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International Law Commission

Seventy-first session (second part)

Provisional summary record of the 3496th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 31 July 2019, at 3 p.m.

Contents

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Present:

Chair:	Mr. Šturma
Members:	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. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Draft report of the Commission on the work of its seventy-first session

Chapter IV. Crimes against humanity (A/CN.4/L.928 and A/CN.4/L.928/Add.1)

The Chair invited the Commission to commence the adoption of the draft report paragraph by paragraph, starting with the portion of chapter IV contained in document A/CN.4/L.928.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted, subject to their completion by the Secretariat.

Paragraph 8

Mr. Park said that he wished to know why no mention had been made of the change in the title of the draft articles.

The Chair said that the new title of the draft articles was reflected in paragraph 11.

Mr. Murphy (Special Rapporteur) said that, as the title of the topic remained unchanged, there was no need to refer in paragraph 8 to the change in title of the draft articles.

Paragraph 8 was adopted.

C. Recommendation of the Commission

D. Tribute to the Special Rapporteur

The Chair said that sections C and D would be left in abeyance until the commentaries to the draft articles had been adopted.

E. Text of the draft articles on crimes against humanity

1. Text of the draft articles

Paragraph 11

Sir Michael Wood, referring to the point made by Mr. Park, said that the heading of section E should read “Text of the draft articles on the prevention and punishment of crimes against humanity”, to be consistent with the new title of the draft articles.

With that correction to the heading of section E, paragraph 11 was adopted.

The Chair invited the Commission to consider the portion of the draft report contained in document A/CN.4/L.928/Add.1.

2. Text of the draft articles and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Prevention and punishment of crimes against humanity

General commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Sir Michael Wood said that the word "transnational" should be added before "organized crime" at the end of the first sentence in order to reflect the title of the convention to which reference was made in footnote 5.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Jalloh said that, in order to respond to the concerns of a number of States regarding the relationship between the draft articles and customary international law, he wished to propose the deletion of the second sentence and its replacement with a text that would read:

> While some aspects of these draft articles may reflect customary international law, codification of existing law is not the primary objective of this topic; rather the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely-adhered-to treaties addressing crimes, as the foundation for a future convention. Further, the draft articles should not necessarily be read as having any particular effect on existing customary law.

The first of those sentences was drawn from paragraph 19 of the Special Rapporteur's fourth report (A/CN.4/725).

Mr. Nolte said that the second sentence should clearly indicate that only some provisions might reflect customary international law. It could therefore begin with the phrase "Although some draft articles may reflect customary international law", and then continue as it stood.

Mr. Tladi said that he could live with either proposal, save that in Mr. Jalloh's proposal he would replace the words "this topic" with "these articles".

Sir Michael Wood said that Mr. Jalloh's proposal begged many questions. He preferred Mr. Nolte's suggestion, except that "some draft articles" should be replaced with "some provisions", because it might be only particular paragraphs, rather than the whole of a draft article, that reflected customary international law.

Mr. Murphy (Special Rapporteur) said that he could accept either of the two proposals. Both were trying to capture the idea that some provisions might possibly reflect customary international law. The language proposed by Mr. Jalloh indicated, first, that the provisions had been crafted on the basis of widely-adhered-to treaties – in other words it added an element of information – and then it added a kind of "without prejudice" sentence. He could accept Mr. Tladi's preference for "these draft articles" instead of "this topic". The amendment to Mr. Nolte's proposal suggested by Sir Michael Wood was a good one. However, his recommendation would be to adopt Mr. Jalloh's proposal, as it covered the point made by Mr. Nolte, and to delete the phrase "at the same time" at the beginning of the third sentence.

Mr. Jalloh said that, in the second sentence of his proposal, he had in mind, for example, the debate on the customary law status of modes of liability, which should not be affected by the draft articles.

Mr. Nolte said that, at the end of the first sentence in Mr. Jalloh's proposal, it would be wise to insert "possible" before the words "future convention" because it could not be

taken for granted that the draft articles would become a convention. He found the second sentence of the proposal somewhat enigmatic.

Sir Michael Wood said that he agreed with Mr. Nolte with regard to the second sentence of Mr. Jalloh's proposal. As its meaning was unclear, it should not be included. In the first sentence, to state that the codification of existing law was not a "primary" objective suggested that it was nevertheless an objective. He had been unaware of that fact. He wondered whether it would be preferable to say "is not the objective of these draft articles".

