal jurisdiction to crimes against humanity, which perhaps warranted, as Mr. Tladi had pointed out, greater consideration in the relevant commentaries. That was a question to which the Commission could perhaps return later when the Special Rapporteur had submitted the final version of the commentaries.

With regard to draft article 10, she had no objection to the Special Rapporteur's proposal to amend the text in order to align it more closely with the "Hague formula". However, such amendment should be explained with some care in the relevant commentaries.

As for draft article 11, the formula used to refer to the procedural rights and guarantees of persons suspected or accused of having committed a crime against humanity was, in her view, correct. It was not necessary to include in the draft article a long list of rights that were already widely recognized in international human rights law. However, she could not support the Special Rapporteur's proposal to delete the phrase "including human rights law". Although the reasons given by some States and accepted by the Special Rapporteur could, in strictly formal terms, be considered valid, it was equally true that the reference to international human rights law in that connection was essential and added value in an area such as the defence of persons who had been investigated in connection with or accused of a crime. Therefore, to remove from the draft article a reference to pre-existing international human rights law was unwise, particularly in view of the consequences that doing so might have not only for the future interpretation of the draft article, but also for the future interpretation of the Commission's understanding of the place in the legal system of international human rights law, a branch of international law that was undoubtedly one of the distinctive features of contemporary international law. However, she had no objection to the addition of a reference to international humanitarian law as proposed by some members of the Commission and some States, since that branch of law also contained provisions on procedural rights and guarantees that might be relevant for the purposes of the draft articles.

Turning to draft article 12, she recalled that, as she had stated in 2017, the draft article in question was of great importance to her, since any legal regime relating to crimes against humanity would lack meaning if it failed to take into account the victims of such crimes. Regrettably, there was still no definition of victim that could be applied consistently, leaving, in her view, ample room for possible restrictive interpretations that still existed in some domestic legal systems. It would therefore be useful for the Commission to take a position on that issue, bearing in mind particular the broad interpretation of the concept of victim that had been promoted and developed by international human rights bodies, which were, in her view, the bodies that the Commission should take as a point of reference for the purpose of clarifying what it understood by victims of crimes against humanity. She did, however, support the Special Rapporteur's proposal to amend the draft article so as to limit the scope of the obligation to make restitution for crimes committed in the territory or

under the jurisdiction or with the consent of a given State, which was in line with the recent jurisprudence of the European Court of Human Rights. In any case, she understood that, in order to avoid misunderstandings, the commentary should address the issue in as much detail as possible.

She did not have any specific comments to make regarding draft article 13 other than to express her support for the inclusion of a new paragraph 1, as suggested by the Special Rapporteur.

As for draft article 14, she had no objection to the amendments and additions suggested by the Special Rapporteur, with the exception of the proposed amendment to paragraph 7, about which she had serious reservations. The original wording was preferable as it offered a means of resolving any dispute that might arise in the process of implementing a future convention on the prevention and punishment of crimes against humanity and any other instruments containing rules on judicial cooperation and assistance; furthermore, that wording also promoted the provision of the highest possible level of mutual legal assistance.

Turning to the new issues examined by the Special Rapporteur in chapter II of the report, she said that, in principle, she had no objection to the proposal for a new article 13 *bis*. While it was true that it was not a provision found in the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Convention for the Protection of All Persons from Enforced Disappearance, it was also true, as Ms. Lehto had already rightly stated, that it was a provision that was increasingly found in mutual legal assistance treaties. Furthermore, it was a new provision that was consistent with the objectives pursued in modern criminal and penitentiary law, such as enabling prisoners to maintain as close and regular contact as possible with their family members and, where appropriate, facilitating the social reintegration of offenders. Although there had been an intense and interesting debate on the issue in the Commission, in her opinion, the current wording of draft article 13 *bis* was sufficiently clear and she did not see how it could give rise either to a legal obligation on the part of the State or to the recognition of an automatic right for individuals.

Regarding the issue of amnesties, it would at the current stage be extremely difficult to introduce into the draft articles a general, unqualified prohibition on amnesties. Moreover, it would probably not be the best option in technical terms. The issue was, however, of great importance and could be expanded upon in the commentaries, which could also include some of the comments formulated by States, international organizations and NGOs.

Lastly, as she had previously indicated, she was somewhat sceptical about the creation of an *ad hoc* institutional mechanism for monitoring implementation of and compliance with the draft articles. However, in the light of the comments made by several States and by the United Nations High Commissioner for Human Rights in particular, mention could be made of that possibility in the final report on the Commission's work, thus leaving the door open for States to consider establishing such a mechanism when negotiating a future convention.