Mr. Grossman Guiloff said that he agreed with the wording proposed by Mr. Jalloh, as the first sentence made it clear that the Commission was not setting out to codify customary international law concerning, for example, disappearances, the definition of "victim" or the requirement of an independent and impartial tribunal. Customary international law established certain concepts that were not reflected in the text. States would themselves decide whether to embody the draft articles in a convention.

Mr. Jalloh, responding to Sir Michael Wood's questioning of the word "primary", explained that it had to be understood in the context of the first part of the sentence, which referred to some aspects of the draft articles that might reflect customary international law. The draft articles might well codify that branch of the law even though that was not their primary purpose. In the second sentence, the phrase "any particular effect" could be replaced with "implications" in order to indicate that the Commission was not trying to exclude the wider body of existing customary international law.

Mr. Murphy (Special Rapporteur) said that, if Mr. Jalloh's proposal was accepted, the word "primary" could be deleted. The idea of inserting "possible" before "future convention" was wise. In the second sentence, the deletion of the word "necessarily" might make it more readable. That sentence was intended to convey the idea that the Commission was not trying to shape customary international law. The definition of crimes against humanity in draft article 2 stated that the draft articles were without prejudice to customary international law. The second sentence therefore echoed an idea that was explicitly set forth in the draft articles themselves.

Mr. Nolte said that he wondered whether, in the second sentence of his proposal, Mr. Jalloh was considering the possibility that there might be a wider understanding of crimes against humanity than the definition contained in the Rome Statute. Perhaps he was trying to convey the idea that the draft articles should not be understood as an attempt to limit that notion. While he understood that concern, there was a danger that such an abstract sentence might impede any positive catalytic effects that the draft articles might have on customary international law and unnecessarily complicate debates in the future. He would not, however, oppose the inclusion of that sentence.

Sir Michael Wood said that, even with the amendments suggested by the Special Rapporteur, he would be reluctant to accept Mr. Jalloh's proposal. The original version was preferable and did not beg so many questions. However, if Mr. Jalloh's proposal was accepted, he proposed replacing the phrase "as the foundation for a possible future convention" with "as a basis for a possible future convention".

Mr. Jalloh said that the addition of "possible" before "future convention" in the first sentence was a very good idea. While he took the point made by Mr. Nolte, the idea that he was trying to express in the second sentence was that, in proposing a treaty on crimes against humanity, the Commission was not attempting to disturb existing customary international law. In a spirit of compromise, he therefore suggested replacing the phrase "any particular effect on existing customary international law" with "implications for developing customary international law", in order to make it quite clear that the Commission had no intention of narrowing the ambit of existing customary international law.

Mr. Tladi suggested that the second sentence could read: "Further, these draft articles are without prejudice to existing customary international law." The phase "without prejudice" would allow for the possibility that the draft articles might have some effect on customary international law, but would not necessarily change it.

Mr. Valencia-Ospina said that the second sentence of paragraph (3), as amended, should make specific reference to "crimes against humanity", rather than simply "crimes". In that regard, he recalled that paragraph (2) of the commentary to draft article 1 stated that the draft articles focused solely on crimes against humanity and did not address other grave international crimes, such as genocide, war crimes or crimes of aggression.

Mr. Hassouna, supported by **Mr. Vázquez-Bermúdez** and **Mr. Jalloh**, said that he agreed with the proposal to use the phrase "without prejudice" in the new third sentence, as it neatly addressed the concern expressed by Mr. Nolte.

Mr. Murphy (Special Rapporteur) said that he did not think that "crimes" should be replaced with "crimes against humanity", since the existing text expressed the idea that the Commission intended to draft provisions that were based on provisions often used in widely-adhered-to treaties addressing crimes generally, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance. With the introduction of the proposed amendments, the second sentence would be replaced with:

> While some aspects of these draft articles may reflect customary international law, codification of existing law is not the objective of these draft articles; rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely-adhered-to treaties addressing crimes, as a basis for a possible future convention. Further, the draft articles are without prejudice to existing customary international law.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Nolte said that, in the penultimate sentence, it would be more accurate to state that the draft articles envisaged, rather than addressed, obligations that might be undertaken by States.

Paragraph (4), as amended, was adopted.

Commentary to the draft preamble

Paragraph (1)

Paragraph (1) was adopted with minor drafting changes.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

Mr. Park proposed that, at the end of the second sentence, the clause "including the rules on the threat or use of force" should be replaced with "including the principle of the non-use of force".

Mr. Nolte said that he understood Mr. Park's concern, but would propose the alternative formulation "including the rule prohibiting the threat or use of force found in the Charter of the United Nations".

Mr. Jalloh said that he wondered whether it was necessary to include a specific reference to the Charter of the United Nations, which was already mentioned in the first sentence of the paragraph. The clause might simply read "including the prohibition of the threat or use of force".

Mr. Park said that the reference to "rules" was too weak: he preferred the term "principles".

Mr. Murphy (Special Rapporteur) said that the use of "including" meant that the clause did not foreclose any existing rules or principles. If the Commission deemed it

necessary to specify a particular rule or principle, the obvious one to mention would be the rule prohibiting the use of force contained in the Charter. However, the debate over rules and principles might be avoided altogether by referring to "the prohibition of the threat or use of force found in the Charter of the United Nations".

Mr. Hmoud said that the prohibition of the threat or use of force was a principle, but he was willing to accept the solution proposed by the Special Rapporteur.

Mr. Tladi said that, while he did not object to any of the proposals that had been made, he would like to point out that the whole purpose of the third preambular paragraph was to recall that it was against the rules of international law for States to use force to prevent crimes against humanity taking place elsewhere, unless they did so pursuant to a Security Council resolution. He preferred not to amend the text of the commentary, as the phrase "rules on the use or threat of force" provided for and did not preclude the possibility that the Security Council might authorize the use of force.

Sir Michael Wood said that for the same reasons as Mr. Tladi, he preferred to retain the existing language. He did not believe that a specific reference to the Charter of the United Nations was necessary, since it was already mentioned both in the draft preamble and in the paragraph under consideration, while such a reference would also beg the question of why the paragraph did not also mention customary international law.

Mr. Saboia said that he, too, agreed with Mr. Tladi. Although he was willing to accept the amendment proposed by Mr. Murphy as a possible compromise, the language as it stood was quite correct.

Mr. Jalloh said that the existing formulation was appropriate and should be retained, since it covered possible Security Council resolutions authorizing the use of force.

Mr. Murphy (Special Rapporteur) said that the Commission would not wish to preclude the possibility of a Security Council resolution that might help stop crimes against humanity; he therefore agreed that it would be best to leave the text unchanged.

Paragraph (4) was adopted.

Paragraph (5)

Mr. Jalloh said that footnote 11 referred to the Commission's prior work on the prohibition of crimes against humanity, which the Commission had previously indicated was a "clearly accepted and recognized" peremptory norm of international law. However, the footnote only referred to the report of the Study Group on fragmentation of international law and did not mention the Commission's subsequent work on peremptory norms. He wondered whether a reference to the draft conclusions on the topic "Peremptory norms of general international law (*jus cogens*)", as provisionally adopted by the Drafting Committee on first reading, should also be included.

Sir Michael Wood said that he would prefer to keep footnote 11 unchanged. In the penultimate sentence of paragraph (5), he proposed that, for consistency, the words "that act" should be replaced with "such acts", given that "certain acts, such as torture" were mentioned earlier in the sentence.

Mr. Park said that he would be grateful for clarification as to why a sentence had been added to the end of the paragraph, to the effect that neither the fourth preambular paragraph nor the draft articles sought to address the consequences of the prohibition of crimes against humanity having *jus cogens* status.

Mr. Huang said he was concerned about the wording of the fourth sentence, which did not seem to be factually accurate. Specifically, he was not convinced that the International Court of Justice, in the cited cases, had explicitly stated that the rules prohibiting war crimes and crimes against humanity had the character of *jus cogens*. He therefore proposed the deletion of the sentence.

Mr. Tladi, echoing Mr. Jalloh, said that it was unclear why footnote 11 contained a reference to the report of the Study Group on fragmentation of international law, but no reference to the draft conclusions on the topic "Peremptory norms of general international

law (*jus cogens*)". In his view, besides being the Commission's own work, the draft conclusions were much more relevant to the content of the sentence to which footnote 11 referred. Therefore, he felt strongly that footnote 11 should contain a reference to draft conclusion 23 on that topic, while footnote 10 should incorporate a reference to the Commission's draft conclusion 3 on the same topic.

Mr. Vázquez-Bermúdez, noting that the Special Rapporteur's intention in drafting the text had been to refer to relevant work of the Commission and its study groups, said that he supported the inclusion of those references.