As for the future of the draft articles, she wished first to express her great satisfaction at the Commission's having almost completed its work following a fruitful process, which had been deftly led by the Special Rapporteur. The Commission should therefore at its current session adopt the draft articles in their final form upon conclusion of the debate on the fourth report, the work of the Drafting Committee on the new proposals and, lastly, the debate on the new commentaries to be submitted by the Special Rapporteur. Her position in that regard was clear and she did not believe there to be sufficient grounds or any compelling reason – including the development of the mutual legal assistance initiative – to change the course of the Commission's work. In making that point, she was not expressing an opinion on that initiative, which, like all proposals intended to strengthen efforts to combat impunity for the most serious international crimes, warranted great respect. However, the Commission had come too far in its work to stop now. The good work done by the Commission should be referred to the General Assembly, which



moreover had always been highly receptive to it. From that moment onwards, Member States would take ownership of the project and would have to decide whether it should become a convention, which she hoped would be the case, what procedure should be followed to that end and, lastly, whether it should be considered separately or in connection with other projects and initiatives. Although she had her personal preferences, the issue at hand was not the preferences of individual Commission members; the Commission had done its work and should refer it to the General Assembly in the form that it had developed over the past few years. It was for the principal organ under whose authority the Commission operated to determine what would happen next. In that connection, she welcomed the proposal to convene informal consultations during the second part of the session to discuss the wording of the recommendation to be made to the General Assembly.

She was in favour of sending the proposals contained in the fourth report to the Drafting Committee. Thanks to the efforts and dedication of the Special Rapporteur, she was confident that the Commission would be able to adopt, on second reading, the draft articles, whose importance for contemporary international law and the international community was unquestionable. She trusted that the draft articles would form the basis of a future convention on the prevention and punishment of crimes against humanity that States would be able to adopt without delay.

**Mr. Zagaynov** said that the methodical analysis of the opinions of Governments, international organizations and others in the Special Rapporteur's substantive fourth report would provide a good basis for the Commission's debate.

He concurred with the Special Rapporteur that the Commission should focus on the most important issues related to the criminalization of crimes against humanity at the national level and should not try to unify all the subsidiary norms of criminal law existing in national legal systems.

In view of the concerns expressed in the Sixth Committee and by some members of the Commission with regard to the second preambular paragraph, he recommended that that provision should be balanced with wording that would make clear that nothing in the draft articles should be interpreted as giving any State the right to use force or to interfere in the internal affairs of any other State. He shared the doubts on the qualification of the prohibition of crimes against humanity as a peremptory norm of international law. It was no coincidence that the practice of qualifying a norm embodied in a treaty as a peremptory norm was not widespread. If that provision were to be retained, the word "recognizing" should be avoided in order to avoid any association with article 53 of the Vienna Convention on the Law of Treaties, or any impression that, through such recognition in the draft articles, the prohibition of crimes against humanity acquired a peremptory character. It might therefore be better to use the words "recalling" or "emphasizing".

He likewise agreed with those members of the Commission who considered that it would be advisable to include a provision in draft article 1, on scope, to indicate that the draft articles would apply only to crimes committed after the draft articles had been adopted and that they would have no retroactive effect. Draft article 3 (4) seemed to have taken on a much broader meaning with reference to paragraph 2 (i) of the draft article than in the original context of the International Convention for the Protection of All Persons from Enforced Disappearance. He was sceptical whether the prohibition of acts which States qualified as crimes against humanity in their international treaties and national legislation could also be regarded as peremptory norms. States might well adopt a different approach to what exactly constituted a crime against humanity and what the scope of the peremptory norm should be. That could lead to a situation where only some crimes against humanity would be prohibited by a peremptory norm of international law. Given the significance and non-derogable character of peremptory norms such a development could have undesirable consequences. He would be glad to hear the Special Rapporteur's comments on that account.

In draft article 4 (1), it might be wise to include a reference to national law, as had been done in the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Although draft article 6 (8) on liability for crimes against humanity was worded rather mildly, it might deter States from accession, because in some jurisdictions,

including Russia, legal persons did not have criminal capacity. In draft article 8 it might be wise to replace the phrase “prompt and impartial” with “effective and impartial”, because the time required for investigation might be determined by national legislation. He was unsure whether the addition of paragraph 9 to draft article 14 was felicitous. It altered little from the point of view of legal regulation, but it did concern an issue which had given rise to serious disagreement among States in recent years. A very detailed set of provisions on extradition and mutual legal assistance in the investigation, prosecution and adjudication of crimes against humanity might well have an adverse effect on accession to a potential convention. He was therefore unsure whether it had been wise to base that draft article on the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, since the dissimilar legal nature of the crimes called for different approaches to provisions on mutual legal assistance.

He supported referral of the draft articles to the Drafting Committee.

*The meeting rose at 1 p.m.*