Mr. Murphy (Special Rapporteur) said that in its judgment on the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the International Court of Justice referred back to *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, describing the conduct at issue in the latter case as "violations of rules which undoubtedly possess the character of *jus cogens*". The charges against the Minister for Foreign Affairs at the centre of the *Arrest Warrant* case related to war crimes and crimes against humanity. Accordingly, the proposition made in the text was quite correct; albeit it was necessary to make the connection between the quote in the *Jurisdictional Immunities of the State* judgment and the crimes that were alleged in the *Arrest Warrant* case.

Regarding footnote 11, the draft conclusions on the topic "Peremptory norms of general international law (*jus cogens*)", as provisionally adopted by the Drafting Committee on first reading, clearly stated that the Commission had previously referred to the prohibition of crimes against humanity as having *jus cogens* status. However, that was not quite the same as the proposition contained in paragraph (5), namely, that the prohibition of crimes against humanity was "clearly accepted and recognized" as a peremptory norm of international law. A solution might be to include a reference to the draft conclusions in footnote 11, provided that some thought was given to how it was drafted.

Regarding the purpose of the final sentence, he recalled that some States and at least one member of the Commission had expressed concern that the inclusion of the preambular paragraph on *jus cogens* might be viewed as creating uncertainty as to the purpose of the draft articles. The sentence was intended to make clear that, while the draft preamble recalled that the prohibition of crimes against humanity was *jus cogens*, the Commission did not consider that the preparation of the draft articles flowed from that status.

Mr. Jalloh said that he agreed with Mr. Murphy's analysis of the jurisprudence of the International Court of Justice. Since he found it odd not to include a reference to the draft conclusions on the topic "Peremptory norms of general international law (*jus cogens*)", he was grateful for the compromise solution put forward by the Special Rapporteur. Those draft conclusions, it should be recalled, contained an illustrative list of peremptory norms of general international law that included the prohibition of crimes against humanity. He shared Mr. Park's doubts about the final sentence concerning *jus cogens*: although it reflected a concern that had been raised by a State party, that concern had not led to much discussion, and, in his view, the sentence should be deleted.

Sir Michael Wood said that a reference to the draft conclusions could be added at the end of footnote 11, beginning with the words "see also".

Mr. Tladi said he did not think that the reference should be inserted at the end of the footnote. He preferred to retain the final sentence of paragraph (5), as he did not wish the world to believe that the elaboration of the draft articles was a consequence of the *jus cogens* character of the prohibition of crimes against humanity.

Sir Michael Wood said that he, too, preferred to retain the final sentence, as the significance of including the preambular paragraph on *jus cogens* had been explained in a previous discussion. Conversely, he was opposed to the addition of a further reference to peremptory norms of general international law in footnote 10.

The Chair said he took it that the Commission wished to return to the paragraph after holding informal consultations to agree on appropriate language.

It was so decided.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraphs (8) and (9)

Sir Michael Wood said that the first sentence of paragraph (8) was not correct. The reference to the "seventh through tenth preambular paragraphs" should be corrected to refer instead to the "eighth through tenth preambular paragraphs", and that entire sentence should be moved from paragraph (8) to the beginning of paragraph (9).

Mr. Murphy (Special Rapporteur) said that, indeed, the seventh preambular paragraph dealt with the definition of crimes against humanity, which was relevant not just to the punishment, but also to the prevention, of crimes against humanity. He therefore agreed with Sir Michael Wood's proposal.

Paragraphs (8) and (9), as amended, were adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Commentary to draft article 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Tladi proposed the deletion of the paragraph, noting that its connection to the scope of the draft articles was not clear.

Mr. Nolte said that it was appropriate to include paragraph (3) in the commentary, dealing with scope *ratione temporis*, as a basis for States negotiating the treaty. He would simply propose the deletion of the phrase "consistent with the law of treaties" at the end of the first sentence, as it added nothing of substance to the paragraph.

Mr. Murphy (Special Rapporteur) said that he agreed with the deletion proposed by Mr. Nolte. As for Mr. Tladi's comment, a number of States had submitted questions and concerns regarding potential retroactive effects if the draft articles were to serve as the basis for a convention. Paragraph (3) was also linked to a later provision that required States to ensure that there was no statute of limitations on the offences of crimes against humanity; even where that provision operated, the obligation of a State under a future treaty would arise in respect of acts and facts occurring after the entry into force of the treaty. He would prefer to retain paragraph (3), as it explained the situation that would arise if the draft articles were to become a convention.

Sir Michael Wood said that he would be in favour of deleting paragraph (3) because, in his opinion, it was incorrect in law. Whether or not the obligations of a State would operate only in respect of acts or facts that took place after the convention entered into force for that State would depend on the exact drafting language of the treaty; that much was made clear in the second sentence, with the citation of article 28 of the Vienna Convention on the Law of Treaties. If paragraph (3) was nevertheless to be retained, he suggested that the word "presumably" should be inserted, in the first sentence, between the words "would" and "only operate".

Mr. Nolte said that he did not share the concern expressed by Sir Michael Wood. As was made clear in the first sentence, paragraph (3) was limited to "the present draft articles"; of course, if States negotiated a different draft article, other rules might apply. Nevertheless, the present draft articles operated according to the general rule further described in the paragraph.

Mr. Tladi said that he would not insist on the deletion of paragraph (3). However, he still felt that it was not correct. As Sir Michael Wood had noted, States negotiating a

treaty on the basis of the draft articles would have an opportunity to indicate whether or not the treaty would operate retroactively. If the Commission had not agreed at an earlier stage to include, in the text of the draft articles, a provision on scope *ratione temporis*, it did not make sense to maintain paragraph (3) of the commentary.

Mr. Nolte said that if States negotiating a treaty on the basis of the draft articles were to read the Commission's current debate on the commentary, some might be concerned that the treaty would operate retroactively unless a clause explicitly indicating otherwise was included; the same States might then hesitate to become parties to the treaty. It would therefore be inadvisable to delete the paragraph.

Mr. Hmoud said that while the paragraph was technically not related to the scope of the draft articles, it was advisable to retain it to make clear to States that if the draft articles were to serve as the basis for a future convention, the latter would not apply retroactively.

Mr. Grossman Guiloff said that if the Commission decided explicitly to indicate that obligations would not arise retroactively for States, then it would need to establish that the text was without prejudice to obligations that were the result of treaty law and customary law.

Mr. Park said that he was in favour of retaining the paragraph, as scope *ratione temporis* was understood as being an aspect of article 1.

Mr. Murphy (Special Rapporteur) said that he felt strongly that the paragraph should be retained. In the light of the concerns expressed, however, he wondered if the Commission would be prepared to adopt the paragraph if it was moved to the final commentary.

Sir Michael Wood said that he did not accept the argument put forward by Mr. Nolte that paragraph (3) was merely a statement about the present draft articles, since the paragraph in question covered the obligations of a State party under a convention for which the draft articles would serve as a basis. The exact contents of such a convention were unknown at the current stage, but the Vienna Convention made clear that retroactive provisions were permitted. Indeed, in certain human rights treaties, retroactive provisions regarding crimes against humanity and other crimes were expressly permitted.

The Chair, speaking as a member of the Commission, said that the paragraph was useful, in his opinion, and that he supported moving it to the final commentary, since it referred to a possible future convention. Scope *ratione temporis* was also a relevant consideration in that regard.

Mr. Jalloh said that he was in favour of retaining the paragraph, but only where it was currently placed – under article 1 – as moving it to the final commentary would elevate it in status. He supported the addition of the word "presumably" because it made clear that there could be circumstances where States agreed to different provisions, thus reflecting the essence of the law of treaties. If States wished to go further than the Commission's draft articles currently did, they could refer to the general rule; the Commission should not close off that option.

Mr. Tladi said that, if the paragraph was to be retained, he would support the addition of the word "presumably" in the first sentence.

Mr. Petrič said that if the Special Rapporteur felt strongly that the paragraph should be retained, and if there were no very strong views to the contrary, the Commission should adopt it.

Mr. Zagaynov said that the paragraph was useful and he would prefer to keep it. As an alternative to Sir Michael Wood's suggestion to insert the word "presumably", he proposed that the phrase "unless agreed otherwise" should be inserted, in the first sentence, between the words "would" and "only operate".

Mr. Tladi said that "unless a different intention appears" might be more appropriate than "unless agreed otherwise", since the intention to have a different outcome might appear from a reading of the treaty as a whole.

Mr. Murphy (Special Rapporteur) suggested that, in the first sentence, the phrase "unless a different intention appears" should be inserted immediately before the words "would only operate"; and that the phrase "consistent with the law of treaties" should be deleted.

Paragraph (3), as amended, was adopted with minor editorial changes.

The meeting was suspended at 4.40 p.m. and resumed at 5.15 p.m.

The Chair invited the Commission to resume its consideration of the commentary to paragraph (5) of the draft preamble.

Mr. Murphy (Special Rapporteur) said that, following consultations, agreement had been reached on footnotes 10 and 11 to paragraph (5) of the commentary to the draft preamble. In footnote 10, immediately after the reference to the Vienna Convention on the Law of Treaties, a semicolon should be inserted, followed by the phrase "see also draft conclusion 2 on the topic 'Peremptory norms of general international law (*jus cogens*)', as provisionally adopted by the Drafting Committee on first reading". In footnote 11, a reference to draft conclusion 23 on the same topic should be inserted immediately before the reference to the report of the Study Group on fragmentation of international law.

As for the concern expressed by Mr. Huang regarding the fourth sentence of paragraph (5), his intention had been to refer to the judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case, in which the Court indicated that it assumed that war crimes were *jus cogens* crimes, before referring to "rules which undoubtedly possess the character of *jus cogens*"; the rules at issue in that case clearly included the prohibition on both war crimes and crimes against humanity. Nevertheless, given that Mr. Huang remained uncomfortable with the inclusion of the sentence, believing it to be unclear and unnecessary, it should be deleted for the sake of consensus. In that case, the fifth sentence would be maintained, but the beginning of the sentence, "Further, the Court", would be replaced with the words "The International Court of Justice". In addition, the phrase "a prohibition of the perpetration of that act" should be replaced with "a prohibition of such acts", as proposed earlier.

Paragraph (5) of the commentary to the draft preamble, as amended and with amendments to footnotes 10 and 11, was adopted.

Mr. Vázquez-Bermúdez said that he had no reservations as to the adoption of paragraph (5) of the commentary; he nonetheless wished to highlight the importance of the Commission's decision to recall, in the fourth preambular paragraph of the draft articles, that the prohibition of crimes against humanity was a *jus cogens* norm. Furthermore, contrary to an earlier statement by Sir Michael Wood, the last sentence of paragraph (5) made it clear that neither the fourth preambular paragraph nor the draft articles sought to address the consequences of the prohibition having such status; that did not mean that such consequences did not exist.

Mr. Nolte said that, in his opinion, the fourth sentence of paragraph (5) was correct as originally drafted.

Mr. Jalloh said that he appreciated the elegant solution found to his concern regarding footnotes 10 and 11. Further, he also wished to express his support in favour of the original fourth sentence.

The Chair said he took it that the Commission wished to maintain its decision regarding the adoption of paragraph (5) of the commentary to the draft preamble.

It was so decided.

The Chair invited the Commission to resume its consideration of the commentary to draft article 1.

Paragraph (4)

Mr. Nolte proposed replacing the word "identify" in the second sentence with "cover" as the draft articles on crimes against humanity were meant to cover all aspects of a State's internal law, not to identify particular aspects of it.

Mr. Nguyen said that he concurred with Mr. Nolte that the use of the word "identify" was erroneous and could cause a misunderstanding by giving the impression that the Commission reserved the right to identify certain aspects of a State's internal law. He proposed using more neutral language, such as a "without prejudice" clause.

Mr. Murphy (Special Rapporteur) said that he understood both proposals to have a similar aim. In the light of Mr. Nolte's proposal, the second sentence should be modified to read "Use of this term is intended to cover all aspects of a State's internal law …". He hoped that Mr. Nguyen would find that solution agreeable.

Paragraph (4), as amended, was adopted.

Commentary to draft article 2 (Definition of crimes against humanity)

Paragraph (1)

Sir Michael Wood asked whether it would not be more accurate to specify that the text of the first two paragraphs of draft article 2 was almost verbatim the text of "paragraphs 1 and 2" of article 7 of the Rome Statute.

Mr. Murphy (Special Rapporteur) said that, to his mind, the current wording of the second sentence and the new wording proposed by Sir Michael Wood were both accurate. In reality, all of article 7 of the Rome Statute had been reproduced almost verbatim, bar one or two changes, as was mentioned in the second part of that sentence. While he had initially been in favour of referring to article 7 as a whole and mentioning those changes separately, upon reflection, he believed that it might well be more expedient to include a specific reference to paragraphs 1 and 2 of article 7. He was therefore willing to go along with the proposal made by Sir Michael Wood if it enjoyed the support of the other members of the Commission.

Mr. Jalloh said it was his assumption that the "international instruments" referred to in the final sentence also encompassed regional instruments. If that was not the case, he suggested inserting the words "or regional" after the word "international". As members of the Commission were aware, the African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) contained a broader definition of crimes against humanity.

Overall, the Commission had made quite a few changes to the text of the Rome Statute, including in respect of the establishment of national jurisdiction as provided for in draft article 7. It would therefore be more accurate to include a broader reference to article 7 of the Rome Statute to account for those changes.

Mr. Murphy (Special Rapporteur) said that the concept of "international instruments" also included regional and bilateral instruments. While the proposal made by Sir Michael Wood was undoubtedly valid, in the light of the view expressed by Mr. Jalloh, he would prefer to retain the current wording of the second sentence.

The Chair said he took it that the Commission wished to adopt paragraph (1) without amendment.

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy (Special Rapporteur) said that the citation from the Nürnberg Charter was not currently accompanied by a footnote, owing to the reordering of draft articles 2 and 3. He proposed inserting a new footnote marker at the end of the citation and including a full reference to the Charter, which was currently in footnote 172, in the new footnote. The text of footnote 172 would then be replaced with an abridged reference.

Paragraph (2), as amended was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

Paragraph (8)

Mr. Jalloh said it was his understanding that there were now 122 States parties to the Rome Statute; it would be more accurate to replace the words "more than 120 States parties" with the exact figure.

Mr. Grossman Guiloff said that, to his mind, the first sentence ought to be substantiated by evidence, set out in a footnote, that States parties to the Rome Statute had indeed incorporated the definition of "crime against humanity" contained therein into their domestic legislation and had characterized those crimes, and all their constituent elements, accordingly.

Mr. Murphy (Special Rapporteur) said that the formulation "more than 120 States parties" had been used to reflect the fact that the exact number of States parties to the Rome Statute was a moving target. In his view, the key issue was the significant amount of support that the article 7 definition of "crime against humanity" had garnered and not the actual number of States parties to the Rome Statute. While he was not opposed to revising the current formulation to reflect the current number of States parties, which could be done by using the "as of mid-2019" formulation used elsewhere in the commentary, he considered the current formulation to be sufficient for the purpose at hand.

In drafting the first sentence of the paragraph, he had relied principally on the information provided by Governments over the course of the project, in which they had helpfully explained, *inter alia*, whether their national law incorporated a definition of crimes against humanity, what crimes it covered and whether it was aligned with the Rome Statute. While to insert a footnote referring to all those submissions would be a complicated task, now that some of them were available on the Commission's website, it might be possible to point users directly to them. In any case, such a footnote would need to be drafted separately.

Mr. Grossman Guiloff said one option would be to include a footnote explaining that the assertion that the definition of a crime against humanity in article 7 of the Rome Statute was being used by "many States parties when adopting or amending their national laws" was based on responses from Governments, but that did not mean that all States parties had fully characterized all the crimes identified in that provision.

Mr. Jalloh said that, while he understood Mr. Murphy's reasons for wishing to retain the formulation "more than 120 States parties", his concern was that, by not specifying the exact number of States parties to the Rome Statute after the words "accepted by", the Commission might give the impression that there was wider acceptance of the definition of a crime against humanity among the larger number of States that had signed but not ratified the Rome Statute, bearing in mind that, under the Vienna Convention on the Law of Treaties, signatories to the Statute had accepted, at least in principle, the concepts set out therein. There was also a risk that, by not updating the number of States parties, the Commission might be perceived as not being up to date with developments. Although using the "as of mid-2019" formulation, which also appeared at the end of paragraph (9) of the commentary to draft article 2, would guarantee some consistency and show that the Commission was aware that situations evolved over time, he was willing to go along with the preference expressed by the Special Rapporteur.

The Chair, speaking as a member of the Commission, said that the more general formulation "more than 120 States parties" was preferable, as the number of States parties to the Rome Statute might well fluctuate over time.

He took it that the Commission wished to leave paragraph (8) in abeyance to give the Special Rapporteur time to draft the new footnote with the assistance of Mr. Grossman Guiloff.

It was so decided.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Paragraph (11)

Mr. Jalloh said that, for the sake of readability and to parallel the explanation of the term "conjunctive" in the first sentence, the words "meaning that they are alternatives" should be inserted after the word "disjunctive" in the last sentence. It was important to explain fully how the wording "widespread or systematic", in article 7 of the Rome Statute, had come about.

Sir Michael Wood said that, for the sake of clarity, the phrase "contains a policy element" at the end of the last sentence should be revised to read "contains a State or organizational policy element".

Mr. Murphy (Special Rapporteur) said that he found those proposals acceptable.

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (22)

Paragraphs (12) to (22) were adopted.

Paragraph (23)

Mr. Murphy (Special Rapporteur) said that the word "religious", preceded by a comma, should be inserted after the word "racial" in the quotation in the second sentence.

Paragraph (23), as amended, was adopted.

Paragraph (24)

Paragraph (24) was adopted.

Paragraph (25)

Mr. Murphy (Special Rapporteur) said that, to ensure consistency with the format of the other precedents cited in the text of footnote 92, the words "unwillingness to manage, prosecute and punish" should be inserted in brackets after "para. 85" at the end of the footnote.

With that amendment to footnote 92, paragraph (25) was adopted.

Paragraphs (26) to (30)

Paragraphs (26) to (30) were adopted.

Paragraph (31)

Mr. Jalloh said that, in view of the debate currently taking place in the field of international criminal law about the "State or organizational policy" requirement and the role of organized groups, such as rebels and militia groups, that might not constitute criminal gangs *per se*, he questioned the wisdom of including the third sentence, which was new text. In *Situation in the Republic of Kenya*, the International Criminal Court had considered the role of the Mungiki militia and whether it constituted an organization for the purpose of fulfilling the "State or organizational policy" requirement. There were in fact many conflicts on the continent of Africa and in other parts of the world in which amorphous rebel and militia groups were the key perpetrators of crimes against humanity. The Commission might therefore prefer to refrain from stating, in the third sentence, that organized criminal groups normally did not commit the kind of violations covered by draft article 2, as doing so at that point in the commentary could lead to subsequent paragraphs being read in a certain light. The inclusion of that sentence made him uncomfortable, as it could allow State authorities to deny that crimes against humanity had been committed in their national territory on account of the nature of the group responsible. The Commission ought to bear in mind that crimes against humanity were now also being perpetrated by new actors, such as non-State armed groups. He would also appreciate an explanation as to how the definition of an "organized criminal group" used in the United Nations Convention

against Transnational Organized Crime, which was reproduced in footnote 114, was applicable in the context of crimes against humanity.

Mr. Murphy (Special Rapporteur) said that the third sentence of the paragraph was new text that had been added during the second reading. It had been included as a small number of Governments had warned the Commission against overstating the idea that non-State actors fell within the scope of draft article 2. He had therefore tried to make it clear that, while criminal groups were certainly capable of committing crimes against humanity, it was not the case that commonplace criminal gangs typically committed such crimes. Although he would prefer to retain the sentence, it could perhaps be moved to the end of the paragraph as a complement to the citation from the 1996 draft Code of Crimes against the Peace and Security of Mankind and as a lead-in to the jurisprudence-related issues taken up in paragraphs (32) and (33).

Sir Michael Wood said that, to his mind, Mr. Jalloh had made a good case for omitting the third sentence altogether.

Mr. Jalloh said that, while he understood that the sentence had been included to allay concerns raised by Governments, he still considered the inclusion in footnote 114 of the definition of an "organized criminal group" as a "structured group of three or more persons" that was acting "in order to obtain, directly or indirectly, a financial or other material benefit" to be problematic, as, in *Situation in the Republic of Kenya*, certain groups had been deemed too amorphous to be considered "structured" or had been considered not to have direct links to the Government, despite having been paid to attack the opposition. If Mr. Murphy insisted on retaining the third sentence, it should be moved to the end of the paragraph and the words "or gang" should be inserted after the words "criminal group" in order to make it clear that the Commission was referring to groups of organized criminals as opposed to amorphous, unstructured entities that acted for material gain while committing crimes against humanity in the process. However, given the sensitivity of the debate surrounding the issue, he remained in favour of deleting the sentence in its entirety.

Mr. Saboia said it was a simple fact that organized criminal groups, or gangs, committed crimes against humanity in certain circumstances, as previously noted by the Commission. The sentence should not be deleted in its entirety; rather it should be moved to the end of the paragraph and amended slightly to address the concerns raised by Mr. Jalloh.

The Chair said he took it that the Commission wished to move the third sentence to the end of the paragraph and to add "or gang" after "criminal group".

Paragraph (31), as amended, was adopted.

The meeting rose at 6.05 p.m.